SYMPOSIUM COMMENTS

The Public Trust After *Lyon* and *Fogerty*: Private Interests and Public Expectations - A New Balance

The California Supreme Court has recently employed the public trust doctrine to protect environmental resources surrounding California's inland navigable lakes and streams. This comment examines the changing balance between public and private rights in these public trust lands. It concludes that courts should balance each landowner's claims against trust policies and should recognize both public and private expectations in deciding the fate of reclaimed lands.

INTRODUCTION: THE PUBLIC TRUST DOCTRINE

The public trust doctrine[1] protects public rights in certain natural resources. The doctrine evolved from the need to assure public access to navigable waterways[2] and remains most vital in the areas of access to

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[1] The public trust in California is best described as a common law public easement. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (holding that public has standing to sue to enforce trust, and that uses are varied; court used property rights language to describe the trust). A commentator has suggested that the public trust is a form of police power. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). *See also* note 80 *infra*.

Helpful discussions on the public trust in California can be found in Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357 (1980) [hereafter *California's Public Trust Easement*]; Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URB. LAW. 519 (1974); Parker, *History, Politics and the Law of the California Tidelands Trust*, 4 WEST ST. U. L. REV. 149 (1977); Comment, *Private Fills in Navigable Waters: A Common Law Approach*, 60 CALIF. L. REV. 225 (1972) [hereafter *Private Fills*]; Comment, *The Tideland Trust: Economic Currents in a Traditional Legal Doctrine*, 21 U.C.L.A. L. REV. 826 (1974); Note, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971). *See also*, Comment, *California's Tidelands Trust for Modifiable Public Purposes*, 6 LOY. L.A.L. REV. 485 (1973).

[2] For a general discussion of the history of public trust law and its broader applications, see Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980). The most comprehensive treatment of the subject to date can be found in H. ALTHAUS, PUBLIC TRUST

and preservation of these waters.[3] Recognition of these rights limits the power of private and governmental landowners to develop or dispose of resources protected by the trust.[4] The state acts as public trustee of these resources[5] and citizens may sue to force the state to fulfill its fiduciary responsibilities.[6]

California embraced the public trust doctrine soon after its recognition by the United States Supreme Court in 1892.[7] The California Supreme Court later applied the trust retrospectively[8] to all tidelands[9] and

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RIGHTS (1978). *See also* MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511 (1975); Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) [hereafter *Liberating the Public Trust*]; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereafter *Judicial Intervention*]; Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS & WATER RIGHTS 177 (R. Clark ed. 1967); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

[3] Arguments and strategies for expanding the public trust concept to other resources are found in H. ALTHAUS, PUBLIC TRUST RIGHTS (1978); R. APPLEGATE, PUBLIC TRUSTS: A NEW APPROACH TO ENVIRONMENTAL PROTECTION (1976); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. C. DAVIS L. REV. 269 (1980).

[4] The public trust protects the public interest in navigable waters from private encroachment and from irresponsible governmental management or disposition of lands adjacent to these waters. City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 184, 50 P. 277, 286 (1897) (city has no power to alienate its entire waterfront); Parker, note 1 *supra*; Sax, *Liberating the Public Trust*, note 2 *supra*, at 186. In a recent decision, the California Supreme Court stated that:

> the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361 (1983) (public trust doctrine protects navigable waters from harms caused by diversion of nonnavigable tributaries from Mono Lake).

[5] Illinois Central R.R. v. Illinois, 146 U.S. 387, 453 (1892) (state's grant of shorezone and submerged lands in Chicago harbor held invalid). As trustee of sovereign lands, the state must ensure that these lands are used for public purposes. In California, use for a public purpose has been described as the minimal standard that limits alienation of the public's rights in small amounts of trust land. Comment, *Private Fills*, note 1 *supra*, at 252-53. *See also* note 12 *infra*.

[6] Marks v. Whitney, 6 Cal. 3d 251, 261-62, 491 P.2d 374, 381, 98 Cal. Rptr. 790, 797 (1971) (expanding trust uses to include ecological preservation).

[7] Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 183-84, 50 P. 277, 285-86 (1897).

[8] People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) (grantees of tide-

submerged lands[10] acquired by California upon admission to the Union in 1850.[11] Most public trust lands conveyed by the legislature to private interests retain the public trust easement.[12] This nebulous judicial doc-

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lands held only a naked fee subject to public trust easement).

[9] 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).

[10] Submerged lands are defined as "lands seaward [from] the lines of mean low tide," *id.*, not including federally owned lands more than three miles from the shore. 43 U.S.C. §§ 1301-1315 (1976). Submerged lands include the submerged beds of navigable freshwater rivers and lakes in California. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 220-22, 625 P.2d 239, 244-46, 172 Cal. Rptr. 696, 701-03, *cert. denied*, 454 U.S. 865 (1981).

[11] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 220-22, 625 P.2d 239, 244-46, 172 Cal. Rptr. 696, 701-03 (1981). California took these lands in its role as sovereign, not as proprietor; as a result, tidelands and submerged lands are called sovereign lands. *Id.*; Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845) (submerged lands in new state are state property).

[12] Land beneath navigable waters in California possesses two distinct incidents of ownership. The first is called the *jus publicum*, or sovereign interest, which is the public's right to the land held in trust by the state. The second is the *jus privatum*, or proprietary interest. If a state buys land, the land is not burdened with the *jus publicum*; the state is free to sell and manage these lands in the same manner as any proprietor. For example, California acquired swamp and overflow lands (lands lying above line of mean high tide but which are periodically subject to extreme high tides) in its proprietary capacity. However, lands that the state acquired by virtue of its status as sovereign are burdened with the *jus publicum*. This burden amounts to a public property right that cannot be alienated even by the legislature so as to damage the public's interest in these lands. City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 183, 50 P. 277, 285 (1897). *See also* note 5 *supra*. Legislatures have a fiduciary duty to protect the *jus publicum*, and one legislature may not impair the power of a succeeding legislature to administer its sovereign duties. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (state cannot pronounce its deeds invalid).

Nor may a private landowner who is a successor in interest to the state's proprietary interests in sovereign land act in derogation of the public's rights. The *jus privatum* is aptly described as a "naked fee" that is subordinate to the public's rights in the land, the *jus publicum*. The fee owner may do nothing on her land that is inconsistent with the public's rights. People v. California Fish Co., 166 Cal. 576, 584, 593-94, 138 P. 79, 82, 86 (1913). *See* notes 80-87 and accompanying text *infra*. For a detailed discussion of the *jus publicum*, see Comment, *California's Tidelands Trust for Modifiable Public Purposes*, 6 LOY. L.A.L. REV. 485 (1973).

Courts presume that the legislature does not intend to abandon the public's rights in trust land. "[S]tatutes purporting to authorize an abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied." People v. California Fish Co., 166 Cal. 576, 597, 138 P. 79, 88 (1913), *quoted in* City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 525, 606 P.2d 362, 367, 162 Cal. Rptr. 327, 332 (1980).

The public trust in California can effectively be terminated in at least four ways.

trine has gained importance recently in its role as arbiter of freshwater resource allocation in California.

Initially, the doctrine in California protected public access for only three purposes: navigation, commerce, and fisheries.[13] California courts have recently expanded the scope of public rights to include recreation and ecological preservation.[14] Because the trust extends to land held in underlying fee by private owners and to some state lands,[15] controversies have developed as the trust has expanded in scope. Protection of environmental values by means of the trust can be achieved in some cases only at the expense of waterfront landowners' development prerogatives.

California courts have not fashioned a proper balance between public and private interests and expectations[16] in public trust cases. Two re-

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First, the legislature may pass laws as part of a program to *improve* trust uses. City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 183, 50 P. 277, 285 (1897). Second, the legislature may declare that certain trust lands are no longer necessary for trust purposes. Mallon v. City of Long Beach, 44 Cal. 2d 199, 205, 282 P.2d 481, 485-86 (1955). *See also* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 440, 658 P.2d 709, 723, 189 Cal. Rptr. 346, 360 (1983); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980). Third, the state may negotiate exchanges, whereby the state frees small parcels from the public trust in consideration of a grant of fee title to the state in another parcel. CAL. PUB. RES. CODE § 6307 (West 1977). Fourth, settlement of legitimate disputes over unclear boundaries can operate to free lands from the trust. City of Long Beach v. Mansell, 3 Cal. 3d 462, 481, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

[13] Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); Stevens, note 2 *supra*, at 222.

[14] Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971), expanded trust uses to include ecological preservation. Justice McComb wrote: "Public trust easements . . . have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes . . . . 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 . . . ." *Id. Accord* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 434-35, 658 P.2d 709, 719-20, 189 Cal. Rptr. 346, 356-57 (1983); State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 230, 625 P.2d 239, 251, 172 Cal. Rptr. 696, 708 (1981).

[15] Oakland v. Oakland Water Front Co., 118 Cal. 160, 183, 50 P. 277, 285 (1897). *See* note 12 *supra*.

[16] *See* notes 90-149 and accompanying text *infra*. As Professor Sax has recognized, the essence of property law is respect for reasonable expectations, including those in interests that may lack formal title. The "central idea" of the public trust is preventing the "destabilizing disappointment of expectations" held in common but lacking title. Sax, *Liberating the Public Trust*, note 2 *supra*, at 187-88. *See also* R. APPLEGATE, note 3 *supra*, at 63.

cent companion cases, *State v. Superior Court (Lyon)*[17] and *State v. Superior Court (Fogerty)*,[18] lean toward protecting the public expectation for a stable ecosystem to the detriment of private property rights. These cases are the first to recognize a public trust easement on four thousand miles of "shorezone," which borders the state's nontidal, navigable lakes and rivers.[19]

This comment analyzes the changing balance between private and public interests in disputes involving public trust lands. Parts I and II analyze the holdings of *Lyon* and *Fogerty*, and discuss their effect upon riverfront (riparian) and lakeside (littoral)[20] landowners. Part III examines the court's analysis of landowners' estoppel claims, and suggests that future courts balance these claims on a case-by-case basis against environmental policy goals. Finally, Part IV observes that these cases inadequately address the fate of reclaimed lands and proposes that courts consider both public and private expectations in deciding the fate of particular parcels.

I. HOLDINGS OF *Lyon* AND *Fogerty*

Together, *Lyon* and *Fogerty* suggest that the California Supreme Court will continue to use the public trust doctrine to protect the environment. These companion cases, both authored by Justice Mosk, recognized for the first time that the public trust doctrine protects the shorezone.[21] *Lyon* holds that the legislature did not alienate *all* public

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[17] 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865 (1981).

[18] 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865 (1981).

[19] "Shorezone," as used in this article, refers to land abutting nontidal navigable lakes and streams, which is alternately covered and uncovered as the water level rises and falls with the seasons. The shorezone is measured by the changing boundary of mean high- and mean low-water. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 214, 625 P.2d 239, 241, 172 Cal. Rptr. 696, 698 (1981).

[20] A riparian owner holds property on a river bank, while a littoral owner holds ocean or lake shore land. BLACK'S LAW DICTIONARY 842, 1192 (5th ed. 1979). The term "littoral" does not necessarily include ocean front property owners.

[21] In order to impose restraints on land use via the public trust doctrine, courts must create the legal fiction that the public easement was always there, even before the court discovered it. Public trust servitudes can be read into patents or grants as implied conditions, in order to make a retrospective 'reformation' of earlier imperfectly considered governmental decisions. Sax, *Judicial Intervention,* note 2 *supra*, at 563.

When a court unmasks the 'true' character of a resource, it in effect redefines the attributes of sovereignty it considers essential. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 50-51 (1977) (Brennan, J., dissenting). The public trust doctrine is

rights in the shorezone in 1872, when the state granted fee title in the shorezone to upland owners.[22] *Fogerty* holds that equitable considerations allow the state to assert and enforce the trust even though it neglected to do so for over one hundred years.[23]

Both *Lyon* and *Fogerty* began as reactions to a new interpretation of public trust rights by the California Attorney General's office in 1977. In 1964, the Attorney General asserted that riparian and littoral owners held the shorezone in fee simple absolute.[24] In 1977, the Attorney General's office reversed its earlier stance and asserted that the State of California, not private owners, held the shorezone in fee.[25] Littoral owners Lyon and Fogerty thought otherwise.

A. Lyon

Plaintiffs Raymond and Margaret Lyon applied to the California Fish and Game Commission for a permit to reclaim a portion of their land that lies below the waters of Clear Lake at certain times of the

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an elegant and powerful tool of the judiciary, for it imposes limits upon the power of legislatures via the notion of trust responsibilities of sovereigns. It is said that no legislature may bind the hands of succeeding legislatures through abrogation of its responsibilities. Illinois Central R.R. v. Illinois, 146 U.S. 387, 453-54 (1892); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810); Sax, *Judicial Intervention*, note 2 *supra*, at 489. Without retrospective application, the doctrine would lose its conceptual underpinnings. Circumvention of retroactivity by charging officials with knowledge of future conceptions of sovereignty would emasculate the doctrine.

[22] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 231, 625 P.2d 239, 251, 172 Cal. Rptr. 696, 708 (1981) (interpreting Cal. Civ. Code § 830).

[23] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244-47, 625 P.2d 256, 258-60, 172 Cal. Rptr. 713, 715-18 (1981).

The *Fogerty* court addressed only one of the plaintiffs' equitable arguments: estoppel. The court did not discuss related questions of general equity as the same court did a year earlier in City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980). *See* notes 133-43 and accompanying text *infra*.

[24] 43 Op. Cal. Att'y Gen. 291, 295 (1964). Until at least 1970, the Attorney General asserted that the state claimed title only up to the low-water mark of nontidal, navigable waters. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 224, 625 P.2d 239, 247, 172 Cal. Rptr. 696, 704 (1981).

[25] On March 8, 1977, the California Attorney General's office sent a letter to the State Lands Commission, advising that: (1) in general, California's sovereign ownership of the lands underlying navigable lakes and nontidal, navigable rivers extends landward to the ordinary high-water mark; and (2) irrespective of whether the state's title to such lands extends landward to that line or merely to the ordinary low-water mark, the strip of land between the two lines is subject to the common law public trust for commerce, navigation, and fisheries. Brief of Tahoe Shorezone Representation at 6, State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981).

year. The Commission denied the permit because under the Attorney General's new interpretation, California claimed absolute ownership of the land to the high-water mark.[26] The Lyons sued to quiet title, arguing that private owners of land abutting nontidal, navigable waters took to the low-water mark in fee simple.[27] Under California law, a body of water is "navigable" if a recreational boat can pass through it.[28]

Lyon held that riparian and littoral owners' fee title in the shorezone is burdened with the public trust easement. The court reasoned that California acquired the navigable, freshwater shorezone upon statehood in 1850,[29] and conveyed only its fee interest to private owners in 1872.[30] The court also found that the public trust easement which existed since statehood extended not only to tidelands, but also to nontidal shorezones of navigable lakes and rivers.[31]

The *Lyon* court ruled that California became the owner of the beds of navigable, nontidal waters as an incident of state sovereignty.[32]

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[26] *See* note 25 *supra.*

[27] Lyons' predecessors in interest granted fee title without specifying the waterward boundary of the land conveyed. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 215, 625 P.2d 239, 241, 172 Cal. Rptr. 696, 699 (1981).

The trial court granted Lyons' motion for partial summary judgment, stating that the lands in question were neither sovereign property of the state nor subject to the public trust. After the Fifth District denied the state's petition, the California Supreme Court agreed to hear the case. In the supreme court, Lake County, supporting Lyons' claim, intervened in the action as grantee of the state's interest in the lands underlying the lake. 1973 Cal. Stat. ch. 639, § 1. The supreme court issued a writ of mandate ordering the trial court to vacate its ruling, and granting the state's motion for partial summary judgment. *Lyon*, 29 Cal. 3d at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710.

[28] Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 568, 127 Cal. Rptr. 830, 835 (1st Dist. 1976) (river which is navigable nine months of the year is navigable at law under recreational boat tests). For a discussion of the navigability test under California and federal law, including its relevance to the public trust doctrine, see Frank, *Forever Free: Navigability, Inland Waterways and the Expanding Public Interest, this issue supra*, at 579.

[29] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 220-22, 625 P.2d 239, 244-46, 172 Cal. Rptr. 696, 701-03 (1981).

[30] *Id.* at 222-26, 625 P.2d at 246-49, 172 Cal. Rptr. at 703-06. *See* notes 44-48 and accompanying text *infra.*

[31] *Id.* at 226-33, 625 P.2d at 248-53, 172 Cal. Rptr. at 705-10.

[32] *Id.* at 220-22, 625 P.2d at 244-46, 172 Cal. Rptr. at 701-03. The *Lyon* court relied primarily on Barney v. Keokuk, 94 U.S. 324, 338 (1876) (Iowa owns banks of Mississippi River to high-water mark and may make improvements in riverbed to aid navigation). The federal government held these lands in trust prior to the admission of the several states for the benefit of those states and their citizens. Frank, *Forever Free: Navigability, Inland Waterways and the Expanding Public Interest, this issue supra*, at 583.

Plaintiffs argued that California's adoption of the English common law gave riparian and littoral owners title extending to the middle of streams and lakes not influenced by the tide.[33] *Lyon*, however, held the English rule inapplicable to conditions in America.[34] Because in England only tidal waters are navigable,[35] the court noted that a test of tidality guaranteed public access to English navigable waters. To use the English test of tidality in America, however, would frustrate the purpose of the common law rule, because limiting access to tidal waters would bar the public from the great navigable river systems of the United States which are uninfluenced by the tides.[36] Thus, the court

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Under the equal footing doctrine, the people of California gained title to the shorezone upon statehood in 1850, in the same manner as the original thirteen states gained title. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See generally* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 419-20 (1970). Amicus California Land Title Association contended that each state could determine the limits of the federal grant of the beds of navigable waterways, and that California did not select any boundary between State and private or federal ownership until 1872, when the State passed Cal. Civ. Code § 830 as a part of the comprehensive Field Code. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 216-18, 625 P.2d 239, 242-44, 172 Cal. Rptr. 696, 699-701 (1981). The *Lyon* court maintained that *Barney* held otherwise. *Barney* declares:

> There seems to be *no sound reason* for adhering to the old rule as to the proprietorship of the beds and shores of such [navigable] waters. It properly belongs to the states by their *inherent sovereignty*, and the United States has wisely abstained from extending . . . its survey *and grants* beyond the limits of *high water*.

94 U.S. 324, 338 (1876) (emphasis added). For cases in support of this proposition, see State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977) (disputed ownership of riverbed lands should be decided as matter of state law rather than federal common law); Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967) (riparian landowners not entitled to compensation when access to navigable part of channel was prevented by construction of bridges). *Contra* Hardin v. Jordan, 140 U.S. 371 (1891) (federal grants of public land are to be construed according to law of state where land lies).

[33] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 217-19, 625 P.2d 239, 242-44, 172 Cal. Rptr. 696, 699-701 (1981); 1850 Cal. Stat. ch. 95 at 219. Debate on the accuracy of this interpretation of the English rule persists. *See* MacGrady, note 2 *supra*, at 585-87.

[34] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 218-19, 625 P.2d 239, 243-44, 172 Cal. Rptr. 696, 700-01 (1981).

[35] *Id.* at 218, 625 P.2d at 243, 172 Cal. Rptr. at 700.

[36] The *Lyon* court declined to "apply a rule founded on a particular reason to a case where that reason utterly fails." *Id.* at 220, 625 P.2d at 245, 172 Cal. Rptr. at 702, *quoting* Crandall v. Woods, 8 Cal. 136, 143 (1857). Justice Bradley's dictum in *Barney* is apt here: "the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and conve-

determined that at statehood, California owned the beds of all navigable bodies of water within its boundaries.[37]

Next, the court upheld the plaintiffs' assertion that even if California owned the shorezone in 1850, the legislature conveyed its fee interest to private littoral owners by enacting California Civil Code Section 830 in 1872:[38]

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders on any other water, the owner takes to the middle of the lake or stream.[39]

The majority held that Section 830 is a "rule of property," not merely a "rule of construction."[40] The court followed past administrative and legislative assertions that the low-water mark was the bound-

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nience." Barney v. Keokuk, 94 U.S. 324, 338 (1876).

[37] The *Lyon* court found support for this holding on three alternate grounds. First, American courts have never adhered "slavishly" to common law doctrines. Second, if California followed the English rule, private persons would have owned land to the middle of streams until Cal. Civ. Code § 830 deprived them of this interest in 1872. This would have constituted a "taking" without just compensation. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 221, 625 P.2d 239, 245, 172 Cal. Rptr. 696, 702 (1981). Third, other states which consider the high-water line as their boundary between private and public ownership have also adopted the common law. *See, e.g.*, Flisrand v. Madison, 35 S.D. 457, 152 N.W. 796 (1915) (quieting title to island on lake).

[38] *Lyon*, 29 Cal. 3d at 224-26, 625 P.2d at 247-48, 172 Cal. Rptr. at 704-05.

[39] CAL. CIV. CODE § 830 (West 1982).

[40] A "rule of property" has been defined as:

> [a] settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property . . . . The principle appears to be an extension of the *"stare decisis"* rule, which . . . seems to apply with peculiar force and strictness to decisions which have determined questions respecting real property and vested rights . . . .

Abbott v. City of Los Angeles, 50 Cal. 2d 438, 456, 326 P.2d 484, 494 (1958).

"Rules of Construction" are tools used by courts to construe ambiguous deeds. Were Cal. Civ. Code § 830 a rule of construction only, littoral owners would presumptively own to low water. Even so, other evidence would have been admissable to establish ownership. Thus, reliance on the parties' practical construction of § 830 could have helped determine the existence of a public easement on the shorezone.

Although § 830 is a rule of property, a situation could arise in which the shorezone remained in state ownership. Imagine an original grant from the state to a littoral owner which says "to the high-water mark," and *not* "to the lake shore." Section 830 says "*[absent] a different intent* . . . [the upland owner] takes to . . . low water . . ." CAL. CIV. CODE § 830 (West 1982) (emphasis added). In this example, California expressly intended to retain title to the high-water mark.

ary of state ownership,[41] reasoning that private owners' reliance on these interpretations of this admittedly ambiguous statute was justified.[42] Thus, the court concluded that the Lyons, not the state, held fee title to the low-water mark of Clear Lake.[43]

However, the court determined that this reliance on representations by the state was insufficient to defeat the public's rights in the shorezone.[44] Section 830 did not alienate the public trust on lands underlying nontidal navigable waters.[45] For the first time,[46] the California Supreme Court declared that the tidelands trust described in *City of Berkeley v. Superior Court*[47] has also extended to four thousand miles of freshwater navigable shorezone since statehoood.[48]

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[41] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 224-25, 625 P.2d 239, 247-48, 172 Cal. Rptr. 696, 704-05 (1981). *See, e.g.*, 43 Op. Cal. Att'y Gen. 291, 295 (1964); 30 Op. Cal. Att'y Gen. 305, 307 (1957); 23 Op. Cal. Att'y Gen. 97, 98 (1954). The State conveyed its interest in the bed of Clear Lake to Lake County in trust. The grant declares the low-water mark as the boundary of the scope of the grant. The *Lyon* court maintained that the language of the grant assumed that the state owns only to the low-water mark. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 225, 625 P.2d 239, 248, 172 Cal. Rptr. 696, 705 (1981). *See* 1973 Cal. Stat. ch. 639, § 1, at 1165 (passing title to Lake County).

[42] The court ruled that administrative construction of a statute does not necessarily determine its judicial interpretation. Yet the court reasoned that the letters and opinions of the Attorney General cannot be disregarded precisely because the statute is unclear. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 225, 625 P.2d 239, 248, 172 Cal. Rptr. 646, 705 (1981).

[43] *Id.* at 226, 625 P.2d at 248-49, 172 Cal. Rptr. at 705.

[44] The *Lyon* court doubted that the state's past failure to assert its trust rights to the shorezone was a "rule of property." 29 Cal. 3d 210, 231, 625 P.2d 239, 251-52, 172 Cal. Rptr. 696, 708-09 (1981). Moreover, the *Lyon* court did not apply the trust in violation of the Taking Clause of the fifth amendment to the United States Constitution. Because California owned the shorezone in 1850, and conveyed only the *jus privatum* in 1872, littoral owners never held the shorezone in fee simple absolute. The attorney general argued that the state cannot "take" from private owners rights in property that they never had. State of California's Brief in Replication to Answer to Petition for Writ of Mandamus at 69, *id. See also* note 12 *supra*; Niles Sand & Gravel Co. v. Alameda County Water Dist., 37 Cal. App. 3d 924, 935, 112 Cal. Rptr. 846, 854 (1st Dist. 1974) (no compensation necessary when water district raises groundwater level above depth of gravel company's pit). *Contra* Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138, 1153-58 (1982).

[45] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 226-30, 625 P.2d 239, 248-51, 172 Cal. Rptr. 696, 705-08 (1981).

[46] *See* note 21 *supra*.

[47] 26 Cal. 3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 328 (1980). For a discussion of *Berkeley*, see notes 131-143 and accompanying text *infra*.

[48] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 231, 625 P.2d 239, 251, 172 Cal.

The *Lyon* court based this holding on two grounds. First, the court said that *Illinois Central Railroad v. Illinois*[49] determines the scope of the public trust in California.[50] In *Illinois Central*, the United States Supreme Court held that trust principles apply to navigable freshwater in addition to tidewater.[51] Moreover, it held that a state could not convey absolute title to submerged lands and the shorezone[52] because a

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Rptr. 696, 708 (1981).

[49] 146 U.S. 387 (1892) (state's grant of shorezone and submerged lands in Chicago to private interests held invalid). *Illinois Central* has been referred to as "the lodestar in American public trust law." Sax, *Judicial Intervention*, note 2 *supra*, at 489.

[50] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 227, 625 P.2d 239, 249, 172 Cal. Rptr. 696, 706 (1981).

A commentator has suggested that *Lyon* wrongly relied on *Illinois Central*, because that case was necessarily a statement of Illinois law and it does not mandate a federal common law public trust. Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138, 1144 (1982). Although *Illinois Central* does not mandate a common law trust, it is wrong to suggest *Lyon* held that *Illinois Central* did mandate the trust. The *Lyon* court did not clarify this misconception with statements like "*Illinois Central* . . . settled the issue." State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 227, 625 P.2d 239, 249, 172 Cal. Rptr. 696, 706 (1981). The *Lyon* court did rely on the *Illinois Central* Court's definition of the public trust doctrine because that definition became the basis of California public trust law when the California Supreme Court decided People v. California Fish Co., 166 Cal. 576, 584-85, 138 P. 79, 82 (1913). *See* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 437-38, 658 P.2d 709, 721-22, 189 Cal. Rptr. 346, 358-59 (1983). That individual states may define the scope of their duties as trustee is shown by the most cursory glance at the way the trust operates in different states. *See* Sax, *Judicial Intervention*, note 2 *supra*.

[51] Illinois Central R.R. v. Illinois, 146 U.S. 387, 436-37 (1892). Additionally, the *Lyon* court dismissed the landowners' argument that *Illinois Central* should be confined to the Great Lakes because of their size and significance for commerce. The *Lyon* majority held that regardless of the size of the body of water, navigability is the "touchstone" to determine whether the trust applies. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 228, 625 P.2d 239, 250, 172 Cal. Rptr. 696, 707 (1981). The majority also cited other jurisdictions that have applied *Illinois Central* to find a trust on shorezone land beneath nontidal, navigable waters. *Id.*

[52] Justice Clark in dissent argued that *Illinois Central* cannot provide authority to extend the trust to the freshwater *shorezone*, for that court expressly limited the trust to *submerged* lands. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 238-39, 625 P.2d 239, 256, 172 Cal. Rptr. 696, 713 (1981) (Clark, J., dissenting), *citing* Illinois Central R.R. v. Illinois, 145 U.S. 387 (1892). One commentator agrees with this assertion, Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138, 1144-45 (1982), and another assumes its validity, Sax, *Judicial Intervention*, note 2 *supra*, at 489.

Justice Clark misconstrued the extent of the *Illinois Central* holding. He quoted this passage from *Illinois Central* in support of his proposition:

> If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the rail-

state cannot effectively abandon its duties as trustee.[53] Thus, the *Lyon* court determined that enactment of Section 830 did not extinguish the trust.[54]

Additionally, the *Lyon* majority found that the purposes of the trust apply equally to tidal and nontidal submerged lands.[55] The court rejected the argument that the shorezone, unlike tidelands, does not require trust protection because it is only seasonally useful for the public trust purposes of navigation, commerce, and fishing.[56] The *Lyon* court emphasized that public trust rights in California include recreation and

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> road company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown . . . .

Illinois Central R.R. v. Illinois, 146 U.S. 387, 450 (1892), *quoted in* Lyon, 29 Cal. 3d at 238, 625 P.2d at 256, 172 Cal. Rptr. at 713 (Clark, J., dissenting). The *Illinois Central* court did not state that the company would take the shorezone free of the trust if the docks were close enough to the shore. The Court referred to whether or not the company could retain use of its docks had they been determined to stand on public trust land. If the docks stretched further than reasonably necessary for purposes of navigation and commerce, they would have interfered with the public's right of navigation. As such, the docks would have been a public nuisance, and should have been removed. If the docks extended only to the point of navigability, they would have aided public navigation, and thus need not have been removed. *Accord* Illinois v. Illinois Central R.R., 91 F. 955 (1899). On remand, the Seventh Circuit Court of Appeals determined that the piers were, in fact, of reasonable length to accommodate the large vessels docking there. *Id.*

The Act which purported to grant this area to the railroad company, the Lake Front Act (1869 Ill. Laws 245), granted the company "the right . . . [to] use and control . . . the lands submerged *or otherwise lying* [400 feet east of Michigan Avenue]." *Illinois Central*, 146 U.S. at 448 (emphasis added). The record is unclear exactly how close the lake was to Michigan Avenue at that time, but the addition of the phrase "or otherwise lying" implies that some of the lands granted were not submerged. Also, the map of the area produced by the trial court (*see id.* at 413) clearly shows that the railroad tracks crossed what was the "old shore line" several times before the company and the city filled this area. The Court upheld revocation of the grant of all lands purportedly conveyed in 1869, including lands underneath the tracks.

[53] Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892). *See also* note 12 *supra*; *see generally* Sax, *Judicial Intervention,* note 2 *supra*, at 489-91.

[54] The court offered this syllogism: The court will not interpret a statute to abandon the trust if another reasonable interpretation is possible. California Civil Code § 830 does not require that the public abdicate the trust. Therefore, Lyons' land is impressed with the trust. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 231, 625 P.2d 239, 251, 172 Cal. Rptr. 696, 708 (1981).

[55] *Id.* at 230-31, 625 P.2d at 251, 172 Cal. Rptr. at 708.

[56] *Id.* In contrast to the shorezone, tidelands are inundated on a daily basis, constantly being used for navigation, commerce, and fishing.

ecological preservation, uses not limited by the ebb and flow of the tide.[57]

B. Fogerty

In 1977, the State Lands Commission proposed to record the state's claims to lands between high and low water in California's navigable nontidal lakes and rivers.[58] Charles and Stella Fogerty, joined by other littoral owners on Lake Tahoe and the Tahoe Shorezone Representation, sued for declaratory relief, claiming inverse condemnation and a violation of their constitutional rights.[59] The plaintiffs claimed that the state wrongfully asserted title or a public trust to the high-water mark. The trial court granted a preliminary injunction to prohibit the state from recording its claims to the shorezone.[60]

The Supreme Court reversed, holding that the Fogertys' land was impressed with a public trust. The court determined as a matter of law that the public may not be estopped from asserting its rights in the shorezone because public policy strongly favors protecting these lands from environmental degradation.[61] The court noted that reclamation and development have greatly reduced the four thousand miles of shoreline along the state's navigable lakes and rivers.[62] Furthermore, the court observed, the legislature has recognized the need for a vigorous public policy to protect California's environmentally important[63] shorezone.[64] Although the court acknowledged plaintiffs' assertion that

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[57] *Id.* at 230-31, 625 P.2d at 251-52, 172 Cal. Rptr. at 708.

[58] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 243, 625 P.2d 256, 257-58, 172 Cal. Rptr. 713, 714-15 (1981).

[59] *Id.* 42 U.S.C. § 1983 (1976 & Supp. IV 1980) provides: "Every person who, under color of any statute . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[60] The trial court held that the shorezone was never owned by the state nor impressed with the public trust, and thus granted plaintiffs' motion for partial summary judgment. State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 243-44, 625 P.2d 256, 258, 172 Cal. Rptr. 713, 715 (1981).

[61] *Id.* at 244, 625 P.2d at 258-59, 172 Cal. Rptr. at 716.

[62] *Id.* at 245, 625 P.2d at 259, 172 Cal. Rptr. at 716.

[63] *Id.* The *Fogerty* court relied heavily on the amicus brief of the California Department of Water Resources, which detailed environmental harms to the shorezone. *See* note 89 *infra.*

[64] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 246, 625 P.2d 256, 259-60, 172 Cal. Rptr. 713, 716-17 (1981). *See, e.g.*, CAL. PUB. RES. CODE §§ 5093.50, 5811 (West Supp. 1982) (declaring that California's wild and scenic rivers and wetlands

Lake Tahoe may not urgently need public trust protection, the majority held that the trust gives state officials the necessary flexibility to protect the shorezone statewide.[65] Thus, the state was not estopped from asserting public trust rights in the shorezone.[66]

The *Fogerty* court also held that the boundary between public and private ownership of a lake must be determined from the current water level rather than from the level existing before the construction of a dam.[67] The majority reasoned that measuring boundaries to pre-dam water levels throughout the state would create insoluble evidentiary problems.[68] Additionally, the court held that the state acquired fee title by prescription in submerged land created by dams, such as the one at Lake Tahoe, which have existed for the requisite statutory period.[69] The majority emphasized that landowners may use their land in any manner consistent with the reasonable needs of the public trust;[70] if the state determines that privately built structures are to be removed from the shorezone, landowners must be compensated for loss of these improvements.[71]

C. The Dissenting Opinions

The *Lyon* dissent asserted that the public trust should be limited to tidelands and submerged lands. Although the dissenters agreed that littoral owners hold fee title to lands above the low-water mark, they argued that the freshwater shorezone should not be impressed with the public trust.[72] In dissent, Justice Clark discussed the burdens *Lyon* and *Fogerty* place upon owners of land already reclaimed from freshwater shorezones. Because the legislature has not severed these lands from the

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need preservation and restoration).

[65] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 247, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981).

[66] *Id.*

[67] *Id.* at 247-49, 625 P.2d at 260-62, 172 Cal. Rptr. at 717-19.

[68] *Id.* at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.

[69] *Id. See also* CAL. CIV. CODE § 1007 (West 1982) (acquiring title by prescription); CAL. CIV. PROC. CODE § 325 (West 1982) (person must claim, continuously occupy, and pay all taxes on land for five years).

[70] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 249, 625 P.2d 256, 261-62, 172 Cal. Rptr. 713, 718-19 (1981); State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 232, 625 P.2d 239, 252, 172 Cal. Rptr. 696, 709 (1981). *See* note 82 *infra.*

[71] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 249, 625 P.2d 256, 261-62, 172 Cal. Rptr. 713, 718-19 (1981). *See* notes 119-121 and accompanying text *infra.*

[72] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 233-39, 625 P.2d 239, 253-56, 172 Cal. Rptr. 696, 710-13 (1981) (Clark, J., dissenting). Justice Richardson joined both dissenting opinions.

trust, he argued, titles to thousands of parcels used for agricultural and residential purposes bear a cloud.[73] The dissent called this an inequitable infringement on long-vested titles, noting that public policy since statehood has, for example, encouraged the reclamation of seasonally submerged land in the San Joaquin Valley.[74] Even now, the dissent observed, these reclaimed lands are far more valuable for farm and residential uses than for trust uses.[75]

In *Fogerty*, the dissenting justices argued that the state should be estopped from asserting its trust rights when the injustice to private landowners outweighs the policy reasons for imposing the trust.[76] Although adjudicating each landowner's claim of injustice would burden the courts, the minority reasoned that such was the judiciary's duty.[77]

II. DIRECT EFFECT OF *Lyon* AND *Fogerty*

In *Lyon* and *Fogerty*, the court attempted to resolve the legal status of four thousand miles of shorezone along sixty-five navigable lakes and rivers in California.[78] Although it is unclear whether the principles articulated in these decisions will apply to all riparian rights cases,[79] the decisions will profoundly affect the rights of private landowners and the public in trust lands.

Because the court held that the state will not be estopped from asserting the trust, environmental concerns will now restrict landowners' ability to develop their shorezone properties.[80] Moreover, the state may

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[73] *Id.* at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710.

[74] *Id.* at 235-38, 625 P.2d at 254-56, 172 Cal. Rptr. at 711-13.

[75] *Id.* at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710.

[76] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 250-51, 625 P.2d 256, 262-63, 172 Cal. Rptr. 713, 719-20 (1981).

[77] *Id.* at 251, 625 P.2d at 263, 172 Cal. Rptr. at 720.

[78] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 216, 625 P.2d 239, 242, 172 Cal. Rptr. 696, 699 (1981); State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 245, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716 (1981).

[79] Future litigants who own riparian property on rivers will likely attempt to distinguish *Lyon* and *Fogerty* because these cases deal with lakes, not rivers.

[80] The State Lands Commission has the authority to grant permits to fill the beds of navigable streams owned by the state. CAL. PUB. RES. CODE § 6303 (West 1977). Arguably, because the Commission has the authority to allow fill on state-owned lands that are subject to the public trust, it also has authority to allow fill on privately owned lands subject to the trust. Even if the Commission were to have such authority, however, exercise of its discretion to allow fill in the shorezone is unlikely in most cases, given the legislature's desire to protect present wetlands environments. *See* Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951); CAL. PUB. RES. CODE § 5811 (West Supp. 1982).

take affirmative steps to protect the public's interest in these lands. For example, the state has the power to remove improvements in the shorezone and to alter the character of the land, even to "enter and possess" it,[81] because the owner holds only a "naked fee" in the soil.[82]

Littoral and riparian owners may find significant new costs associated with the public trust. Greater public use of trust lands may increase landowners' maintenance costs.[83] Despite this heightened use, statutory authority should absolve owners of possible costs from expanded tort liability to the general public.[84] Public access, however, will likely diminish property values because public use of the shorezone may grow and the state can now exercise greater control over these lands.[85]

The public and the environment will benefit from the court's exten-

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Limitations on a private owner's right to develop her property have stirred heated debates that go to the heart of the definition of property rights. For an expression that property rights include an unfettered right to develop, see Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 57-58, 228 A.2d 169, 182-83 (1967). For an opposing view, see Babcock & Feuer, *Land as a Commodity "Affected with the Public Interest,"* 52 WASH. L. REV. 289, 291-99 (1977) and cases cited therein. However, California courts consider the public trust "servitude" a public property right, not merely a police power function. *See* Forestier v. Johnson, 164 Cal. 24, 36, 127 P. 156, 161 (1912); Dunning, *California's Public Trust Easement*, note 1 *supra*, at 363-67.

[81] People v. California Fish Co., 166 Cal. 576, 599, 138 P. 79, 88 (1913).

[82] Taylor, *Patented Tidelands: A Naked Fee?* 47 CAL. ST. B.J. 420, 420 (1972). A littoral owner has rights distinct from the general public. For example, she may enjoin nuisances and build a pier out to the line of navigability. She has rights to accretion, navigation, and to access from her entire frontage to the line of ordinary low tide. Marks v. Whitney, 6 Cal. 3d 251, 262-63, 491 P.2d 374, 382, 98 Cal. Rptr. 790, 798 (1971). Still, these rights of access are not absolute. Littoral owners adjacent to tidelands may not own to low water. *See, e.g.*, Miramar Co. v. City of Santa Barbara, 23 Cal. 2d 170, 173-74, 143 P.2d 1, 2-3 (1943). State law has forbidden the alienation of tidelands since 1879. If the State owns to high water, it may cut off littoral owners' access to the water without compensation. *Id.* at 176, 143 P.2d at 4. Because littoral owners on navigable waters not influenced by the tide own to low water, the state presumably has no right to prevent access to these waters.

[83] Mr. Ken Cory, chair of the State Lands Commission, has asserted that costs will increase due to vandalism, wear and tear, and erosion. *Cory Criticizes Bee Support of Swampland Giveaway*, Sacramento Bee, Sept. 17, 1980, § B, at 7, col. 1.

[84] CAL. CIV. CODE § 846 (West 1982) (landowner owes no duty of care to keep his premises safe for entry or use by others for recreational purposes).

[85] Title insurance companies should be liable for those policies which failed to provide for public trust claims. Landowners whose title policies did not insure against public trust claims likely received no monetary compensation of any kind for the imposition of the trust. The state need only compensate for improvements that are removed. *See* notes 119-121 and accompanying text *infra*.

sion of the public trust. The public should immediately profit from expanded recreational opportunities provided by these decisions. However, many littoral and riparian owners may not allow access to the shorezone across their land,[86] making part of the shorezone difficult to reach except by boat.[87] In the long run, not only the state's residents,[88] but the shorezone environments and the habitats they support will be the major beneficiaries.[89] The public trust allows the State Lands Commission and the public to intervene to prevent the rapid deterioration of

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[86] Nevertheless, there are indications that the California Supreme Court may be receptive to claims for access to inland areas. In a recent pretrial ruling, the court unanimously reinstated without opinion an order of the trial court that had enjoined closure of a trail providing the only access to Escondido Falls, a large waterfall near the Southern California coast. Trabish v. Traugh, No. 2 Civ. 65191, 1982 Cal. Official Rpts. No. 19, Supreme Court minutes, at 33 (June 24, 1982).

[87] CAL. CONST., art. X, § 4 (formerly art. XV, § 2), while purporting to guarantee access to navigable waters at the expense of littoral owners, has not achieved its intended goal. Although art. X, § 4 has not been officially declared inconsistent with the United States Constitution, it appears to violate the Just Compensation clause. *See* City of Los Angeles v. Aitkin, 10 Cal. App. 2d 460, 474-75, 52 P.2d 585, 592 (3d Dist. 1935) (draining of Mono Lake required compensation to littoral owners).

[88] The citizens of a state may enjoy the benefits of the public rights associated with trust land only on lands within their own state's boundaries. *See* Forestier v. Johnson, 164 Cal. 24, 39, 127 P. 156, 162 (1912).

The public trust doctrine provides for more democratic, widespread use of land. Traditionally, it has operated to protect diffuse benefits to the public from encroachment by tightly organized groups with clear and immediate goals. *See generally* Sax, *Judicial Intervention*, note 2 *supra*, at 556.

[89] The Department of Water Resources argued that the rate of deterioration of shorezone environments in 1980 was so great that the damage would have become irreversible if the shorezone was not found subject to the public trust. Among its observations: (1) the natural freshwater shorezone environment was reduced to one-sixth of its original size; (2) most natural shorezone vegetation is now gone; (3) at the present rate of destruction nearly all riparian vegetation on the Sacramento River could be eliminated; (4) exercise of ordinary police power measures has been insufficient to prevent the deterioration of this environment; (5) the natural shorezone is essential to good water quality (clarity and potability); (6) the vegetation acts as a buffer against floods and erosion; and (7) a natural shorezone is essential to the survival of many species of birds, fish, plants, and other wildlife. Brief for the Dep't of Water Resources at 56-129, State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 245, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716 (1981).

Prior to *Lyon* and *Fogerty*, the government had granted to private interests the authority to make resource use decisions which subordinated broad public resource uses to those of private interests. Unfettered private property rights provided incentives to ignore environmental concerns. Professor Sax argues that the public trust can provide for more rational resource use by allowing consideration of the long run externalities of individual and governmental decisions. Sax, *Judicial Intervention*, note 2 *supra*.

the shorezone.

III. THE ESTOPPEL ISSUE: INJUSTICE VS. PUBLIC POLICY

The *Fogerty* court held that for public policy reasons,[90] the government could not be estopped[91] from asserting the nontidal trust although some landowners may have detrimentally relied upon contrary judicial and legislative pronouncements.[92] Estopping the government,[93] the court reasoned, would nullify the public policy of protecting the freshwater shorezone.[94] The court did not explicitly weigh landowners' interests against the public policy involved, as it had in the past. Even if the court had balanced the competing interests, however, the state may still have prevailed in imposing the public trust.

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[90] *See* notes 61-66 and accompanying text *supra*.

[91] Traditionally, four elements are necessary for the doctrine of equitable estoppel to apply:

> (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) [the other party] must rely upon the conduct to his injury.

City of Long Beach v. Mansell, 3 Cal. 3d 462, 489, 476 P.2d 423, 442, 91 Cal. Rptr. 23, 42 (1970), *quoting* Driscoll v. City of Los Angeles, 67 Cal. 2d 297, 305, 431 P.2d 245, 250, 61 Cal. Rptr. 661, 666 (1967).

[92] City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 467, 52 P.2d 585, 588 (3d Dist. 1935); CAL. CIV. CODE § 830 (West 1982); 43 Op. Cal. Att'y Gen. 288, 295 (1964) (riparian and littoral owners held shorezone in unencumbered fee).

[93] Estoppel against governmental bodies is disfavored at common law. United States v. City & County of San Francisco, 112 F. Supp. 451, 454 (N.D. Cal. 1953). This rule, similar to principles of government immunity to civil liability, was promulgated to protect government finances and to give the government greater flexibility in making decisions. Although courts today are less reluctant to apply estoppel against the government, California rarely applies the doctrine. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 500, 476 P.2d 423, 451, 91 Cal. Rptr. 23, 51 (1970); People v. County of Kern, 39 Cal. App. 3d 830, 838, 115 Cal. Rptr. 67, 73 (5th Dist. 1974). For a thorough discussion of estoppel applied against governments, see Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978).

[94] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244-47, 625 P.2d 256, 259-60, 172 Cal. Rptr. 713, 716-17 (1981). Although estoppel was not raised in the trial court, the supreme court decided this issue as a matter of law to reduce case-by-case litigation. *Id.* at 244, 625 P.2d at 258, 172 Cal. Rptr. at 715. *See also* City of Long Beach v. Mansell, 3 Cal. 3d 462, 487-88, 476 P.2d 423, 441, 91 Cal. Rptr. 23, 41 (1970). This concern with avoiding multiple litigation echoes the analysis in City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 535, 606 P.2d 362, 374, 162 Cal. Rptr. 327, 339 (1980).

A. Failure to Balance Competing Claims

The court did not discuss the possible injustice to landowners resulting from imposing the trust on previously reclaimed lands. This failure to consider countervailing equities in estoppel situations departs from the balancing test articulated in *City of Long Beach v. Mansell.*[95] The *Mansell* court declared that if public policy reasons outweigh injustice to private property owners, the government will not be estopped from asserting the public trust.[96] In contrast, *Fogerty* did not discuss private burdens, even to dismiss them. Rather, the majority focused on the potential public harm from shorezone degradation. The court concluded that the urgent need to protect the shorezone[97] justified state assertion of the trust.[98]

Fogerty has left California with two different methods of resolving questions of estoppel against the government. The first standard of review, articulated in *Mansell*, balances the injustice to landowners against public policy.[99] The second standard of review, articulated in *Fogerty*, provides that estoppel cannot prevail if it would nullify a strong rule of public policy, regardless of any balancing of interests.[100] For reference, this Comment refers to the test employed in *Fogerty* as

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[95] 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970). In *Mansell*, both state and local governments had encouraged private filling and development of tidelands in Alamitos Bay south of Los Angeles. In an effort to vindicate thousands of landowners' good faith reliance on government actions, the legislature purported to free these lands from the public trust easement. The California Supreme Court upheld this grant, holding that the city was estopped to assert the trust as a matter of law. *Id.* at 501, 476 P.2d at 451, 91 Cal. Rptr. at 51.

[96] *Id.* at 496-97, 476 P.2d at 448, 91 Cal. Rptr. at 48. The *Mansell* court concluded that the legitimate expectations of thousands of homeowners outweighed any deleterious effect upon public policy. The court decided not to enforce the trust because the public would still have extensive access to Alamitos Bay and the decision would create an extremely narrow precedent. *Id.* at 500, 476 P.2d at 451, 91 Cal. Rptr. at 51.

[97] The Department of Water Resources indicated that the deterioration of California's wetlands will become irreversible if not slowed. Brief for the Dep't of Water Resources at 58, State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 245, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716 (1981). *See* note 89 *supra.*

[98] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244-47, 625 P.2d 256, 259-60, 172 Cal. Rptr. 713, 716-17 (1981). The California Legislature has confirmed the need to protect wetlands. *Fogerty*, 29 Cal. 3d at 246, 625 P.2d at 259, 172 Cal. Rptr. at 716. *See, e.g.*, CAL. PUB. RES. CODE §§ 5093.50 (Wild and Scenic Rivers Act) and 5811 (Wetlands Preservation Statutes of 1976).

[99] City of Long Beach v. Mansell, 3 Cal. 3d 462, 496-97, 476 P.2d 423, 448, 91 Cal. Rptr. 23, 48 (1970).

[100] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 715-16 (1981).

an "estoppel nullification by policy standard" because under it, the policy at issue nullifies any assertions of estoppel.[101]

Moreover, in most cases the method chosen will determine the result. Most land use cases that explicitly apply the *Mansell* balancing test have held that private injustice outweighed any negative effect upon public policy and thus have upheld estoppel.[102] Yet it appears that when the courts define this issue *solely* in terms of public policy, as in *Fogerty*, they have rejected estoppel arguments.[103]

Whether a court will apply the *Mansell* or *Fogerty* standard may depend upon the public policy threatened and the breadth of the precedent established by estopping the government. In *Mansell*, the existing configuration of Alamitos Bay fulfilled the relatively minor public needs of navigation and recreation.[104] Conversely, the *Fogerty* court

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[101] *Id.* at 244, 625 P.2d at 259, 172 Cal. Rptr. at 716 (1981). The *Fogerty* court essentially ignored specific injustices to landowners caused by imposing the public trust. *Id.* at 244-47, 625 P.2d at 258-60, 172 Cal. Rptr. at 715-17.

[102] The *Mansell* court explicitly balanced the injustice to landowners against public policy considerations and held the government estopped from asserting the trust. City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

Other cases in which courts specifically balanced the equities include: Anderson v. City of La Mesa, 118 Cal. App. 3d 657, 661, 173 Cal. Rptr. 572, 575 (4th Dist. 1981) (estopping city from withholding building permit because injustice to homeowners outweighed harm to public policy from granting variance from zoning ordinance); Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 975, 137 Cal. Rptr. 699, 705 (3d Dist. 1977) (expressly declining to hold that environmental policy outweighed injustice to developer because evidence needed to apply estoppel balancing test was not before court); People v. Department of Housing and Community Dev., 45 Cal. App. 3d 185, 200, 119 Cal. Rptr. 266, 276 (3d Dist. 1975) (estopping government from rescinding building permit because "state's failure to commence its suit before the citizen incurred heavy losses created an injustice which outweighed any adverse effect of the state's failure to make timely environmental inquiries"). These cases suggest that when courts expressly use the *Mansell* test to balance injustice to landowners against a rule of public policy, the equities tend to favor landowners. For a case decided prior to *Mansell*, see City of Imperial Beach v. Algert, 200 Cal. App. 2d 48, 19 Cal. Rptr. 144 (4th Dist. 1962) (city estopped from denying that land marked as street on subdivision map was actually private land, because land was never used as street).

[103] Other cases in which courts have applied the estoppel nullification by policy standard include: County of Los Angeles v. Berk, 26 Cal. 3d 201, 605 P.2d 381, 161 Cal. Rptr. 742 (1980) (refusing to balance equities and rejecting landowner's claims of estoppel because it would nullify policy which guarantees public access to shoreline areas); Pettitt v. City of Fresno, 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (5th Dist. 1973) (refusing to estop city from rescinding building permit because public policy of community zoning patterns outweighed any injustice that individual who relied on invalid permit might suffer).

[104] City of Long Beach v. Mansell, 3 Cal. 3d 462, 500, 476 P.2d 423, 451, 91 Cal. Rptr. 23, 51 (1970).

confronted the rapid deterioration of over four thousand miles of freshwater resources.[105] The court employed the estoppel nullification by policy standard to further a policy of conservation,[106] and thereby ignored the economic injustice to landowners.[107]

Additionally, the precedential weight of a decision may affect a court's analysis of an estoppel issue. *Mansell* explicitly stated that the rare combination of extensive reliance and government action created a narrow precedent.[108] In contrast, *Fogerty* established a broad precedent affecting over four thousand miles of shoreline, not just Alamitos Bay.[109] Also, landowners' reliance on the underlying legislation and on opinions of the Attorney General's office may have occurred statewide.[110] Thus, the *Fogerty* court applied the estoppel nullification by policy standard, thereby avoiding a broad precedent contrary to policies that protect valuable environmental resources.

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[105] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 245, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716 (1981). *See* note 89 *supra.*

[106] *See* note 89 *supra.*

[107] The dissent implied that large parts of the San Joaquin and Sacramento Valleys face potential "exercise" of the public trust because the *Mansell* test has been misinterpreted. State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 251, 625 P.2d 256, 262-63, 172 Cal. Rptr. 713, 720 (1981) (Clark, J., dissenting).

[108] City of Long Beach v. Mansell, 3 Cal. 3d 462, 500, 476 P.2d 423, 451, 91 Cal. Rptr. 23, 51 (1970). The *Mansell* court also contrasts County of San Diego v. California Water & Tel. Co., 30 Cal. 2d 817, 186 P.2d 124 (1947) (estoppel did not apply when county promised company to trade new highway for limitation on damages in case in which old access road to company was flooded by rain) with City of Imperial Beach v. Algert, 200 Cal. App. 2d 48, 19 Cal. Rptr. 144 (4th Dist. 1962) (city estopped from denying land marked as street on subdivision map was actually private land, because land was never used as street) to emphasize that ". . . each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated." *Mansell*, 3 Cal. 3d at 495 n.30, 476 P.2d at 447 n.30, 91 Cal. Rptr. at 47 n.30, *citing Algert*, 200 Cal. App. 2d at 52, 19 Cal. Rptr. at 145.

[109] The *Lyon* court maintained that the fate of 4,000 miles of shoreline would be affected by its decision. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 216, 625 P.2d 239, 242, 172 Cal. Rptr. 696, 699 (1981).

[110] The California Attorney General's office had repeatedly declared that the state claimed ownership of nontidal submerged lands only to the low-water mark. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 224, 625 P.2d 239, 247, 172 Cal. Rptr. 696, 704 (1981), *citing* 43 Op. Cal. Att'y Gen. 291, 295 (1964); 30 Op. Cal. Att'y Gen. 262, 269 (1957); 23 Op. Cal. Att'y Gen. 306, 307 (1954). *See* notes 38-42 and accompanying text *supra.* However, many title insurance companies included exceptions in their policies for a possible public easement on littoral and riparian land. Informal correspondence from Jan Stevens, Cal. Deputy Att'y Gen., Sacramento (Jan. 27, 1983) (copy on file at U.C. Davis Law Review office).

The court can more effectively analyze estoppel issues with one comprehensive balancing test rather than with two standards of review. Estoppel is, after all, an equitable doctrine which requires courts to inquire into the facts of each case.[111] Although the *Fogerty* court justified its estoppel determination as a means of avoiding multiple litigation,[112] this does not warrant ignoring individual burdens by failing to balance competing claims.[113] The courts should balance public trust policies against possible injustice to private landowners. Equitable rights can be protected without compromising environmental goals or creating unnecessarily broad precedents. Landowners' legitimate expectations deserve careful factual consideration, not summary dismissal.

B. Considerations of Policy and Justice

Imposing the public trust on the shorezone should not significantly change present use patterns, notwithstanding the state's new flexibility in determining the best use for particular shorezones.[114] Budgetary con-

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[111] *See, e.g.*, 31 C.J.S. Estoppel § 59 at 372 (1964).

[112] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244, 625 P.2d 256, 258, 172 Cal. Rptr. 713, 715 (1981).

[113] The *Fogerty* majority acknowledged that the issue of estoppel, as a technical matter, was not before the court. *Id.* at 244, 625 P.2d at 258, 172 Cal. Rptr. at 715. It has been held that if facts constituting estoppel appear in the complaint, estoppel is adequately pleaded although not formally before the court. Anderson v. City of La Mesa, 118 Cal. App. 3d 657, 661, 173 Cal. Rptr., 572, 574 (4th Dist. 1981) (city estopped from invalidating building permit when homeowner had already built home on her land); N.C. Roberts Co. v. Topaz Transformer Products, Inc., 239 Cal. App. 2d 801, 821, 49 Cal. Rptr. 209, 222 (4th Dist. 1966) (shareholders estopped to challenge validity of stock sales when sales were made in violation of permit). In *Fogerty*, however, the facts concerning every landowner along 4,000 miles of shorezone were not before the court.

[114] Trust lands are not locked into a pattern that favors one use over another. Nor are they at the mercy of individual decisions that collectively operate to undermine the resource for all. Flexibility permits the government to respond to changing public needs and values. The trust has not been interpreted to require leaving the shoreline in exactly the same configuration and condition as before white people came to the area. *See, e.g.*, City of Milwaukee v. State, 193 Wis. 423, 451, 214 N.W. 820, 830 (1927) (state may cede submerged lands to city for landfill in order to improve harbor of Milwaukee). While the trust may be redefined by the courts, it is to an uncertain extent immune from destructive legislation. *See* Note, *Increased Public Trust Protection for California's Tidelands* — City of Berkeley v. Superior Court, 14 U.C. DAVIS L. REV. 399, 419 n.70 (1980), and cases cited therein. The government has the flexibility to prioritize trust uses, State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 247, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981); Dunning, *California's Public Trust Easement*, note 1 *supra*, at 388, but not to abrogate the trust completely through its police powers. Lane v. City of Redondo Beach, 49 Cal. App. 3d 251, 257, 122 Cal. Rptr. 189, 193 (2d Dist.

straints limit the State Lands Commission's ability to abate structural improvements in the shorezone.[115] Further, the benefits of seizing reclaimed land or improvements to restore the shorezone remain questionable. First, given state flexibility to exercise the trust, such drastic measures should not be necessary to preserve the freshwater shorezone.[116] Second, it is unclear whether an attempt to reconstruct the original shorezone would benefit the environment.[117]

Because the state must compensate owners if it orders the removal of structures which conflict with trust uses, landowners' hardships are reduced.[118] One commentator has suggested that removing these structures merely recovers costs that individual landowners have previously imposed on the public.[119] Since the public trust has existed on the

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1975) (city's powers do not include power to destroy right of public access to navigable waters).

The *Fogerty* court suggested that flexibility may allow the government to restrict public access to the shorezone to preserve it for future generations. For example, areas endangered by overuse can be closed to public bathers. State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 247, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981). The old objective of obtaining the most widespread use of trust lands may interfere with the trust purpose of ecological preservation. This conflict between democratization and preservation may require a redefinition of resource management goals.

[115] Informal correspondence from Jan Stevens, Cal. Deputy Att'y Gen., from Sacramento (Jan. 27, 1983) (copy on file at U.C. Davis Law Review office). The difficult task for the State Lands Commission and the courts will be protecting the public's expectations of a clean environment while infringing on private property interests as little as is practicable.

[116] *See* note 114 *supra.*

[117] Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233, 264 (1980). Johnson questions whether attemps to reconstruct the original shorezone are ecologically or financially possible. Financial constraints could be avoided by ordering private landowners to pay to have fills abated, as in Wilbour v. Gallagher, 77 Wash. 2d 306, 316-18, 462 P.2d 232, 239-40 (1969) (private fill held an obstruction to navigation). When viewed in the long run, removing landfill might improve the environment for marine biomes simply by providing a larger aquatic habitat. Another argument for abating fill on trust lands is that a wider range of trust uses is available in the shorezone than on filled lands. City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338 (1980). *See* notes 139-49 and accompanying text *infra.*

[118] CAL. PUB. RES. CODE § 6312 (West 1977). *See also* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 440 n.22, 658 P.2d 709, 723 n.22, 189 Cal. Rptr. 346, 360 n.22 (1983).

[119] When a property owner imposes costs on others without compensation, the government's vindication of public rights may economically injure the owner. However, the disadvantaged owner is yielding something which was arguably not his in the first place. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 180-81 n.64 (1971).

shorezone since 1850,[120] the landowners have used these lands at the public's expense. From this perspective, the landowner loses money only when the costs of imposing the trust exceed the value that he previously received from denying public rights to his land. Thus, appropriate compensation for improvements such as docks and piers[121] can mitigate the economic harm suffered by landowners.

Even when the injustice to landowners outweighs policy considerations, courts may still reject estoppel on the facts. In land title cases, California law requires that the party to be estopped must have committed actual or constructive fraud to induce reliance.[122] However, the state's failure to assert that the public trust extended to freshwater shorezones indicates that the government did not believe shorezone titles were clouded.[123] If the government was only guilty of a mistaken interpretation of an ambiguous statute, it may have lacked the requisite fraudulent intent for estoppel.[124] Thus, had the Supreme Court remanded *Fogerty* for a judgment on the facts, the trial court may have rejected the landowners' estoppel claims.

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[120] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 222, 625 P.2d 239, 246, 172 Cal. Rptr. 696, 703 (1981).

[121] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 249, 625 P.2d 256, 261, 172 Cal. Rptr. 713, 719 (1981). Cal. Pub. Res. Code § 6312 authorizes compensation for existing improvements, and excludes compensation for planned or contemplated improvements. This may still be inadequate. If, for example, the state requires a landowner to remove a rental home because its foundation creeps into the shorezone, it is unclear whether the state must pay for lost rental income. For a discussion of compensation issues on waterfront property, see Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1970) [hereafter *Thou Shall Not Fill*].

[122] City of Long Beach v. Mansell, 3 Cal. 3d 462, 488-91, 476 P.2d 423, 442-44, 91 Cal. Rptr. 23, 42-44 (1970), and cases cited therein. Yet, if the party to be estopped has made affirmative representations, knowledge of the true facts may be imputed if he ought to have known the truth. Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 462, 143 P. 754, 757 (1914) (party estopped from disputing location of boundary when his predecessor in interest had relied on adjoining proprietor's representations). The state should not be charged with that knowledge, because *Lyon* provides the first clear authority that California freshwater shorezone has been impressed with a public trust easement.

[123] Not until 1970 did the California Attorney General assert that the state owned the shores of navigable lakes and streams to high water. State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 224, 625 P.2d 239, 247, 172 Cal. Rptr. 696, 704 (1981).

[124] *Id.* at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709. *See* note 122 *supra*.

IV. FATE OF RECLAIMED LANDS UNDER *Lyon*, *Fogerty*, AND *City of Berkeley v. Superior Court*: PROTECTING LEGITIMATE EXPECTATIONS

Notwithstanding Justice Clark's strident dissent,[125] the *Lyon* majority failed to discuss the fate of millions of acres of reclaimed land.[126] Though this refusal suggests that the issue was not before the court, nevertheless, *Lyon* and *Fogerty* cast doubt on the existence of the public trust on lands already reclaimed from freshwater shorezones.[127]

Fogerty does not resolve the legal status of reclaimed lands. The *Fogerty* holding affirmed a policy of protecting *existing natural* shorezone environments.[128] Because these shorezone environments exclude areas *already reclaimed*, the *Fogerty* rationale does not apply to reclaimed lands.[129] The absence of controlling authority[130] on the question of reclaimed lands invites a critical look at existing law on similar issues. In *City of Berkeley v. Superior Court*,[131] the California Supreme Court provided a method of analysis which will be discussed below.

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[125] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 236-37, 623 P.2d 239, 255-56, 172 Cal. Rptr. 696, 712-13 (1981) (Clark, J., dissenting).

[126] *Id.* Justice Clark was most disturbed about lands reclaimed for agricultural and residential purposes in California's Central Valley. He believed *Lyon* cast a cloud on the title of these lands, which he called inequitable to those who have long relied on state policy encouraging reclamation of the valley. *See* notes 72-75 and accompanying text *supra*.

[127] *See* Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138, 1151-52 (1982). This commentator accepts most of Justice Clark's dissenting arguments. She states that titles to reclaimed lands bear a cloud. The California State Lands Commission appears to agree; although the Commission considers reclaimed lands subject to the trust, it does not require a lease as it could, CAL. PUB. RES. CODE § 6321.2 (West 1977), for lands filled to the low-water mark only. The Commission has not attempted to restrain existing private uses of reclaimed lands. Telephone interview with Dave Judson, Cal. Deputy Att'y Gen. (Nov. 18, 1982) (copy on file at U.C. Davis Law Review office).

[128] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 246, 625 P.2d 256, 259-60, 172 Cal. Rptr. 713, 716-17 (1981). The *Fogerty* court cited CAL. PUB. RES. CODE § 5811 (West Supp. 1980), which mandates an affirmative public policy directed at preservation and restoration of "remaining" wetlands. *Id.*

[129] According to the amicus brief of the California Dep't of Water Resources (DWR), the fragile ecosystem of freshwater shorezones is unalterably changed when these areas are filled. The DWR urged that the natural shorezone ecosystem be saved from complete destruction at the hands of private developers. *See* note 89 *supra*.

[130] *See* note 127 *supra*, and note 137 and accompanying text *infra*. For a thorough discussion of reclaimed lands in California, see Comment, *Private Fills*, note 1 *supra*.

[131] 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

Berkeley, however, does not protect the legitimate expectations of the parties to each dispute.[132] This Comment suggests an alternative method to determine the status of reclaimed lands: courts should examine the expectations of both private landowners and the public before deciding to retain the public trust on particular parcels of reclaimed land.

The *Berkeley* case involved the status of tidelands granted to promote reclamation for agricultural use. Prior judicial decisions had held that the entire Berkeley waterfront was owned in fee, unencumbered by the public trust.[133] *Berkeley* reversed those decisions, holding that all reclaimed lands at issue in the San Francisco Bay were free of the trust, and lands not reclaimed were impressed with the public trust.[134] Although the *Berkeley* court noted the general rule that reclamation alone does not terminate the trust,[135] the court reasoned that the reliance of private landowners upon prior judicial decisions outweighed the public interest in reclaimed lands.[136] Because landowners like the Lyons and Fogertys relied on administrative interpretations of statutes rather than judicial opinions, *Berkeley* may not resolve the reclaimed lands issue.[137]

The *Berkeley* court implied that general considerations of equity and fairness should be paramount in deciding whether the public trust

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[132] *See* notes 141-48 and accompanying text *infra*.

[133] The *Berkeley* court overruled Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915), and disapproved of Alameda Conservation Ass'n v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1st Dist. 1968). City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 527-33, 606 P.2d 362, 368-73, 162 Cal. Rptr. 327, 333-38 (1980).

[134] City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 534-36, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 338-39 (1980).

[135] *Id.* at 535 n.19, 606 P.2d at 374 n.19, 162 Cal. Rptr. at 339 n.19. For the general rule, see Marks v. Whitney, 6 Cal. 3d 251, 261, 491 P.2d 374, 381, 98 Cal. Rptr. 790, 797 (1971). *See also* Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 401-02, 60 P.2d 825, 829 (1936) (state retains right to make harbor improvements on lands granted which are subject to public trust); Atwood v. Hammond, 4 Cal. 2d 31, 40-41, 48 P.2d 20, 24-25 (1935) (tidelands reclaimed out to bulkhead remain dedicated to public uses of commerce, navigation, and fishing) (see cases cited therein).

[136] City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338 (1980) (balancing test used to weigh competing interests). *See* note 140 *infra*.

[137] The *Lyon* court maintained that its holding was less of an interference with private property rights than that in *Berkeley*. In *Lyon*, the landowners merely relied on "administrative interpretation[s] of an ambiguous statute [§ 830]." State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 232, 625 P.2d 239, 252, 172 Cal. Rptr. 696, 709. *See also* City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 535 n.19, 606 P.2d 362, 374 n.19, 162 Cal. Rptr. 327, 339 n.19 (1980). *See* note 142 *infra*.

should burden lands filled by private landowners.[138] The court reasoned that reclaimed lands were "substantially valueless" for trust purposes because the lands were no longer physically adapatable for trust uses.[139] The court balanced this public interest against the interests of private landowners and freed reclaimed lands from the public trust.[140]

The *Berkeley* balancing test did not adequately balance the equities. Instead, the court drew a bright line between those who had reclaimed their land and those who had not. Although this line of judicial convenience reduces future litigation,[141] it addresses only the expectations of private landowners. The test ignores public expectations in certain reclaimed lands. All owners of reclaimed lands, including those who filled lands without relying on the overruled decisions, retained title unburdened by the public trust.[142] The court reasoned that reclaimed

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[138] City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 534-36, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 338-39 (1980).

[139] *Id.*

[140] The *Berkeley* court's balancing test is as follows:

> 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 interests 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, 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.

Id. at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338.

A commentator notes that the *Berkeley* court modified its balancing test in order to eliminate any "implication that good faith — i.e., compliance with land use regulations prohibiting fill — of the property owners was a prerequisite to the termination of the public trust under the balancing test." Note, *Increased Public Trust Protection for California Tidelands* — City of Berkeley v. Superior Court, 14 U.C. DAVIS L. REV. 399, 414 n.54 (1980).

[141] City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 535, 606 P.2d 362, 374, 162 Cal. Rptr. 327, 339 (1980). The *Fogerty* court appears motivated by the same consideration of judicial economy. State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244, 625 P.2d 256, 258, 172 Cal. Rptr. 713, 715 (1981).

[142] *Berkeley* reasoned that even those who filled lands without relying on these overruled decisions would retain their land unburdened by the public trust, in order ". . . to preclude clouding the titles of landowners . . . ." City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 535, 606 P.2d 362, 374, 162 Cal. Rptr. 327, 339 (1980). Notwithstanding its reasoning, the court held that actual reliance on subsequently overruled judicial decisions was not necessary to free filled lands from the trust. *Lyon* did not address this inconsistency. The fate of reclaimed lands remains unresolved. *Cf.* Note,

lands allow fewer trust uses.[143] In doing so, the uses of recreation, open space, and access to navigable waters, no matter how compelling in particular instances, were disregarded by a court more interested in retaining legal ownership patterns than in protecting the legitimate expectations of all parties involved.

A more comprehensive analysis would recognize the diffuse public expectations for trust uses when determining the fate of reclaimed lands. Ideally, the public trust protects commonly held expectations that lack formal recognition such as title.[144] Traditionally, tangible expectations of private landowners enjoy greater recognition than legitimate public expectations because individual landowners expressly assert their rights in the legal process. Conversely, the public rarely speaks in a clearly focused voice. Hence, the unexpressed but nevertheless undeniable public expectation for relatively stable ecosystems[145] has generally gone unrecognized in our legal system. If courts expressly considered all legitimate expectations in analyzing public trust problems, not just those in private property, they would take a step toward a more inclusive and democratic resource allocation system.

How would such a system work? One must begin by recognizing that expectations, both private and public, will differ for each parcel. Two private holders of reclaimed land, one owning a parcel filled and improved, and one owning land filled but unimproved, have expectations that differ in ways that the law should recognize. Among the factors which should be considered in weighing private landowners' expectations are: (1) the amount of money spent to buy and improve the parcel; (2) the length of time the land has been filled; (3) the extent of government representations as to fee title; (4) the measure of structural improvements already in place;[146] and (5) the existence of actual or constructive notice of the public trust easement. These factors should be balanced with public expectations which also may differ with each parcel. Courts should consider patterns of past public use on each parcel, the need for certain kinds of trust uses as expressed by diffuse public

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Increased Public Trust Protection for California's Tidelands — City of Berkeley v. Superior Court, 14 U.C. DAVIS L. REV. 399, 422 (1980).

[143] *See* note 140 *supra*.

[144] "The idea of justice at the root of private property protection calls for identification of those expectations which the legal system ought to recognize." Sax, *Liberating the Public Trust*, note 2 *supra*, at 187.

[145] In this regard, see Murphy, *Has Nature Any Right to Life?*, 22 HASTINGS L.J. 467 (1971); Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388.

[146] Corker, *Thou Shalt Not Fill*, note 121 *supra*.

expectations, and the suitability of each parcel for future public use.

As at least one court has recognized, the range of trust uses is so broad[147] that no parcel can be absolutely useless for trust purposes.[148] The *Berkeley* court reasoned that reclaimed land is nonetheless "substantially valueless" for trust purposes, presumably because fewer kinds of trust uses are possible on reclaimed land. The *Berkeley* analysis does not recognize that there may be greater public expectation and use accompanying some parcels that offer a limited range of uses than others that offer a wide range of uses. Because filled parcels contiguous to urban areas are extremely valuable for the single trust purpose of recreation, they can be more valuable for trust purposes and more deserving of trust protection than parcels filled for agricultural purposes in rural areas.

Continuing confusion about the legal status of land reclaimed from the freshwater shorezone can be remedied through judicial adoption of a balancing test different from the one used in *Berkeley*. Courts should examine on a case-by-case basis the expectations of all parties with an interest in the dispute, not just those of private landowners. When a reclaimed parcel is extremely valuable for even a single trust use, courts should recognize the weighty public expectations that attach to such parcels. By taking public expectations into account, the legal system could provide a resource management function more consistent with modern concerns such as renewability and sustained yield.[149]

CONCLUSION

The California Supreme Court has recently employed the public trust doctrine to protect the state's dwindling freshwater resources. In *Lyon*, the court declared that the public trust applies to over four thousand miles of shorezone surrounding California's inland navigable lakes and streams. In *Fogerty*, the court concluded that the urgent need to protect the shorezone foreclosed examination of landowners' claims of

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[147] Trust uses include commerce, navigation, fisheries, recreation, preservation, scientific study, hunting, and open space. This list is not exhaustive, and appears to embrace any nonconsumptive public use. Dunning, *California's Public Trust Easement*, note 1 *supra*, at 367-68. *But see* City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 536, 606 P.2d 362, 374, 162 Cal. Rptr. 327, 339 (1980) (Clark, J., dissenting).

[148] County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973) (tidelands may be alienated to private owners if they have been or will be reclaimed pursuant to public program of harbor development). *But see* City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 534-35, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 338-39 (1980).

[149] *See* Sax, *Liberating the Public Trust*, note 2 *supra*.

estoppel. Although this expansion of the trust will directly benefit the public through a more stable ecosystem and increased recreational opportunities, it will burden private landowners through restrictions on development and a likely decline in property values.

The *Fogerty* decision failed to balance landowners' reliance interests or development expectations against environmental policies. The court applied what this comment has labeled an "estoppel nullification by policy standard"; it reasoned that the policy of preserving the ecological integrity of the shorezone nullified any estoppel claims of private landowners. Essentially, this failure to examine landowners' claims ignored their equitable rights. When litigating estoppel issues, the court should explicitly balance public trust policies against possible injustice to landowners.

Finally, this comment has noted the ambiguity on the fate of reclaimed lands after *Lyon* and *Fogerty*, and has offered a new balancing test that weighs both public and private expectations before deciding whether any reclaimed parcel remains subject to the public trust. The *Berkeley* balancing test, with its convenient bright line drawn to exclude all reclaimed lands from public trust protection, ignores legitimate public expectations in parcels that may be extremely valuable for some trust uses. Moreover, were courts to give legal recognition to public expectations as well as to private prerogatives, they would function better as resource planners, a role courts are increasingly required to perform.

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