IN THE
SUPREME COURT OF FLORIDA

CASE NO. 68,399

THE BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND
OF THE STATE OF FLORIDA,

Petitioner,

vs.

SAND KEY ASSOCIATES, LIMITED,

Respondent.

ON PETITION FOR REVIEW OF THE
DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT SAND KEY ASSOCIATES, LIMITED

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III. WHETHER THE DISTRICT COURT PROPERLY HELD THAT UNDER FEDERAL LAW, THE ACCRETIONS TO SAND KEY'S OCEANFRONT PROPERTY BELONG TO SAND KEY.

STATEMENT OF THE CASE AND THE FACTS

The Respondent, SAND KEY ASSOCIATES, LIMITED ("SAND KEY"), adopts the Statement of the Case and the Statement of the Facts of the Petitioner, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (the "STATE"), with the following modifications.

SAND KEY proceeded in the trial court with a two count quiet title action. Count I sought relief on the basis of state law. Count II sought that same relief under federal law. After the trial court granted an injunction under Count I, SAND KEY appealed that order to the District Court, which reversed and certified a question to this Court. The State's Petition for review is pending before this Court, which ordered briefing and argument, but has not accepted jurisdiction. Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Limited, Case No. 66,372, hereinafter referred to as "Sand Key I".

The instant case involves the District Court's affirmance of the Final Judgment in favor of SAND KEY, based solely on the application of federal law. The District Court certified a question of great public importance to this Court in the case at bar, hereinafter referred to as "Sand Key II".

SUMMARY OF THE ARGUMENT

The Court should determine the federal law issue raised in the instant case in order to eliminate the constitutional issue before the Court in Sand Key I. The application of federal law to SAND KEY'S oceanfront property will render the constitutional issue moot. This Court should not decide the constitutional question because it is not necessary for the ultimate resolution of the dispute between the parties.

The District Court correctly followed the United States Supreme Court decisions that have determined the exact issues raised in the instant case. Hughes v. Washington, 389 U.S. 290 (1967), and California ex rel. State Lands Comm. v. United States, 457 U.S. 273 (1982), unequivocally hold that federal law governs title to accretion occurring on oceanfront land owned by, or patented by, the federal government. The inapposite decision exclusively relied on by the STATE, Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977), dealt solely with inland property and has no application to the case at bar.

Under the undisputed federal common law, accretion, whatever its cause, vests in the owner of the upland. Thus, SAND KEY is entitled to ownership of those accretions under federal common law.

ARGUMENT

I. THE COURT SHOULD ACCEPT JURISDICTION, UPHOLD THE DECISION OF THE DISTRICT COURT, AND DENY THE PETITION IN SAND KEY I AS MOOT.

The District Court correctly recognized the importance of its decision below by certifying a question of great public importance to this Court. This presents an opportunity to avoid the constitutional question presented in the pending Petition for Review in Sand Key I. The Court should follow the well established rule that it will not decide a constitutional question unless it is absolutely necessary for the ultimate resolution of the case. See, e.g., Singletary v. State, 322 So.2d 551 (Fla. 1975); In re Estate of Sale, 227 So.2d 199 (Fla. 1969).

The District Court, in its Sand Key I decision (Petition for Review pending), was compelled to review a state statute without the benefit of the trial court's decision in Count II of this cause. In Sand Key II, the District Court properly followed the controlling decisions of the United States Supreme Court in affirming the trial court's ruling. See Point II, infra. The principle established in these cases and followed by the District Court in Sand Key II, to wit: federal law controls the ownership of accretions to federally patented oceanfront property, eliminates the need for state statute review.

If this Court upholds the District Court's decision in the case at bar, then its work will be completed. The petition for review of the state law issue would then be moot, because the determination that federal law applies to determine SAND KEY'S

property rights will be a final determination of this case on the merits.

II. THE DISTRICT COURT PROPERLY HELD THAT TITLE TO ACCRETIONS ON SAND KEY'S PROPERTY, DERIVED FROM A FEDERAL PATENT, IS A QUESTION OF FEDERAL LAW.

SAND KEY derives its title to oceanfront property from a federal patent issued in 1883. Over the past several years, there has been a gradual and imperceptible build-up of land to the shore of this oceanfront property. It is undisputed that this build-up of land is accretion. 1

In affirming the trial court's judgment, the District Court correctly followed the controlling decisions of the United States Supreme Court, which unequivocally require the application of federal law to SAND KEY'S federally patented property. The Court has consistently held that title disputes over oceanfront land patented by the United States are governed by federal law. California ex rel. State Lands Comm. v. United States, 457 U.S. 273 (1982); Hughes v. Washington, 389 U.S. 290 (1967); Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935).

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1. Accretion is the gradual and imperceptible addition of soil to the shore of waterfront property. The test as to what is gradual and imperceptible is, that though witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. St. Clair County v. Lovingston, 90 U.S. (23 Wall.) 46, 68, 23 L.Ed. 59 (1874). Title to accreted lands by the great weight of authority vests in the riparian owners of abutting lands. Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919); Mexico Beach Corp. v. St. Joe Paper Co., 97 So.2d 708, 710 (1st D.C.A. Fla. 1957); cert.denied 101 So.2d 817 (1958).

Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 209 So.2d 209, 211 (Fla. 2d DCA 1973).

In Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S.10 (1935), the Court held that the boundaries and extent of oceanfront property granted by a federal patent are determined by federal law. Writing for a unanimous Court, Chief Justice Hughes reasoned:

> The question as to the extent of this federal grant, that is, as to the limit of the land conveyed ... is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.

Id. at 22 (citations omitted). The Borax Court's directive to apply federal law to federally patented oceanfront property was reaffirmed several years later in Hughes v. Washington, 389 U.S. 290 (1967).

In Hughes, the successor in title to a federal patentee claimed title to accretion which was forming on her land bordering the Pacific Ocean. The State of Washington applied a provision of its constitution to divest her of title to the accretion. The Supreme Court reversed, unanimously holding that:

> the extent of ownership under the federal grant is governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion.

389 U.S. at 292.

The Court explained the compelling federal interest in applying the federal rule of law to determine the ownership of

oceanfront property derived from a federal patent, stating:

> The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land".

389 U.S. at 293.

Hughes concerned a federal patent made prior to statehood, while Borax dealt with a patent made after statehood, as in the instant case. In both cases, the Court determined that whenever title to oceanfront property is derived from a federal patent, federal law governs the extent of that patent, including the rights to future accretion. SAND KEY'S ownership of the accretion on its property is manifestly a question to be determined by federal law.

As recently as 1982, the Supreme Court expressly reaffirmed Hughes in California ex rel. State Lands Comm. v. United States, 457 U.S. 273 (1982). In California, a jetty caused accretion to occur on oceanfront property owned by the United States, which claimed title under federal law. California claimed title to the accretion under state law. The Court noted that:

> Except for the fact that in the present case, the upland to which the accretions attached has always been owned by the United States, this case and Hughes are similarly situated. Unless Hughes is to be overruled, judgment must be entered for the United States.

457 U.S. at 280-81.

The Court rejected California's contention that Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977), implicitly overruled the Hughes decision. The STATE now advances that same failed argument in the case at bar. In California, the Court harmonized Hughes and Corvallis, explaining:

> Corvallis itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced." 429 U.S at 371 ... The Corvallis opinion ... recognized ... that the Hughes Court considered oceanfront property "sufficiently different ... so as to justify a 'federal common law' rule of riparian proprietorship." 429 U.S. at 377 n.6. The Corvallis decision did not purport to disturb Hughes.

457 U.S. at 281-82.

Reaffirming Hughes, the Court unequivocally ruled that one unified choice-of-law rule applied, holding:

> that a dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law.

457 U.S. at 283. The State's contention that the foregoing rule is dicta is an unsupportable attempt to divide the one unified choice-of-law rule. The California decision clearly demonstrates that the Court makes no distinction between federally patented oceanfront lands and lands still owned by the federal government.

Repeatedly, the Court referred to this rule.[2]

In summary, it is clear that the decision rendered in Corvallis dealt soley with inland property and has no application to the case at bar. Conversely, it is the Hughes rule, which dealt with oceanfront land, that supplies the rule of decision in the instant case. Recognizing this critical distinction, the Supreme Court in California harmonized these decisions on the basis of compelling federal interest in the nation's boundaries. The California Court conclusively held that federal law determines title to accretion on oceanfront land owned or patented by the United State. The determinate rulings of the United States Supreme Court unequivocably require that title to the accretion on SAND KEY'S federally patented oceanfront property be governed by application of federal law.

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2. For example, in closing its opinions, the California court summarized:

> We reaffirm today that federal law determines the boundary of oceanfront lands owned or patented by the United States.

457 U.S. at 288 (emphasis added).

III. THE DISTRICT COURT PROPERLY HELD THAT UNDER FEDERAL LAW, THE ACCRETIONS TO SAND KEY'S PROPERTY BELONG TO SAND KEY.

The District Court's ruling that federal common law vests title to accretion on federally patented oceanfront property in the upland owner is beyond dispute. The STATE appears to concede this issue by its silence.

In California ex rel. State Land Comm. v. United States, supra, where construction of a jetty had resulted in accretions to oceanfront land, the Supreme Court explained the federal common law rule governing the rival claims to its ownership:

> [T]his is not a case in which federal common law must be created. For over 100 years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner, New Orleans v. United States, 10 Peters 662, 717 (1836); County of St. Clair v. Lovingston, 23 Wall. 46, 68 (1874). "Almost all jurists and legislators-both ancient and modern, have agreed that, the owner of the land thus bounded is entitled to these additions." Jefferis v. East Omaha Land Co., 134 U.S. 178, 189 (1890), quoting Banks v. Ogden, 2 Wall. 57, 67 (1863).

457 U.S. 273, 284 (emphasis in original).

The federal common law rule of accretion is based on the ancient precept that the right to future accretions is an inherent and essential attribute of the property. Federal law makes no distinction between naturally occurring accretion and artifically occurring accretion. Over 100 years ago, the Supreme Court noted:

> In light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion . . . . Whether it is the effect of natural or artificial causes makes no difference. The result as to ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. . . . If there be a gradual loss, he must bear it; if a gradual gain, it is his.

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874) (emphasis added).

Accordingly, the District Court properly followed more than a century of Supreme Court precedent and quieted title to the accretions in SAND KEY. As Justice Black explained in Hughes, supra:

> [T]he soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of the property, and continually vulnerable to harassing litigation challenging the location of of the original water lines.

389 U.S. at 293-94. Therefore, the District Court's holding that SAND KEY owns all accretions occurring on its oceanfront property, derived from a federal patent, must be affirmed.

CONCLUSION

This Court should take the opportunity presented to render moot the constitutional question presented in Sand Key I by affirmatively answering the certified questions submitted in Sand Key II. In so doing, the judgment of the trial court and the decision of the District Court, vesting title in accretions to SAND KEY should be upheld.

A firm foundation for such a ruling lies both within the dictates of this Court and our nation's Supreme Court. It is settled that when the constitutionality of a state statute can remain unquestioned, through the application of alternative laws, then it should remain undisturbed. Here, the law of our land is clear: "federal law determines the boundary of oceanfront lands owned or patented by the United States". California, 457 U.S. at 288. The District Court correctly adhered to these principles in reaching its decisions in Sand Key I and Sand Key II.

As contrasted by the United States Supreme Court, the rules relating to inland riparian property and oceanfront lands differ significantly. The federal common law, which applies to SAND KEY'S gulf front property, has been established for over a century. It mandates that accretions, whether artificial or natural, be vested in the owner of the upland property. Consequently, it is undisputable that SAND KEY is entitled to the accretions on its oceanfront property.

Therefore, SAND KEY requests that this Court:

1. Grant the Petition for Review in the case at bar;
2. Uphold the District Court's decision in Sand Key II;
3. Answer the certified question in the affirmative;
4. Deny the Petition for Review in Sand Key I as moot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven A. Been, Esquire, General Counsel's Office, Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32301, on this 2ND day of June, 1986.

_____
RICHARD J. SALEM, ESQUIRE