Law Note

COASTAL ZONE MANAGEMENT—THE TIDELANDS: LEGISLATIVE APATHY vs. JUDICIAL CONCERN

> Except for combatting pollution of its air and water, California has no more important environmental challenge than controlling haphazard development of its shoreline.[1]

INTRODUCTION

The following three cases, *City of Long Beach v. Mansell*,[2] *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission*,[3] and *Zabel v. Tabb*,[4] are important recent developments in the rapidly expanding area of the law of coastal zone management. The purpose of this article is to present each of the cases individually, then to demonstrate how the inter-relation of the three cases can and probably will be utilized by the courts to effectuate legislative policy.

Generally, tidelands comprise that land which is covered and uncovered by the rise and fall of ordinary tides and which is the ecologically important interface between the ocean and the continental land mass. Commonly included in tidelands are estuaries[5] and tidal

1. Editorial, Los Angeles Times, Dec. 10, 1970, Part II at 6, col. 1.
2. 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970).
3. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).
4. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3360 (U.S. Feb. 22, 1971).
5. That part of the lower course of a bay or river flowing into the sea which is subject to tide.

marshes.[6] The importance of this narrow strip surrounding the continent is partially demonstrated when it is realized that approximately two-thirds of all coastal sport fish are dependent on the tidelands during part of their lives,[7] that this nation's seven largest metropolitan areas are located on or near large bodies of water subject to tidal influence,[8] and that everyone enjoys "going to the beach for a picnic."[9]

The problems of tidelands management have largely been creaated by piecemeal regulatory measures designed to meet specific problems and situations without adequate consideration of the total water-atmosphere-soils-mineral ecological continuum commonly called the environment.[10] Multiplicity of agencies exercising control in the coastal zone at all levels of government, lack of coordination and planning in the marine resource area, and the total neglect of the tidelands by governmental officials are well documented[11] and amply demonstrated by *Candlestick, Long Beach,* and *Zabel.* None-the-less, a consideration of the ecosystem of the coastal zone is beyond the scope of this article; instead the focus will be on the California effort to administer and manage the tidelands, emphasing legal issues arising out of man-made physical altera-

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6. See, 1 A. SHALOWITZ, SHORE AND SEA BOUNDARIES, (Coast and Geodetic Survey Pub. No. 10-1, 1964), for a definitive analysis of the ocean-continental landmass interaction; *see also* Comment, *Fluctuating Shorelines and Tidal Boundaries,* 6 SAN DIEGO L. REV. 447 (1969).

7. *Hearings on Estuarine Areas before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries,* 90th Cong., 1st Sess., 29 (1967).

8. *Our Nation And The Sea—A Plan for National Action,* H.R. Doc. No. 91-42, 91st Cong., 1st Sess., at 52 (1969).

9. Additionally, the following beneficial, and often competing, uses for the tidelands are often cited:

a. population growth and urbanization;
b. conservation and utilization of mineral and living resources;
c. esthetics;
d. waste disposal and dispersion into the ocean;
e. water and power development;
f. engineering and technological research and development of the ocean resources;
g. commerce in the coastal zone.

10. DEFINING THE CALIFORNIA PUBLIC INTEREST IN COASTAL ZONE MANAGEMENT, 2ND ANN. REP. OF THE CALIFORNIA ADVISORY COMM. ON MARINE AND COASTAL RESOURCES (1970) [hereinafter cited as 2ND CMC REP.]; *Hearings on S.2752 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations,* 91st Cong., 2nd Sess., pt. 1, at 67 (1970) [hereinafter cited as *S 2752 Hearings*]; *Power, Chesapeake Bay in Legal Perspective,* 129 et seq. (1970); 3 MAINE LAW AFFECTING MARINE RESOURCES, University of Maine School of Law (1970) [hereinafter cited as MAINE LAW].

11. *See, e.g.,* authorities cited note 8, *supra.*

tions which tend to diminish the physical area of the tidelands.[12]

Although it has been suggested that the states are inadequate vehicles for managing the coastal zone,[13] California generally does not suffer from the geographical/jurisdictional inter-state conflicts surrounding the exploitation of the tidelands that have hampered the use of management techniques on the eastern seaboard.[14] Thus the California experience, if ultimately successful, may provide the basic model upon which the federal and state governments may base their programs for the development and conservation of their tidelands.

Long Beach, Zabel, and *Candlestick* demonstrate the conflicts which can arise when five different entities (federal, state, regional, municipal and private land owner), exercise some degree of control in the coastal zone. A careful consideration of these cases will show the role that may be played by our legal system in effectuating policy decisions at all five levels of control.

CITY OF LONG BEACH V. MANSELL[15]

In 1965 the California legislature enacted legislation disclaiming state and other public interest in certain coastal zone lands in the Alamitos Bay area of the City of Long Beach and authorizing conveyance of these lands.[16] The land has been highly developed by both private parties and public agencies and comprises at least 40 acres today worth over $19 million.[17] Among other uses, the area is one of the most attractive marina-complexes in the state.

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12. It should be noted that *no* planning or developmental effort for the coastal zone can be wholly effective in maximizing beneficial uses while minimizing deleterious uses without a consideration of:
a. the entire coastal zone (which includes the area between the coastal watershed out to the three mile limit);
b. all the various competing interests and effects;
c. centralize planning and enforcement. 2ND CMC REP. *supra* note 10, at 9.

13. *See* Knight, *Proposed Systems of Coastal Zones Management,* 3 NAT. RES. LAW. 599 (1970).

14. *E.g.,* Power, *supra* note 10, at 224.

15. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970) [hereinafter cited as Long Beach].

16. Cal. Stat. §§ 1-9, ch. 1688 (1965).

17. Brief for Respondents at 41, 43, City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

A combination of factors cast a cloud on the title to the land, and the parties agreed that an action to quiet title would have been of no practical value.[18] Pursuant to the legislation, two agreements, between the city and state on the one hand and private parties to this action on the other, were completed. The city manager and city clerk of Long Beach refused to perform the ministerial duties necessary to complete these agreements on the grounds that the legislation violated constitutional and common law prohibitions against the alienation of state-owned tidelands and submerged lands.

The City of Long Beach, invoking the California Supreme Court's original jurisdiction,[19] sought a pre-emptory writ of mandate commanding its city manager and clerk to execute the agreements. Several real parties in interest joined the action.[20] *Held:* Writ issued because the agreements did not violate the California Constitution or were enforceable under the doctrine of equitable estoppel. *City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23* (1970).

Uncertain State of Title in the Area

The following is a summary of the voluminous stipulated facts and shows how the confusion and uncertainty as to the ownership of the coastal zone lands arose.

In 1784, Rancho Los Alamitos, which included the area in question, was created by a grant of the Spanish governor. A United States Government survey of the area, approved in 1874, simplified the boundaries of the grant by showing straight meander lines and reducing the number of courses around the bay, thereby excluding certain portions of the grant above the high water mark. To complicate matters further, the mouth of Alamitos Bay moved southward over the years, and it was impossible to separate the accretive from avulsive changes.[21]

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18. 3 Cal. 3d at 467, 476 P.2d at 427, 91 Cal. Rptr. at 27.

19. CAL. CONST. art. VI, § 10.

20. Real parties in interest are: (1) the State of California; (2) the Los Angeles County Flood Control District; (3) the Title Insurance Corporation; (4) Security Pacific National Bank, as trustee of a trust holding substantial private lands in the area; and (5) Macco Realty Co., holding a surface lease on the lands held in the aforementioned trust. 3 Cal. 3d at 468 n.3, 476 P.2d at 427 n.3, 91 Cal. Rptr. at 27 n.3.

21. The augmentation of existing upland by gradual natural accretion alters the boundary of that upland accordingly. When such augmentation occurs as a result of a sudden avulsion or by accretion caused by the works of man, however, the boundary is not altered. 3 Cal. 3d at 469 n.4, 476 P.2d at 428 n.4, 91 Cal. Rptr. at 28 n.4.

Delineating accretive and avulsive changes in the shoreline is, in itself,

In 1903, a tract map was filed, despite the uncertainty as to the boundaries in the grant, that included a portion of land not within the original Spanish grant. Much of the land in question was privately improved in accordance with the 1903 tract map. There was no agreement at the time of suit among the parties as to the original or present boundaries of the grant and the present boundaries of parcels whose title derived from it.[22]

In 1886, a successor in interest to the original grant received state patents on 900 acres of tidelands within the bay. The patents were valid and served to pass title to the land,[23] but their original and present boundaries were uncertain mainly because there was no attempt at a comprehensive survey until 1966, when the monuments and other lines intended in the original patents could not be determined.[24] Again, substantial private and public development took place on these now reclaimed lands, and uncertainty as to the true boundaries rendered the titles in doubt.

Natural factors also contributed to the confusion. The most significant factor in the change of the configuration of the bay area was the San Gabriel River. The changes it wrought were both accretive and avulsive. The most dramatic of the avulsive type was a flood in 1867-68 that cut a new channel and emptied the river through the Alamitos Bay. There has been constant dredging and filling of the area, all with the consent of the United States Army Corps of Engineers.[25] At the present it is impossible to determine which of the physical changes are accretive or avulsive, nor is it possible, with respect to certain filled areas, to determine whether they were artificially or naturally filled. The resulting title and boundary problems were therefore not soluble.[26]

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a most difficult problem. *See* Comment, *Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem*, 6 SAN DIEGO L. REV. 447 (1969).

22. 3 Cal. 3d at 469, 476 P.2d at 428, 91 Cal. Rptr. at 28.

23. The California constitutional provision, article XV section 3, which forbids the alienation of tidelands within two miles of an incorporated city, was in effect in 1886, but the tidelands in question were then more than two miles from an incorporated city. Section 7991 of the CAL. PUB. RES. CODE (West 1956), which presently forbids the sale of tidelands, was not enacted until 1909. *Id.* at 469 n.5, 476 P.2d at 428 n.5, 11 Cal. Rptr. at 28 n.5.

24. 3 Cal. 3d at 469, 476 P.2d at 428, 91 Cal. Rptr. at 28.

25. Agreed Statement of Facts and Stipulation at 32, 38, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

26. 3 Cal. 3d at 471, 476 P.2d at 429, 91 Cal. Rptr. at 29.

Man's development of the area also actively contributed to the title and boundary problems. Steamshovel Channel, which ran through the grant, and the tidelands surrounding it were filled and developed by a private developer in 1923-1924. The activity was undertaken with government approval.[27] The area was, however, specifically *excluded* from the 1886 tideland patents and was *included* in the 1924 conveyance of public tidelands to the city as a part of the state tidelands trust grant.[28] Neither the city nor the state, at any time, protested the residential use and occupation of the filled channel, and the precise location of the channel before filling is now unknown.[29]

Public development of the area also took place despite an awareness on the part of some officials that such problems might exist. For example, the city commenced work on the Marine Stadium and related facilities in 1925. In the late 1920's, oil was discovered north of the Stadium, and the question of ownership claims in that area arose. The city council requested the city attorney to investigate the status of titles, but the matter was dropped when the city attorney stated that the investigation had given rise to "uneasiness" in the property owners, and the quiet title action would call into question many titles within and without the area, and that the city had little to gain from such a proceeding.[30]

The Agreements

The primary purpose of the first agreement, the Belmont Shores-Naples Boundary Settlement (hereinafter referred to as the Belmont agreement), was to settle the title problems of lands described in section 2(a) of the statute authorizing the agreements.[31] Both the city and private landowners have a substantial claim of paramount legal title to the area. The city's claim is based on the 1925 trust grant of the tidelands from the state, and the homeowners' claims are based on the Spanish grant and the tidelands patents.[32]

The agreement provides that for consideration of $783,500 to be paid by the Title Insurance Corporation (a real party in interest),

27. *Id.* at 471, 476 P.2d at 430, 91 Cal. Rptr. at 30.
28. *Id.*
29. *Id.* at 472, 476 P.2d at 430, 91 Cal. Rptr. at 30.
30. *Id.*
31. *Id.* at 475, 476 P.2d at 432, 91 Cal. Rptr. at 32. In section 2(a), the legislature found that lands within the Alamitos Bay area which lie above the line of mean high tide were no longer necessary or useful for commerce, fisheries, and navigation and were therefore freed from the public use and trust. CAL. STAT. § 2(a), ch. 1688 (1965).
32. 3 Cal. 3d at 475, 476 P.2d at 432, 91 Cal. Rptr. at 32.

the city and state will execute conveyances to settle the title to the area and resolve the boundary problems. The agreement also disclaimed public interest in the lands inadvertently omitted from the plat of the original rancho grant.

The second agreement, the McGrath-Macco Boundary Settlement and Exchange (hereinafter referred to as the McGrath agreement) deals with the undeveloped lands described in section 2(b) of the statute authorizing the agreements. These lands lie immediately north of Long Beach's Marine Stadium and were formed for the most part by the filling resulting from dredging during the construction of the Stadium.[33] This agreement principally provides for the fixing of boundaries between state lands and McGrath lands according to a 1966 state survey; for the exchange of 5 acres of state land for 8.5 acres of McGrath lands; and for the expenditure of the city tideland trust funds to construct public park and marina facilities.[34]

The Legal Problem

Article XV section 3 of the California Constitution, which became effective in 1879, provides in pertinent part: "All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations. . . ."[35]

The *Long Beach* court first considered decisions interpreting the constitutional provision. The court reaffirmed its holding in *Muchenberger v. City of Santa Monica*,[36] that when the boundary

33. *Id.* at 476, 476 P.2d at 433, 91 Cal. Rptr. at 33. In section 2(b), the legislature found that portions of the Alamitos Bay area (other than those lands described in section 2(a)), had been filled and reclaimed, were no longer submerged or below the line of mean high tide, and were thus no longer necessary or useful for commerce, fisheries, or navigation. CAL. STAT. § 2(b), ch. 1688 (1965).

34. 3 Cal. 3d at 477, 476 P.2d at 433, 91 Cal. Rptr. at 33.

35. The court defined tidelands as used in this provision to be lands which were seaward of the mean high tide line at the time when the constitutional provision was adopted in 1879 and not at the time of the proposed alienation, thus including the Alamitos Bay area. *Id.* at 479, 476 P.2d at 435, 91 Cal. Rptr. at 35.

36. 206 Cal. 635, 275 P. 803 (1929).

between public trust tidelands and private uplands is uncertain, and the parties genuinely try to determine the boundary and agree to a line, then the subsequent formal conveyance by the trustee does not constitute a grant or sale within the meaning of article XV section 3. Thus, the portions of the two agreements that are true boundary settlements are not unconstitutional.[37]

Secondly, the court considered the application of *Atwood v. Hammond*,[38] a case concerning the alienation of public trust lands included under article XV section 3. A brief explanation of the common law public trust is required for an understanding of the *Long Beach* court's decision as to how *Atwood* was applied. The state's ownership of public tidelands is not of a proprietary nature, but rather the state holds the lands in trust for the public purposes of navigation, commerce, and fisheries.[39] Tidelands subject to the trust may not be alienated into absolute private ownership,[40] but if the state finds it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes, the legislature can declare them free from the trust. When tidelands have been so freed from the trust *and* if not subject to the constitutional prohibition against alienation, they can be irrevocably conveyed to absolute private ownership.

The *Long Beach* court held that *Atwood* stands for the proposition that article XV section 3 does not forbid alienation of tidelands within 2 miles of an incorporated city, but only when the lands have been reclaimed " 'as the result of a highly beneficial program of harbor development,' are relatively small in area, and have been freed of the public trust by legislative act."[41] This principle, according to the court, validated the portion of the McGrath agreement which provided for the exchange of certain reclaimed tidelands for other lands.[42]

This principle thus did not apply to the lands described in section 2(a) of the legislation. To the extent they are in fact public tidelands, these lands, which represent the main portion of the Belmont agreement, remain subject to the constitutional prohibition against alienation to private persons.[43]

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37. 3 Cal. 3d at 481, 476 P.2d at 436, 91 Cal. Rptr. at 36.
38. 4 Cal. 2d 31, 48 P.2d 20 (1935).
39. 3 Cal. 3d at 482, 476 P.2d at 437, 91 Cal. Rptr. at 37.
40. CAL. PUB. RES. CODE § 7991 (West 1956).
41. 3 Cal. 3d at 484, 476 P.2d at 439, 91 Cal. Rptr. at 39.
42. *Id.* at 486, 476 P.2d at 440, 91 Cal. Rptr. at 40.
43. *Id.* at 486-87, 476 P.2d at 440-41, 91 Cal. Rptr. at 40-41.

Estoppel

Even though the court found that the legal title to the section 2(a) lands was in Long Beach and the state, it was further held that equitable estoppel would prevent exercise of this title.

To apply equitable estoppel, the court found that four common elements were necessary: 1) that the party to be estopped was apprised of the true state of his own title or that such knowledge could be imputed to him in light of the circumstances; 2) that he made the admission with the express intention to deceive or with such careless and culpable negligence as to amount to constructive fraud; 3) that the other party was without any convenient or ready means to acquire knowledge of the true state of the title; and 4) that the other party relied directly upon such admission and would be injured by allowing its truth to be disproved.[44] The court found all the elements present in this case and in regard to the requirement of constructive fraud stated:

> We merely say that the collective conduct of both governmental entities over the years reaches that degree of culpability interdicted by the doctrine of estoppel and that the principle of justice and fair dealing inherent in that doctrine dictates that we apply it in this case.[45]

The court then considered whether the doctrine of equitable estoppel should be applied to a governmental entity. It stated the rule as follows:

> The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.[46]

The court thus found that manifest injustice would be present if the state ultimately prevailed since the state and city had treated the lands as if wholly free from trust claims during the development of the area. It also determined that estoppel would not have a significant deleterious effect on the public policy reflected in article XV section 3 of the constitution, to insure that certain lands of

44. *Id.* at 489-91, 476 P.2d at 442-44, 91 Cal. Rptr. at 42-44.
45. *Id.* at 492, 476 P.2d at 445, 91 Cal. Rptr. at 45.
46. *Id.* at 496-97, 476 P.2d at 448, 91 Cal. Rptr. at 48.

unique value to the public would not be shorn of that value by alienation into private lands.[47]

The court cited two significant factors in reaching its conclusion. First, the development of the Alamitos Bay area resulted in an area providing a vast array of public facilities for navigation and recreation so that alienation into private hands had not resulted in the area being withdrawn from the public.[48] Second, and of even greater apparent significance to the court, was its belief that the combination of government conduct and extensive reliance involved in the case is rare and will create an extremely narrow precedent for application in future cases.[49]

Comments

The haphazard development of the Alamitos Bay area demonstrates the effect of the failure of the state or the city to take positive and aggressive action to manage the tideland areas. The state never accurately surveyed the area until it was too late to determine the boundaries, and the city, although aware of the problem as early as the 1920's, when building Marine Stadium, ignored it. The historical photographs in the court exhibits show that the land had few improvements on it in 1920, whereas almost every portion of it is now developed.[50] Resolution of the problem was thus possible in the 1920's, when the estoppel argument would not have arisen, and a large portion of the land could have been saved for public ownership.

By its decision, the court has, however, given new vitality to article XV section 3 and insured that most of the remaining 1600 miles of public tidelands in California,[51] at least those within two miles of any incorporated city or town, will be protected by the constitutional prohibition.[52] The proponents of the agreements argued

47. *Id.* at 500, 476 P.2d at 450, 91 Cal. Rptr. at 50.

48. *Query:* Which "public" will benefit from the area being an attractive marina in private hands?

49. 3 Cal. 3d at 500, 476 P.2d at 451, 91 Cal. Rptr. at 50-51.

50. Exhibits 11A, 11B, 12A, 12B, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

51. Reply Brief for Petitioners at 17, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

52. Tidelands not within two miles of an incorporated city or town are subject to the public trust discussed in the text at note 39, *supra*, and to article XV section 2 of the California Constitution. That section provides, "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor . . . or other navigable waters in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . . ; and the legislature shall

for a broad interpretation of past cases involving this section in an attempt to limit its application. Seeking a declaration that the legislature could free tidelands from the public trust unfettered by the constitutional provision whenever such lands ceased to be necessary or useful for navigation, commerce, and fisheries,[53] they reasoned that such an interpretation would give needed flexibility to the state and administrative authorities in administering the trust.[54] Such a policy, however, might subject the tidelands to a piecemeal, shortsighted, and possibly politically-influenced alienation by the state and its grantees without regard to the public's interest, now protected by article XV section 3.

Although not expressly mentioning this danger, the court has declared that the constitutional section retains its plain meaning, and severely limits the permissible exceptions to it. It limits the *Muchenberger* exception to bona fide boundary settlements,[55] and it warns that the circumstances under which the *Atwood* principle[56] can occur are unique and that the prerequisites to apply it must be "scrupulously observed."[57] No prior decision has given such a strong and definite meaning to the section.

The result in this case, that is alienating several acres of tidelands literally within the constitutional section, is not inconsistent with the court's view of article XV section 3; rather, it is justified by the peculiar facts. Much of the land is reclaimed land, some of it several blocks from what are now the "de facto tidelands," the ones of actual use to the public for navigation and other such public trust

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enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

In light of the increasing population and growing importance and scarcity of *all* tidelands, the distinction in section 3 of the same article concerning the two mile limit seems without justification today and consideration should be given to amending it to protect all tidelands.

Article XV section 2 does not bar absolute private ownership in this case since the legislature can find the lands are no longer useful for trust purposes, as they did for the Alamitos Bay lands in question. 3 Cal. 3d at 482, 476 P.2d at 437, 91 Cal. Rptr. at 37.

53. 3 Cal. 3d at 481, 476 P.2d at 437, 91 Cal. Rptr. at 37.

54. Brief for Petitioner at 19-23, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

55. 3 Cal. 3d at 481, 476 P.2d at 436, 91 Cal. Rptr. at 36.

56. See text accompanying note 38, *supra*.

57. 3 Cal. 3d at 485, 476 P.2d at 440, 91 Cal. Rptr. at 40.

purposes. No overriding public interest exists in retaining these lands, especially when compared to the private owners' extensive development of the area and their "detrimental" reliance on government action. The court accordingly limits its application of estoppel by warning that "similarly compelling circumstances will not often reoccur,"[58] a caveat to those who seek to rely on the case in the future to claim title to tidelands.[59]

If the California courts in the future continue the trend set in this case, article XV section 3 will remain a viable and potent weapon in protecting the state's tidelands.

CANDLESTICK PROPERTIES INC. V. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION[60]

Candlestick Properties is the owner of real property which is submerged at high tide by the waters of the San Francisco Bay. In an attempt to utilize this property as a dumping ground for the deposit of construction debris, Candlestick acquired a land fill permit from the City and County of San Francisco. Pursuant to Government Code section 66632,[61] Candlestick applied to the San Francisco Bay Conservation and Development Commission for permission to fill the land in question. In January 1967, the commission denied the Candlestick application. In review of the commission's decision, Candlestick petitioned the San Francisco Superior Court for a writ of mandate and, in the alternative, sought damages for an alleged taking of the property without just compensation. The writ of mandate was denied and a demurrer without leave to amend was sustained for the cause of action for damages.

Candlestick appealed to the First District Court of Appeals of California. *Held*: Restrictions imposed upon the filling of private property in the San Francisco Bay are a valid implementation of the police power and can not be construed as a taking for constitutional purposes. The significance of the decision is the recognition in California of a valid mechanism through which the conservation of privately owned tidelands can be effectively regulated.[62]

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58. *Id.* at 500, 476 P.2d at 451, 91 Cal. Rptr. at 51.

59. The scope of this note excludes an in depth discussion of the doctrine of equitable estoppel or the propriety of its application in this case.

60. Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n., 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970) [hereinafter cited as *Candlestick*].

61. CAL. GOV'T CODE § 66632 (West 1966).

62. Permit restrictions in coastal zoning in other jurisdictions: CONN. GEN. STAT. ch. 473, §§ 25-10 to -18 (Supp. 1970-71); ME. REV. STAT. ch. 471, § 4701 (Supp. 1970-71); MASS. GEN. LAWS ch. 130, § 27a (Supp. 1971); N.J.

The San Francisco Bay Plan

San Francisco Bay provides protection for wildlife, enhancement of recreational activities, a beneficial influence upon climate, and retention of needed aesthetic values. All these benefits are threatened by the lack of regional planning.

San Francisco Bay is, in fact, one of the worst examples of unplanned dredging and filling in the entire country. Dumping, industrial filling, highway construction, and especially uncontrolled housing developments, have reduced the water area of the bay from approximately 680 square miles to a little less than 400 square miles.[63] Primary factors contributing to the misuse of this area are diversification of land ownership and lack of a unified planning commission. The ownership of 50 percent of this area lies in the state government, 22 percent is occupied by private parties; 23 percent is owned by cities and counties; and 5 percent is allocated to the federal government.[64] Such a diversity of interests demands control by a centralized regulatory agency.

In an effort to unify control of this area, the California legislature in 1964 inaugurated the San Francisco Bay Conservation Study Commission.[65] This study commission recommended to the legislature the initiation of a development and conservation commission to supervise the growing pains of the bay area. In 1965, the legislature enacted the McAteer-Petris Act, which established the San Francisco Bay Conservation and Development Commission (BCDC).[66]

The McAteer-Petris Act primarily provided for the appointment of a 13 member commission to complete a detailed study and prepare a comprehensive plan for shoreline development. The act further empowered the commission to suspend all fill projects until the completion of the plan.[67]

REV. STAT. title 13, § 8(A)(1) -18 (1932); N.Y. CONSERV. LAW §§ 1-0701 to -0715 (McKinney 1967); N. CAR. GEN. STAT. ch. 113, §§ 113-229 (Supp. 1969).

63. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, PLAN 3, (January 1969) [hereinafter cited as S.F. Plan 3].

64. Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351 (1970) [hereinafter cited as Heath].

65. CAL. STAT. § 127, ch. 98 (1964).

66. CAL. GOV'T CODE § 66600 (West Supp. 1971).

67. CAL. STATS. § 2941, ch. 1162 (1965) (now CAL. GOV'T CODE § 66604 (West Supp. 1971)).

Early in 1969 the BCDC produced its plan, and on August 7, 1969, it became law.[68] The plan permits filling only when public benefits from fill clearly exceed public detriment from the loss of the water areas.[69]

It is important to note that at the time Candlestick filed its application for fill, the commission plan was not yet adopted. Therefore, the applicable provisions of the McAteer-Petris Act are the pre-1969 temporary moratorium restrictions.

Candlestick contended that (1) the granting or denial of a permit to its land was governed by the Hunters Point Reclamation District Act of 1955[70] rather than the McAteer-Petris Act, and that (2) the exercise of the police power in this case constituted a taking without just compensation under the fifth amendment of the United States Constitution.[71]

Hunters Point Reclamation District Act

The Hunters Point Reclamation District Act of 1955[72] was enacted due to a compelling economic necessity for reclaiming, draining, and developing tidelands and other submerged lands.[73] In essence, it provides for the authorization of fill projects within the reclamation district. Candlestick contended that this act constituted a specific declaration by the legislature that fill within the district did not adversely affect the comprehensive plan of the commission.[74]

The court rejected Candlestick's argument on two grounds. Primarily, nothing in the record of the case indicated that the Hunters Point Reclamation District had determined to fill Candlestick's parcel by agreement or condemnation. Therefore, the issues concerning the powers of the reclamation district were moot.

Furthermore, the clear intention required for general legislation to overcome specific legislation was apparent in the McAteer-Petris Act.[75] The legislature made it evident that their objective in that

68. CAL. GOV'T CODE § 66603 (West Supp. 1971).
69. CAL. GOV'T CODE § 66601 (West Supp. 1971).
70. CAL. WATER CODE APP. § 78 (West 1968).
71. The court entertained other ancillary issues; however, they are not within the scope of this article.
72. CAL. WATER CODE APP. § 78 (West 1968).
73. CAL. WATER CODE APP. § 78-1 (West 1968).
74. For cases upholding such a declaration, *see* Warne v. Harkness, 60 Cal. 2d 579, 387 P.2d 377, 35 Cal. Rptr. 601 (1963); Riley v. Forbes, 193 Cal. 740, 227 P. 768 (1924); People *ex. rel.* Bd. of State Harbor Comm'rs v. Pacific Improvement Co., 130 Cal. 442, 62 P. 739 (1900).
75. CAL. GOV'T CODE § 66600 (West 1966).

act was to attain uniform control of the entire bay.[76] If particular areas of the bay were not within the BCDC's jurisdiction, the objective of comprehensive planning would be frustrated. Thus, the court determined that "to the extent that the expressions of policy are in conflict, the BCDC, being more recent in time, should control".[77]

Exercise of the Police Power[78]

In the alternative, Candlestick claimed $50,000 in damages for the de facto taking of its property. The court denied recovery stating that such a restriction was not a taking, but a valid exercise of the police power.[79] The court declared that an undue restriction on the use of private property was as much a taking for constitutional purposes as appropriating or destroying it; however, merely denying Candlestick a land fill permit did not amount to an undue restriction on its property.[80]

The court evaded a constitutional discussion of the police power which was generated by case law cited by Candlestick in support of its position.[81] The court distinguished cases holding similar enactments as takings on the basis that the commission's regulation was more reasonable than those cases which found such action a taking.[82]

It is at this point that the court's argument faltered. In order for the court to reach such a conclusion it necessarily had to find that the Candlestick property was useful for some other purpose than

76. CAL. GOV'T CODE § 66601 (West 1966).
77. *Candlestick* at 572, 89 Cal. Rptr. at 901.
78. The term police power has no exact definition. Berman v. Parker, 348 U.S. 26, 32 (1954). It is normally used to signify those governmental restrictions which may be invoked, without compensation, for the public's health, safety, or morals. Munn v. Illinois, 94 U.S. 113, 146 (1876).
79. *Candlestick* at 572, 89 Cal. Rptr. at 906.
80. *Id.*
81. Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 78 Cal. Rptr. 391 (1969); Dooley v. Town Plan and Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).
82. The court specifically distinguished Dooley v. Town Plan and Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964), by the fact that in *Dooley* 75 percent of the value of the property had depreciated because of the restriction.

land fill. However, such a conclusion was not supported by evidence, since no evidence was introduced upon the topic. Although Candlestick alleged in its second cause of action that the value of the land was completely valueless, due to the sustained demurrer without leave to amend, no evidence was received in regard to the remaining utility of the property.[83]

In each case upon which the court relied as authority for its position, one factor existed which was not present in the instant case. Within each of the cited authorities, it was evidenced that the land was useful for some purpose other than the purpose restricted by the legislation. Thus, it was mandatory for the court to entertain evidence as to the land's utility. However, the court stated "[E]ven if the reasonableness of the regulation is fairly debatable, the legislative determination will not be disturbed."[84] Through such a statement, the court implied that it was not within the judicial realm to determine a specific piece of legislation as a taking or use of police power, regardless of its form. Such an implication is unfounded in the law.[85] Once again the court evaded a discussion of the constitutional requisite for a taking under the fifth amendment.[86]

Another factor also limited the court's adjudication. The court's decision occurred during a period when the overall bay plan was still being formulated. It is apparent that the court knew that the zoning plan being created would be of little use if the interim moratorium period were not enforced. It would have been destructive to any future plan if, during the period of formulation, parties seeking to evade the negative affect of such a restriction were permitted to enter upon a course of construction which might defeat the ultimate purpose.[87]

All authority in support of the court's implementation of the police power[88] revolved about some interim in which permits were denied due to the expectation of an overall plan.[89]

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83. *Candlestick* at 562, 89 Cal. Rptr. at 899.
84. *Candlestick* at 571, 89 Cal. Rptr. at 905.
85. For an excellent discussion of the dilemma of police power versus taking, *see* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).
86. Various theories have been posed by the courts in an effort to determine the elements of a constitutional taking: *Diminution of Value Theory*—United States v. Cors, 337 U.S. 325 (1949); *Invasion Theory*—Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951); *Noxious Use Theory*—Atchinson T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953).
87. Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925).
88. Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1960); Lima v. Woodruff, 107 Cal. App. 285, 290 P. 480 (1930).
89. For other jurisdictions holding opposite in a similar factual pattern,

The Candlestick decision should, therefore, be limited to its facts. However, this does not detract from the case's importance. The legislature and attorney general had previously recognized the bay as a body of water, housing valuable natural resources, rather than a piece of real estate.[90] The Candlestick decision lends support to the legislative priority of preserving the California tidelands.[91]

Conclusion

As the government becomes more sensitive to the impact of human activity upon the environment, regulation of land use becomes recognized as essential to the health of our society. The police power must remain flexible to respond to modern needs. However, this flexibility should not extend into the realm of constitutionally protected rights. This is not a new problem; rather, it has plagued the courts for decades. Many commentators have referred to the Supreme Court's determinations of takings versus police power as "the crazy quilt pattern of the Supreme Court Doctrine."[92] There are no rigid rules or formulae available to determine where regulation ends and taking begins.[93] Therefore, a solution to this problem is not easily ascertained. The feasibility of long-range utilization of police power in tideland management would necessarily render some property owners with virtually worthless land. On the other

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see Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965)—The Supreme Court of Massachusetts in a suit to enjoin a filling of a salt marsh by the commissioner, remanded the case to determine whether the property owner had been deprived of any worthwhile right or benefit in his land by action of the commissioner. *See also* City of Phoenix v. Burke, 9 Ariz. App. 395, 452 P.2d 722 (1969); Dooley v. Town Plan and Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

90. CAL. GOV'T CODE § 66600 (West 1966).

91. It was also contended by *Candlestick* that the public trust, as elaborated in the common law and in the California Constitution at article X and article I section 25 was an independent basis which sustains the validity of the McAteer-Petris Act. CAL. GOV'T CODE § 66600 (West 1966).

92. Dunham, *Griggs v. Allegeny County in Perspective; Thirty Years of Supreme Court Expropriation Law*, 1962 S. CT. REV. 63 (1962).

93. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); U.S. v. Caltex (Phillipines) Inc., 344 U.S. 149, 156 (1952); Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

hand, in order to fund compensation for such tidelands, an extraordinary expenditure would be required by the region's taxpayers.[94]

The legislature has remained quiescent on the issue of tideland management for too long. However, the BCDC is a step in the right direction. Although, the Candlestick decision contains a number of questionable determinations, it is a basis upon which subsequent decisions may build and improve.[95] The important factor is that the legislature and courts have now officially recognized the problem.

ZABEL V. TABB[96]

Conservation of natural resources, preservation of ecological life cycles, and maintenance of the aesthetic qualities of nature have become major concerns of the United States. Congress, legislatures, and courts have responded to public concern with legislation and decisions which emphasize the importance of the above factors. The purpose of this section of the article is to summarize and analyze one decision of the Court of Appeal, Fifth Circuit, in the case of *Zabel v. Tabb*. Several timely inquiries are to be posed and detailed in an attempt to alert the reader to these issues.

The case of *Zabel v. Tabb* was commenced in 1967 in the United States District Court for the Middle District of Florida at Tampa. It was filed in response to a refusal by the Army Corps of Engineers and the Secretary of the Army to issue a permit to dredge and fill a portion of navigable waters in Boca Ciega Bay, near St. Petersburg, Florida.

Zabel owned riparian land on the bay and adjacent land underlying the bay. He desired to dredge and fill the underlying property to construct thereon a trailer park. The park was to be connected to the adjacent upland by a bridge or a culvert. After obtaining the requisite state authorization,[97] Zabel requested a federal

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94. Much of this tideland area is held in fee. The parcel owned by Candlestick was originally sold into private ownership by the Board of Tideland Commissioners. *See* Act of March 30, ch. 543, at 716, CAL. STATS. (1867-68). Indications from previous cases were that underwater lands sold by this Board in San Francisco Bay had been conveyed into private ownership pursuant to a plan in furtherance of commerce and navigation and therefore the purchasers received full fee title. *See* text accompanying notes, 38-40, *supra*.

95. The only other BCDC case involving utilization of the police power was People *ex rel.* San Francisco Bay Conservation and Dev. Comm'n v. Town of Emmeryville, 69 Cal. 2d 533, 446 P.2d 90, 98 Cal. Rptr. 790 (1968).

96. 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 39 U.S.L.W. 3360 (U.S. Feb. 22, 1971) [hereinafter cited as *Zabel*].

97. Zabel's application to the Pinellas County Water and Navigation

dredge and fill permit from the Corps of Engineers. The District Engineer, Colonel Tabb, held a public hearing regarding the issuance of a permit. At the hearing the Pinellas County Water and Navigation Control Authority,[98] the Board of County Commissioners of Pinellas County, the Florida Board of Conservation, and approximately 700 individuals filed protests. The United States Fish and Wildlife Service, a part of the Department of the Interior, also opposed the issuance on the grounds that it would be harmful to the fish and wildlife resources in Boca Ciega Bay.

Upon the conclusion of the hearing, the District Engineer recommended the refusal of the permit. The recommendation was supported by the Division Engineer and the Chief Engineer. Finally, the Secretary of the Army refused to issue the permit on the grounds that it:

> 1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,
>
> 2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),
>
> 3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and
>
> 4. Would be contrary to the public interest.[99]

In response to Zabel's contention that the proposed work would not hinder navigation and that therefore the Secretary had no authority to deny the permit, the district court granted summary judgment for Zabel and ordered the issuance of a permit, subject to appeal.

The court of appeal reversed the district court decision and granted Tabb's original motion for summary judgment. In so hold-

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Control Authority, was initially rejected by that agency, and that rejection was sustained by the Florida District Court of Appeal in Zabel v. Pinellas County Water and Navigation Control Authority, 154 So. 2d 181 (Fla. Ct. App. 1963). The Florida Supreme Court reversed on the grounds that the agency had the burden of proving any adverse effect to the public interest, rather than Zabel showing *no* adverse effect; Zabel v. Pinellas County Water and Navigation Control Authority, 171 So. 2d 376 (Fla. 1965). In response, the District Court of Appeal directed the issuance of the permit; Pinellas County Water and Navigation Control Authority v. Zabel, 179 So. 2d 370 (Fla. Ct. App. 1965).

98. The same State agency which, by court order, issued the locally required permit.

99. *Zabel* at 202.

ing, the court said that the ". . . Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation . . . ."[100] Each issue articulated by the court in reaching the above holding will be dealt with separately.

The court began its examination of the issues by referring to the commerce clause[101] for the congressional authority to regulate tidelands. The court formulated the test of congressional power to protect wildlife in navigable waters, a power superior to private property rights, on the basis of whether or not the activity of the individuals to be regulated has a "substantial effect on interstate commerce."[102] The court then dismissed any doubt of the activity falling within the penumbra of the commerce clause by a short, tongue-in-cheek explanation aimed at Zabel, and a footnote commenting on Zabel's narrow vision.[103] Therefore, because dredge and fill operations tend to destroy the ecological balance (fish and wildlife) and because they have a substantial effect on interstate commerce, the court found that Congress has the *power* to regulate such operations.

In anticipation of the above finding, Zabel argued that Congress relinquished the power to regulate such operations to the states in the Submerged Lands Act,[104] and only retained power over matters of navigation, flood control, and hydroelectric power.[105] The court noted the strength of the above argument[106] but rather than adopting it, looked to other portions of the same legislation for a more definite interpretation of what power had been relinquished and what power had been retained. To clarify the distribution of power, the court looked to the following sections of the Submerged Lands Act:

> *The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce,* navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprie-

100. *Id.* at 203.
101. U.S. CONST. art. I, § 8.
102. *Zabel* at 203, *citing* Wickard v. Filburn, 317 U.S. 111, 125 (1942).
103. *Zabel* at 203-04. There the court notes that there could hardly be any question of the activity meeting the stated test. Then the court footnotes Zabel's cases cited against the commerce clause proposition pointing out that both of them were decided prior to either United States v. Darby, 312 U.S. 100 (1941) or Wickard v. Filburn, 317 U.S. 111 (1942).
104. 43 U.S.C. §§ 1301 *et. seq.* (1964).
105. *See* 43 U.S.C. §§ 1301(e), 1311(a), (b), (d) (1964).
106. *Zabel, supra* note 96, at 205.

> tary rights of ownership, or the rights of management, administration . . . .[107]

Zabel argued that the retention mentioned in the quote refers only to navigation, flood control, and hydroelectric power with all other power being relinquished. Therefore, he contended that this section was consistent with the section mentioned earlier.[108] However, the court interpreted the section just quoted to mean that congressional power over other types of commerce was *not* relinquished to the states. The court stated that ". . . to hold that it is an explicit reservation of all commerce powers gives the section meaning."[109] The court concluded that there was no relinquishment of commerce power through the Submerged Lands Act to regulate the use of tidelands for conservation purposes.

After first determining that Congress had the power to regulate tidelands on commerce grounds and further determining that concern for fish and wildlife was within the power, the court turned its attention to what power had been delegated to the Secretary of the Army and Corps of Engineers. The court examined the original delegating statute to determine the initial scope of the power of the Corps of Engineers. The court's examination continued by analyzing subsequent legislation, as well as cases and congressional reports, in an attempt to accurately define the criteria to be used by the Corps of Engineers in exercising their power.

The major issue confronting the court was under what conditions the Secretary of the Army could either grant or deny the permit. The congressional grant, or delegation of authority to the Secretary of the Army and Corps of Engineers, was found in the Rivers and Harbors Act.[110] The Act forbids any obstruction to the navigable capacity of United States waters without express permission of Congress or the Secretary of the Army. The Act does not detail any guidelines for the Secretary of the Army to grant or deny a permit. However, the court pointed out that there has been a generally ac-

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107. 43 U.S.C. § 1314(a) (1964) (emphasis added).
108. 43 U.S.C. §§ 1311(a)-(d) (1964).
109. *Zabel, supra* note 96, at 206.
110. 33 U.S.C. § 403 (1964): "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

cepted rule-of-reason approach taken by the Secretary of the Army under specific conditions. These specific issues were at issue.

Zabel contended that the denial of the permit could only be based on navigational grounds.[111] The Corps countered with an abundance of authority supporting the view that the permit might be denied for reasons other than navigational.[112] By starting with an early example of a case denying a permit for other than navigational interference, *United States ex. rel. Greathouse v. Dern*,[113] the court took a methodological approach in resolving the issue. The court also cited the recent case of *Citizens Comm. for the Hud-*

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111. Zabel cited for the proposition in the text, the case of Miami Beach Jockey Club Inc. v. Dern, 86 F.2d 135 (1936), and a United States Attorney General's Opinion, 30 U.S. Att. Gen. Ops. 410 (Feb. 13, 1925). It should be noted, however, that both authorities are old and do not reflect the present attitude of the Attorney General or the courts. Colonel Tabb cited more than ample authority to overcome Zabel's position, *infra* note 112.

112. In his brief, Colonel Tabb cited the following statutes, congressional reports, and cases in the following order in support of his position that the Secretary of the Army may refuse a permit on grounds other than navigational. Fish and Wildlife Coordination Act, 48 STAT. § 401 (1934) *as amended*, 16 U.S.C. §§ 661-66 (1964) (discussed *infra*, text accompanying note 114); SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, S. REP. No. 1981, 85th Cong., 2d Sess. (1958) (shows legislative history of 1958 amendments to the Fish and Wildlife Coordination Act, and Congress' concern for ecology); Memorandum of Understanding, July 13, 1967 (entered into by the Secretary of the Army and the Secretary of the Interior requiring Corps of Engineers to obtain a satisfactory ecological/environmental report from the appropriate agency prior to issuing a dredge and fill permit); H.R. REP. No. 91-113, 91st Cong., 1st Sess. (1969) (". . . the corps and the Department have the *duty*, . . . to consider the effect of the proposed work upon the total public interest and not merely upon navigation."). Colonel Tabb analogized from similar legislation affecting other agencies; the Fish and Wildlife Act, 70 Stat. § 1119 (1956), *as amended* 16 U.S.C. § 742(a) (1964) (that fish and wildlife are important to the strength of the Nation); the Water Resources Planning Act, 42 U.S.C. § 1962 (Supp. I 1965) (". . . the policy of the Congress to encourage the conservation, development, and utilization of water and related land resources . . . on a comprehensive and coordinated basis by the Federal Government . . ."); the Marine Resources and Engineering Development Act, 33 U.S.C. § 110(a) (1966) (it is ". . . the policy of the U.S. to develop, . . . a coordinated . . . program in marine science); Federal-Aid Highway Act, 23 U.S.C. § 138 (Supp. V 1970) (requiring the Secretary of Transportation to cooperate with the Secretary of the Interior on environmental matters before permitting highway construction). The cases used by Tabb were: United States v. Republic Steel Corp., 362 U.S. 482 (1960); Sanitary District v. United States, 266 U.S. 405 (1925); Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966); United States v. Dern, 289 U.S. 352 (1933).

113. 289 U.S. 352 (1933), the permit was denied for construction of a wharf because the land was to be condemned by the United States for highway purposes and the wharf would increase the cost to the government.

son Valley v. Volpe[114] for the same proposition. In continuing, however, the court did not feel the necessity of depending on the indirect analogy of case-by-case explanations. Instead, the court rested its decision upon two statutes, the Fish and Wildlife Coordination Act[115] and the National Environmental Policy Act.[116]

It was found that the Fish and Wildlife Coordination Act requires ". . . the dredging and filling agency . . . , whether public or private, to consult with the Fish and Wildlife Service, with a view of conservation of wildlife resources."[117] The court reasoned that if Congress desired to regulate private dredge and fill projects because of environmental effects, it would be reasonable for the only federal agency licensing such projects to consider ecological findings of the Fish and Wildlife Service. In support of the above interpretations, the court cited a Senate Report[118] from the legislative history of the Act. Secondly, the court cited *Udall v. Federal Power Commission* where the interpretation of the Act was directly on point.[119] Finally, the court alluded to a *Memorandum of Understanding* entered into between the Secretary of the Army and the Secretary of the Interior requiring the Corps of Engineers,

114. 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970), because the Secretary of Transportation must consider environmental impact in approving the route of any new highways, the Corps of Engineers could not issue a fill permit when the overall effect of the fill would be to force the Secretary of Transportation to accept the route without considering the requisite factors. Therefore, the Army could not be oblivious to the effect of the fill on beauty and conservation of natural resources.

115. 16 U.S.C. §§ 661-66 (1964).

116. 42 U.S.C. §§ 4331-47 (Supp. V 1970).

117. *Zabel, supra* note 96, at 209.

118. S. REP. No. 1981, 85th Cong., 2d Sess., 2 U.S. CODE CONG. AND AD. NEWS 3446 (1958): "The amendments, would provide that wildlife conservation shall receive equal consideration with other features in the planning of Federal water resource development programs. This would have the effect of putting fish and wildlife on the basis of equality with flood control, irrigation, navigation, and hydroelectric power in our water resource programs, which is highly desirable and proper, and represents an objective long sought by conservationists of the Nation." *Id.* at 3450.

119. 387 U.S. 428, 443-44 (1967). The court gave the following meaning to the Act:

> Section 2(a) . . . provides that an agency evaluating a license under which the waters of any stream or other body of water are proposed . . . to be impounded first shall consult with the United States Fish and Wildlife Service, Department of the Interior . . . with a view to the conservation of wildlife resources. . . . Certainly the wildlife conservation aspect of the project must be explored and evaluated.

upon receipt of an application for a dredge and fill permit, to notify all interested state and federal conservation and environmental agencies. The District Engineer must then evaluate all relevant information received from the state and federal conservation and environmental agencies in deciding whether or not to issue the permit.[120]

The court utilized the statute, the case, and the memorandum as examples of the combined intent of the several branches of the federal government to compel the Secretary of the Army to ". . . [w]eigh the effect a dredge and fill project will have on conservation before he issues a permit lifting the Congressional ban."[121]

Through dicta, the circuit court found support for its decision in the National Environmental Policy Act.[122] That act requires every federal agency to consider ecological data when dealing with any activity having a potential effect upon the environment.[123]

The cumulative effect of the authorities cited above led the circuit court to finally conclude:

> For we hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors. In rejecting a permit on non-navigational grounds, the Secretary of the Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors. (citation omitted).
>
> . . . .
>
> When the House Report and the National Environmental Policy Act of 1969 are considered together with the Fish and Wildlife Coordination Act and its interpretations, there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act.[124]

The preceding discussion has illustrated a changing attitude in government and in the courts toward the environment. Environmental protection and ecological awareness are principles which permeate most aspects of American life. The manner in which *Zabel v. Tabb* is to play a part in environmental involvement, and the manner in which the public may use the case as a tool are

120. *Zabel, supra* note 96, at 210-11.
121. *Id.*
122. 42 U.S.C. §§ 4331-47 (Supp. V 1970) (note that this Act was passed subsequent to the District Court decision in this case) (*See, Recent Develpments in the Law of the Seas: A Synopsis*, 7 SAN DIEGO L. REV. 627, 640 (1970).)
123. *See* text accompanying notes 152 *et. seq. infra.*
124. *Zabel, supra* note 96, at 213-14.

questions of interest to the concerned reader. A discussion of these issues and others will be developed in the following section, concentrating on tidelands management and control.

ANALYSIS

The foregoing discussion was designed to provide an individual evaluation of each of the three cases. This analysis is designed to extrapolate from the prior discussion possible ramifications and applications of the principles cited, in order to demonstrate how the courts can implement the legislative intent to provide for the preservation of the tidelands.

City of Long Beach v. Mansell

This case demonstrates the concern of the court with implementation of the public policy implicit in the provisions of article XV, section 3 of the California Constitution that the tidelands are to be preserved as a public trust for the people of California. That the various governmental entities either disregarded this public policy, or were powerless to effectuate it until 1965 is apparent from the stipulated facts. The natural resources of the Alamitos Bay region were particularly suited for exploitation as a highly desirable residential marina complex. The policy of benign neglect practiced by municipal and state government in no way hampered those that sought to maximize their economic gains. The effects of this haphazard development over a period of 100 years on the ecology of the Los Angeles-Long Beach coastal zone may never be known, however beneficial the development has ultimately proven to be for the human inhabitants as residential and recreational facilities.[125]

The public trust concepts of coastal zone management, having derived from English common law, are well documented elsewhere.[126] Accordingly, the vast majority of American jurisdictions have adopted this theory to preclude the alienation of the tidelands by the state save in isolated instances and then only for bona-fide "public uses", subject to the state's navigational servitude.[127] Cali-

125. *See* text accompanying notes 21-30, *supra.*
126. Shively v. Bowlby, 152 U.S. 1 (1894); *see* 1 *Water and Water Rights* § 36.3 (Clark ed. 1967).
127. *See* Port of Seattle v. Oregon & W. R.R., 255 U.S. 56 (1921); *but see*

fornia, by the use of constitutional provisions, statutes, and application of the common law, has attempted to preserve the tidelands for the people of the state. Until the decade of the Sixties, this express public policy was observed more in the breach than in the execution.[128] The distaste of the court to breach the "public trust," despite the obvious need to provide a solution to the question of title instability in the Alamitos Bay region and the legislative action designed to alleviate the problem, is manifested by the precision with which the court limited the holding to the specific facts before it.[129]

Since the California Constitution prohibits alienation in fee of the tidelands within two miles of a municipality,[130] it is arguable that this provision could be in conflict with any overall coastal development that proposes as an integral part of the plan to sell a portion of the tidelands to a private entity. On the other hand, the courts would be willing to uphold the validity of any such plan, provided that the programmed alienation met the requirement of article XV, section 3 prohibiting alienation in fee to private parties, and was delineated for the purposes of navigation, commerce, public right of access or fisheries. Because section 3 applies only to those lands within two miles of an incorporated city in existence in 1879,[131] here remains a considerable proportion of the California coastline subject only to the general concepts of "public trusts" as embodied in the common law, legislative enactments and section 2 of the California Constitution.

Governmental Estoppel

As noted in the prior discussion on *Long Beach*,[132] estoppel applied to a governmental entity is a rarely used doctrine, particularly when used to derogate the provisions of the state's constitution. However, the use of equitable estoppel as a meaningful tool to implement a broad based comprehensive coastal zone plan and possibly protect it from federal diminuation should be considered.[133] Where

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Wilbour v. Callagan, 77 Wash. 2d 307, 462 P.2d 232 (1969); *see also* 1 *Water and Water Rights* § 36.4 (Clark ed. 1967).

128. *E.g.*, *Long Beach* at 471-73, 91 Cal. Rptr. at 29, 476 P.2d at 429.

129. See text accompanying notes 55-59, *supra*.

130. CAL. CONST. art. XV, § 3.

131. *Long Beach* at 478-79, 91 Cal. Rptr. at 34, 476 P.2d at 434; see text accompanying note 35, *supra*.

132. See text accompanying notes 55-59, *supra*.

133. *See* Morreale, *Federal Power in Western Waters*, 3 NAT. RES. J. 1, 67 (1963), for an evaluation of the application of equitable estoppel against the federal government in the context of consumptive water rights in western states.

the people of the state, acting through their legislature, have provided for such a plan[134] in reliance on both inaction by the federal government and federal pronouncements to the effect that the states have the primary responsibilities in the coastal zone, it is arguable that the federal government could be estopped from imposing a management program with less stringent standards than that of the state.[135] For example: the Submerged Lands Act of 1953[136] quitclaimed the submerged lands three miles to seaward of a state's contiguous zone; should the federal government establish a coastal zone management plan pre-empting the state from its territorial waters under the supremacy clause, it appears that estoppel as applied in *Long Beach* could be applied to preserve the state's primary rights. This hypothetical argument could be subject to a broad based commerce power attack; which has often been described as plenary,[137] especially here, where the commerce power in the contiguous zone was expressedly reserved to the federal government.[138] The pivotal issue in any such litigation would be whether the state could have justifiably relied on the Submerged Lands Act and the governmental inactivity in the contiguous zone.

That this problem will not arise in the near future is clearly demonstrated by the mood of Congress, which has based the majority of recent enactments concerning the interstate problems of environment on the primary duty of the state to formulate policy, effectuate minimum standards matching the federal standards, and implement and enforce regulations pertaining to those standards, with some federal financial assistance and management expertise.[139]

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134. Such as the California Ocean Area Plan (COAP) scheduled for publication in 1972. 2ND CMC REP. *supra* note 10, at 79.
135. See discussion accompanying notes 195-200, *infra*.
136. 43 U.S.C. §§ 1301 *et seq.* (1964).
137. *Zabel supra* note 96, at 203-04.
138. Submerged Lands Act of 1953, 43 U.S.C. § 1314 (1964).
139. *E.g.*, S. REP. No. 91-351, 91st Cong., 1st Sess. 37 (1969):

> The basis for the [Water Quality Control Act] is a strong Federal-State-local partnership. The States have been delegated the primary responsibility to protect and enhance the quality of air and water within their boundaries, and, in co-operation with other states, to protect and enhance the quality of air and water within resource areas common to those States. The Federal Government has the responsibility to improve our understanding of environmental threats, the authority to act where States fail or are unable to fulfill their obligations and the obligation to protect the environment in its own activities.

Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission

The San Francisco Bay Conservation and Development Commission of the State of California (BCDC) is one of the few regional development and planning organizations functioning at the state level anywhere in the United States.[140] The BCDC was established to meet the planning and development needs of a specific geographic area, and thus may be subject to criticism as "piecemeal legislation." However, the scope and power of the BCDC as defined in the statute[141] establishing the commission, was sufficiently broad to preclude such an attack. The actual operations of the commission indicates that the BCDC concept has worked so well as to provide a model for other jurisdictions considering the regional planning concept.[142]

The key to BCDC's success has been the fact that it has been adequately funded to perform its tasks,[143] a characteristic not shared by other state management plans.[144] Funding may be the most important aspect of establishing a coastal zone planning and development organization no matter what the scope of its powers and authority. For example, the first step that must be undertaken in order to have an effective coastal zone plan, is to inventory available assets. To conduct this inventory, an organization needs an adequately sized staff,[145] access to technical expertise, and the ability to absorb administrative costs.[146] Because the BCDC has been established with the requisite funding and has fulfilled its legislative mandate, it has been cited as contributing significantly to the solution of coastal/estuarine management problems of central California.[147]

The action taken by the court of appeals is significant in perpetuating developmental and planning efforts by state and regional management commissions. By upholding the validity of the powers of the BCDC to deny permits, the court implicitly recognizes the fact that once an area within the coastal zone is reclaimed by dredge and fill operations, the biotic communities thereby de-

140. *See* Heath *supra* note 64, at 355-66.
141. CAL. GOV'T CODE § 66603 (West 1966).
142. *Accord*, Heath *supra* note 64, at 357-59.
143. *Id.*
144. 3 MAINE LAW *supra* note 10, at 531; 2ND CMC REP. *supra* note 10, at 7.
145. For example, the BCDC had 13 full time members. S.F. PLAN 3 *supra* note 63, at 3.
146. For the result when adequate funds are not provided, see 2ND CMC REP. *supra* note 10, at 7.
147. 2ND CMC REP. *supra* note 10, at 5; *see* Heath *supra* note 64, at 355 *et seq.*

stroyed can never be replaced. By allowing the BCDC to implement a plan for coastal zone management and construing the legislative intent of the BCDC enabling act to preserve the power of the BCDC to deny the fill permit, the court recognized that any prospective diminution of the present state of the San Francisco Bay Region by Candlestick Properties, Inc. must be subordinated to the legislatively mandated requirements for regional planning and establishment of competing use priorities by the BCDC.

The Public Interest

Defining the public interest is important, since the validity of the state's exercise of its police power under the Constitution depends on whether or not the particular application of the police power is for the "public health, safety, morals or welfare."[148] As expressed in the National Environmental Policy Act of 1969 (NEPA),[149] it is in the national interest to:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> . . . .
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities. . . .[150]

On the issue of reasonableness, the congressional determination of the public interest by NEPA may well be "well-nigh conclusive,"[151] should a state adopting these standards enact a coastal zone management plan. The concept of public welfare as applied to the state's exercise of the police power will be upheld by the Supreme Court if "any state of facts either known or which could reasonably be assumed affords support" for the legislation.[152]

Although the policies enumerated in the NEPA are necessarily broad, they are directly applicable to concepts of coastal zone man-

148. Berman v. Parker, 348 U.S. 26, 31 (1954).
149. Pub. L. No. 91-190, § 101(b) (Jan. 1, 1970).
150. *Id.*
151. 348 U.S. at 32.
152. Goldblatt v. Hempstead, 369 U.S. 590, 596 (1962).

agement. The optimum plan provides for a regional agency established by the legislature to inventory all available assets, both natural and man-made, within the coastal zone region, then projecting the needs of the population into the foreseeable future. The agency assigns priorities in accordance with specific legislative guidelines between beneficial and deleterious uses (which are often competing). Finally the agency develops a plan from which it is hoped the ecology of the region will be enhanced.[153] Each of these processes involves balancing private rights against the public welfare.

The *Candlestick* court recognized the "strong public purpose" of the BCDC enabling act, and implicitly upheld the power of the legislature to delegate the authority to withhold the fill permit.[154]

Inverse Condemnation[155]

The concept of inverse condemnation arises whenever the state, in the exercise of its police power, regulates the private landowner's use of his property, depriving him of present and/or future utilization of that land as he desires.[156] In *Candlestick* and *Zabel,* the regulation took the form of a denial of permission to fill submerged lands adjacent to the private owner's land, and the contention in each case was that by denying the owner the right to make profitable use of his land, that the government had "taken" his land unconstitutionally and he was entitled to compensation under the fifth amendment (inverse condemnation).

The fact that Candlestick Properties, Inc. can make a reapplication for the fill permit, after the plan is formulized, takes the case out of the context of condemnation and into area of a valid exercise of the police power by the BCDC. The regulation is reasonable, since it is for a short duration and a valid public purpose.[157]

The difficult issue is when does the state's exercise of the police power to regulate the property holder become an unconstitutional

153. *Accord,* Heath *supra* note 64, at 371; Power *supra* note 10, at 227; 2ND CMC REP. *supra* note 10, at 1-3; 1 MAINE LAW *supra* note 10, at 145. The power to plan and regulate the entire coastal zone should be vested in a single state agency with sufficient funds to implement the plan, subject to legislative and judicial review.

154. *Candlestick* at 565, 89 Cal. Rptr. at 901.

155. For the California definition, see Cothran v. San Jose Water Works, 58 Cal. 2d 608, 614, 25 Cal. Rptr. 569, 573, 375 P.2d 449, 453 (1962).

156. *See* note 85, *supra.*

157. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. Cambridge, 277 U.S. 183 (1928).

taking.[158] This problem will arise when and if Candlestick Properties, Inc. makes reapplication under the legislatively approved plan and is rejected by the BCDC. The lack of case law on the precise question of the state's application of its law to the physical alteration of the tidelands problem[159] increases the importance of *Candlestick* in providing precedent for national application.[160]

The definition of an unconstitutional taking depends on the reasonableness of the restriction on the landowner's use.[161] If a court were to apply the concept of inverse condemnation to compensate the private landowner, on the owner's showing that the particular land has no other "use" except when filled and developed, contradictory to a state's regulation of that land through a coastal zone plan, the court would be missing the entire concept of coastal zone management. The basic premise underlying all coastal zone plans is to provide a reasonable balancing of all possible uses to which the entire region can be put.[162] As applied to a particular plot of land, this determination results from a finding by the agency involved that there is a use of legislatively mandated higher priority than the dredge and fill operation desired by the landowner. The owner benefits with the public at large by the improvement in the ecology of the entire region occasioned by implementation of the management plan. These higher priority uses to which his land can be put should be upheld as reasonable regulations.

Possible Solutions

There are two solutions to avoid the problem of inverse condemnation. The first is to provide an adequately funded acquisition program under the auspices of the regional management commission, which, after a fair and public hearing, would compensate the landowner for the alleged taking.[163] The cost of treating all restrictive use regulation as a condemnation would be prohibitive.[164]

158. *See* Michelman, *Just Compensation*, 80 HARV. L. REV. 1165 (1967); a detailed analysis of the prevailing theories concerning "taking" versus "regulation."
159. Heath *supra* note 64, at 360.
160. See discussion accompanying notes 93-95, *supra*.
161. Cases cited *supra* note 157.
162. *See, e.g.*, Power *supra* note 10, at 597, for an evaluation of coastal zone statutes cited earlier.
163. Heath *supra* note 64, at 359-60.
164. For example, the cost of rehabilitating Lake Erie is twenty *billion*

The second alternative is to draft the statute/regulation in such a manner as to provide meaningful and reasonable priorities between competing uses, and to found the legislation on the public trust doctrine, and the constitutional provisions. By having the legislature define "reasonable restriction" in the constitutional terms of the bonafide public purposes of navigation, commerce, public right of access, or fisheries, the exercise of authority by the management and development commission can be extended to properly implement the plan.[165] Then the decision of a duly constituted planning commission, acting under legislative mandate as to priorities, that a particular restriction placed on the filling of a single parcel of tidelands pursuant to a comprehensive and well developed regional plan, would be held reasonable. Zoning restrictions (that vary considerably in area and longevity) have been consistently upheld as not being unlawful "takings" so long as there was no foreclosure of the pre-existing uses without compensation.[166]

A development plan for the coastal zone has many of the same aspects as a zoning plan. Both the tidelands plan and zoning regulation are primarily prospective in nature and promote the general welfare although in different contexts.[167] In the tidelands, the needs of the individual to develop his land so as to enjoy an economic gain must give way to the needs of a citizen to live in an enhanced environment[168] made possible only by a weighing and evaluating process that has projected the needs of society over the foreseeable future.

However, it should be recognized that the duty of the state to roll back the wave of urbanization and population growth in the tidelands area through the use of a general development plan would necessitate an aggressive and extensive reclamation and rehabilitation program within the tidelands.

One of the methods by which the state can accomplish this is to provide for open purchasing of private land holdings utilizing condemnation machinery when required.[169] Although this part of

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dollars, Seaborg, *Hope for the Environment*, THE NEW YORK TIMES ENCYCLOPEDIA ALMANAC—1971, at 463 (1970). For the cost analysis of a single intrastate region, see S.F. PLAN 3 *supra* note 61.

165. 369 U.S. at 593-94.

166. 272 U.S. 365; *accord*, Dooley v. Town Zoning Commission, 151 Conn. 304, 197 A.2d 770 (1964) (holding that since the zoning restriction precluded any *profitable* use of the land, it was a confiscatory taking).

167. The coastal zone plan is concerned with all of the possible competing uses, while the zoning ordinance traditionally has been concerned with urban growth and economic development. 2 MAINE LAW *supra* note 10.

168. *See* discussion accompanying notes 7-10, *supra*.

169. For example, over the past 120 years, 225 land grants have been

the coastal zone plan may require massive expenditures, the benefits to be derived from planning and optimal utilization of the coastal zone may outweigh the immediate costs.

Another alternative is to enact legislation providing for useful life amortizaton of deleterious, pre-existing, non-conforming uses. Although this method retains title in the private owner, it may provide the more economical approach for state governments.

The *Candlestick* rationale, if applied to the final San Francisco Bay plan, containing the inevitable restrictions on private uses, could prove to be a powerful tool in the hands of a commission implementing the policies of the legislature.

The policy of the lawmakers in enacting tidelands legislation should include a consideration of the reasonable expectations of the littoral owner as well as the economics of any course of action.[170] In the majority of situations where the land is either underdeveloped or being marginally utilized the public interest is best served by reasonably restricting uses to the need of the region, even if this appears to entail "condemning" the adjacent landowner's littoral rights. There may be no greater need than for the public to have their tidelands preserved from economic exploitation.[171] This is the import of the California Constitutional provision upheld in *Long Beach*.[172] The problems created by haphazard development, which the commission was established to prevent, could not be controlled solely by application of the Constitutional provisions or common law "public trust" doctrines nor by a commission so hamstrung as to be unable to control the source of the problem. It was necessary for the legislature to recognize the public interest in vesting centralized control and adequate regulatory powers in BCDC to accomplish the requirements of comprehensive regional planning.

The *Candlestick* decision has another significant feature. Although the manner of judicial interpretation of the McAteer-Petris

made in the California tidelands, mostly to municipalities. 2ND CMC REP. *supra* note 10, at 65.

170. Michelman *supra* note 158, at 1166-67.

171. During the period 1947-1967, seven percent nationally, and sixty-seven percent of California's estuarine areas had been destroyed by dredge and fill operations. *Hearings on Estuarine Areas before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess., 37 (1967).

172. Text accompanying notes 55-59, *supra*.

Act is predictable when one analyzes the California law involved,[173] a court using the *Pennsylvania Coal Co. v. Mahon*[174] test of diminution of value, rather than the California approach of balancing of interests,[175] could hold that the denial of a permit, even if pursuant to a valid coastal zone plan, would be an unconstitutional taking unless Candlestick Properties were compensated.[176] By upholding the commission's power to deny permits, the appellate court has assisted the legislature in eliminating one of the prime problem areas in coastal zone management—multiplicity of governmental entities having control or responsibilities in the tidelands.[177] The continued recognition of the public interest as contained in the statutes and constitution will allow the legislature wide discretion to determine the manner in which these lands subject to the public trust are to be allocated and utilized.

Zabel v. Tabb

It is now well established that the states have been delegated the prime responsibility for ownership and management of the tidelands.[178] However, the federal government retains significant residual powers of navigation, commerce, international relations and national defense. It has been said that there are other national priorities which also provide significant bases for the right of the federal government to review the efficacy of any tidelands/coastal zone management system imposed by a lesser entity.[179] The power of the federal government, if exercised, may well be plenary, however exclusive the states title to the tidelands may appear.[180] Federal controls concerning the physical alteration of the tidelands

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173. Text accompanying notes 75-77, *supra.*
174. 260 U.S. 393 (1922).
175. See note 85, *supra.*
176. *See* Michelman *supra* note 158, at 1190.
177. 2ND CMC REP. *supra* note 10, at 7; 2 MAINE LAW *supra* note 10, at 352; *see also,* Power *supra* note 10, at 145.
178. An extended discussion of the evolution of ownership rights is not appropriate here. There is a long line of cases from Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 211 (1845) through United States v. California, 332 U.S. 19 (1947) that have reaffirmed the proposition that the states "own" the tidelands. *See also,* Shively v. Bowlby, 152 U.S. 1 (1894).
179. These include:
a. preservation of unique natural areas;
b. tidelands as a national resource;
c. vital role of estuaries in supporting populations of migratory wildlife.
Panel Reports of the Comm. on Marine Science, Engineering and Resources, H.R. Doc. No. 91-42, 91st Cong., 1st Sess., pt. 2 at 146 (1969).
180. Note 178, *supra.*

have been exercised by the Secretary of the Army.[181] Generally the government has exercised discretion in asserting its paramount rights and has limited the scope of the Secretary's authority to navigable waters, thereby excluding many estuaries and tidal marshes, through the medium of the permit system established by the Rivers and Harbors Act of 1899[182] applying primarily to dredge and fill operations.[183] Congress has reserved to the states the primary authority for the administration of the tidelands,[184] and has consistently indicated an intention to continue to rely on the states for the management of the coastal zone.[185] To date there has been no national legislation concerning the management of the coastal zone, although there have been continuing efforts to initiate such legislation.[186]

There are two important enactments that affect the above named powers of the Army Corps of Engineers to grant or deny permits to alter the tidelands: the Fish and Wildlife Coordination Act[187] and the National Environmental Policy Act of 1969[188] (NEPA). The significance of these laws was fully recognized by the *Zabel* court.[189] Although not specifically directed at the coastal zone, the court found that the intent of Congress was to grant all governmental agencies not only the power, but the duty to consider ecological factors before granting any permits that might affect the environment.[190]

181. The first enactments having to do with the tidelands, vested in the Department of War the right to prohibit erection of obstructions to navigation. Act of Sept. 19, 1890, ch. 907, § 7, 26 Stat. 454. The first act dealing with the problems of refuse depositing in navigable waters was Act of Aug. 18, 1894, ch. 299, §§ 6-8, 28 Stat. 363, which involved only those navigable waters that had been the subject of government appropriations and improvements. This was rectified in the Rivers and Harbors Act of 1899 (which included the Refuse Act), wherein the Secretary of War [later Army] was given the power to permit the deposit of any material otherwise proscribed by the Act, in "navigable waters, within limits to be defined and under conditions to be prescribed by him," so long as in "the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby." 33 U.S.C. § 407 (1970).

182. 33 U.S.C. §§ 403 *et seq.* (1970).

183. Heath *supra* note 64, at 355.

184. 43 U.S.C. §§ 1301 *et seq.* (1964).

185. Knight *supra* note 13, at 600 *et seq.*

186. Heath *supra* note 64, at 354.

187. 16 U.S.C. §§ 661-66 (1964).

188. 42 U.S.C. §§ 4321-47 (1970).

189. *See* text accompanying notes 115, *et seq.*

190. *Zabel* at 201; *see also,* COMM. ON GOV'T OPERATIONS, THE PERMIT

Thus the *Zabel* court, as had the California courts previously discussed, acted to further the public interest in the tidelands. It may even be postulated that this court was more impressed with the overwhelming opposition to the granting of the permit[191] than it was with the ultimate effects that its decision will have on coastal zone management and control. That this decision prevented "a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay"[192] is laudable, but the ultimate effect on the Army Corps of Engineer's District Engineers actual operational policies may harm more than help the environment.

The proposition that Congress has delegated nearly "plenary" powers to the Secretary of the Army, or his *delegate*, to consider ecological factors in tidelands alteration situations before granting or denying a permit, can be drawn from *Zabel*. By founding the decision on the commerce power as delineated in *Wickard v. Filburn*,[193] and ratifying the authority of the Secretary of the Army, the court broadened the traditional scope of the Army's authority in the tidelands far beyond that envisioned by the 1899 Act.[194] The court's position is supported by both the cases and legislative intent.[195] But one must also examine the circumstances in *Zabel*, where a large number of citizens, a co-equal governmental agency, and three state agencies, confronted the District Engineer and demanded that he deny the permit. In the face of this opposition, Colonel Tabb had no alternative but to retreat and deny the permit. Contrast *Zabel* with the slightly different situation of the District Engineer, who when faced with a moderate number of concerned citizenry (13 against the permit, 5 for), an indecisive co-equal governmental agency, and the tacit approval of the two state legislatures concerned (admittedly not in accordance with any plan) grants the fill permit, even though the evidence before him showed that ecological damage would result.[196] By affirming that the Army has wide discretion in deciding whether to grant or deny the permit,[197] and by extending this discretion to include the nebulous concept of environment, the *Zabel* court through Congress has vested too much power in the hands of the District Engineer. It is

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FOR LANDFILL IN HUNTING CREEK: A DEBACLE IN CONSERVATION, 4th REP., H.R. REP. No. 91-113, 91st Cong., 1st Sess., 13 *et. seq.* (1969) [hereinafter cited as HUNTING CREEK DEBACLE].

191. See text accompanying note 97, *supra*.
192. *Zabel* at 202.
193. 317 U.S. 111 (1942).
194. *See* note 181, *supra*.
195. Note 113, *supra*; HUNTING CREEK DEBACLE *supra* note 190, at 9.
196. HUNTING CREEK DEBACLE *supra* note 190, at 13 *et seq.*
197. *Zabel* at 207.

unrealistic to assume that any given District Engineer, lacking authoritative guidelines, resources upon which to base his evaluation,[198] and particular expertise in the area of environmental protection, will be able to exercise that fine degree of discretion, value judgment, and expertise which the states have found essential before even attempting to plan.[199] When one considers the additional fact that the Army Corps of Engineers, acting under the guidance of these same District Engineers, is one of the largest polluters of the Great Lakes and northeastern rivers, the possibility for improvement becomes even more remote.[200] That the District Engineer acts in good faith and to the best of his capabilities, is not to be denied; it is simply that he is not the proper vehicle in the present circumstances for implementing the management of the coastal zone.

The crucial issue to arise from *Zabel* is not the wisdom or the abilities of individual District Engineers but rather how much power has been delegated to the Secretary of the Army to derogate from a valid state comprehensive ocean area plan.[201] There are two federal policy decisions involved. The first being that the Secretary of the Army, having been delegated wide discretionary powers under the commerce clause, can deny or grant permits to alter the coastline based on "ecological considerations", as well as the traditional considerations of navigation, flood control and the production of power.[202] The second being the avowed policy of Congress to allow the states to fashion their own coastal zone management programs, as evidenced by congressional action in other areas of environmental control.[203] States like California (having recognized

198. Arguably the District Engineer can utilize the determinations made by the Secretary of the Interior or his subordinates, plus public hearings, but as demonstrated in the Hunting Creek debacle, these may be unavailable or inconclusive, HUNTING CREEK DEBACLE *supra* note 191, at 8-9, contrary to the dictates of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, 662 (1964). For the conclusion of the Hunting Creek drama, see Sax, *A Little Sturm und Drang at Hunting Creek*, ESQUIRE, Feb., 1971, at 84.

199. The BCDC recently completed their regional plan after a four year study costing over $1,000,000 from an area roughly the same size as that administered by a District Engineer. Heath *supra* note 64, at 356.

200. *Hearings on H.R. 4148 and Related Bills before House Comm. on Public Works*, 91st Cong., 1st Sess., at 117 *et seq.* (1969).

201. Note 134, *supra.*

202 *Zabel* at 200.

203. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.* (1970).

the problem, having few interstate jurisdictional conflicts, and having commenced to resolve the problem) need little federal guidance or control in order to implement an effective and comprehensive coastal zone management plan. Yet the very commerce powers delegated by Congress and recognized in *Zabel*, could be used to over-ride and thwart such a plan once enacted by the state legislature.

The potential conflict would likely arise in the situation where an applicant would file for permission to fill a tideland area with the District Engineer. The Engineer, after an independent apprisal and evaluation of the impact of this project on the environment, would grant the permit.[204] The applicant would then attempt to compel the state to grant their equivalent permit, even if to grant such a permit would be in direct contravention of a comprehensive coastal zone plan for the area of concern. The grounds for such a mandate would be that the managing state agency could not deny permission to fill the land once the District Engineer, under his delegated commerce clause powers, had granted the permit, since any action taken by the state denying that authority would be an illegal usurption of the commerce power. The fact that there are two conflicting congressional policies, and that there is no federal legislation concerning the specific problem of coastal zone management, may lead the court to uphold the Army's permit and preclude the state from denying their permit. The court could rely on *Zabel* for the proposition that since Congress has delegated its powers to the Army, and those powers are plenary, the state can do nothing to invalidate the previously granted permit.[205] Such a position would emasculate any state coastal zone plan, and would have the ultimate effect of casting the entire costal zone management burden into the hands of the federal government.

Conclusion

It is in the ultimate public interest to have the tidelands so administered as to maximize the beneficial uses and minimize those uses that derogate the quality of the coastal zone. To this end, each of these courts has attempted to resolve existing conflicts, by the use of statutes, constitutional provisions and the common law. With an ear attuned to the legislative policy to preserve our environment for the future needs of society, these courts have at-

204. *See* Hunting Creek Debacle *supra* note 190, at 9.
205. *Id.*, at 64; *see also*, Sax, *A Little Sturm und Drang at Hunting Creek*, Esquire, Feb., 1971, at 124, col. 2.

tempted to best serve the public welfare. Having been required to work with archaic tools, these three courts have shown that it is possible for the judicial system to keep abreast of society's needs. But the scope of the problem of managing the coastal zone, in a manner consonant with technology and future needs, is far broader than the case by case approach of the judicial system. The courts can only function with the law as it is written and interpreted.

The solution is for lawmakers to recognize the primary interest of the state in its own tidelands, and to the extent that the states are unwilling or unable to manage their own tidelands, recognize the over-riding responsibility of the federal government for the national environment. Then Congress, using an approach similar to that of the Water Quality Control Act of 1965, should formulate national standards, establish timetables for meeting those standards, provide financial and technical assistance to the states, and implement adeqate enforcement procedures. This would allow the state to seek independent and, in some cases, more severe solutions better attuned to local needs for their own coastal zone management problems, at the same time insuring that there were some efforts being made by all tidelands states to preserve the public trust for their citizens, as handed down to them by the common law.

> We need action by the Legislature next year. We have everything to gain and a coastline to lose.[206]

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206. Editorial, Los Angeles Times, Dec. 10, 1970, Part II at 6, col. 2.