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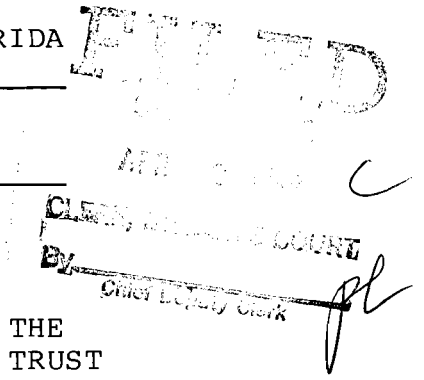
IN THE

SUPREME COURT OF FLORIDA

Case No. 68,399



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

PETITIONER,

v.

SAND KEY ASSOCIATES, LIMITED,

RESPONDENT.

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT

INITIAL BRIEF OF PETITIONER

STEVEN A. BEEN, ESQUIRE
ASSISTANT GENERAL COUNSEL
DEPARTMENT OF NATURAL RESOURCES
SUITE 1003, DOUGLAS BUILDING
3900 COMMONWEALTH BOULEVARD
TALLAHASSEE, FLORIDA 32303
TELEPHONE: (904) 488-9223

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STATEMENT OF THE CASE

This brief supports the State's* second petition for review based on a certified question from a decision of the Second District Court of Appeal arising out of the same lawsuit. The first appeal, Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Limited, Case No. 66,372, was briefed and argued and is pending before this Court. Both decisions of the Second District ruled on the same ownership question. The first decision was based on the district court's application of state law. The second decision was based on the district court's application of federal law.

Sand Key commenced this proceeding on June 3, 1983 with a quiet title action in the Sixth Judicial Circuit (Record 1). Sand Key's complaint sought a declaration that it owns approximately 5.08 acres of accreted land that gradually attached to its beach front property as the mean high water line moved seaward. (Record 1-2). The State's answer defended on the basis of section 161.051, Florida Statutes, which provides that accretion caused by Chapter 161 beach erosion control projects belongs to the State (Record 8-9). On January 4, 1984, Sand Key moved to add a Count II to its complaint, alleging that Sand Key could trace its title to an 1883 United States Patent, and demanding

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*Petitioner Board of Trustees of the Internal Improvement Trust Fund of the State of Florida is referred to as "the State." Respondent Sand Key Associates, Limited is referred to as "Sand Key."

the same relief as requested in the original complaint, but based on federal law (Record 12). On January 13, 1984, Sand Key moved for summary judgment as to Count I (Record 18). The circuit court on April 4, 1984 denied Sand Key's motion for summary judgment as to Count I (Record 152). Sand Key appealed to the Second District on May 2, 1984 (Record 155). The district court rendered its decision on Sand Key's Count I appeal on October 26, 1984. Sand Key Associates, Ltd v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2d DCA 1984). That decision was based on common law and on the district court's interpretation of section 161.051, Florida Statutes. The Second District certified to be of great public importance a question concerning the construction of section 161.051, Florida Statutes. On November 21, 1984, the State invoked the jurisdiction of the Supreme Court to consider the certified question. That appeal is pending in this Court (Case No. 66,372).

On October 9, 1984, while its appeal from the circuit court's ruling on Count I was pending before the Second District in Case No. 84-960, Sand Key moved in the circuit court for summary judgment on Count II (Record 156). On December 11, 1984, while the State's state law appeal was pending in this Court, the circuit court issued its Final Summary Judgment, which ruled for Sand Key based on the 1883 federal patent and on federal common law (Record 253-254). The State appealed to the Second District from the Final Summary Judgment on January 4, 1985. The Second

District issued a per curiam affirmance on October 4, 1985, with citations, but no opinion (Appendix 1). On January 29, 1986, treating the State's motion for rehearing en banc as a motion for rehearing, the district court withdrew its October 4, 1985 decision and substituted a new opinion. (Appendix 2-6). The January 29, 1986 opinion certified the following question as one of great public importance:

> Does the answer to the question posed in Sand Key Associates, Ltd. v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2d DCA 1984), depend upon whether the title of any upland owner is traceable to a federal patent?

Based on the certified question, the State now seeks review of the district court's January 29, 1986 decision.

STATEMENT OF THE FACTS

On December 29, 1972, Sand Key acquired deed to a parcel of land in Pinellas County bordering on the mean high water line of the Gulf of Mexico. (Record 5-6, 253). Sand Key traces its title to a United States Patent issued June 20, 1883. (Record 28). For several years prior to 1983, the beach on Sand Key's property gradually expanded seaward, and Sand Key did not take any action to cause such accretion (Record 23-27, 253). The State contends that the expansion of the beach resulted from a shore protection measure authorized pursuant to Chapter 161, Florida Statutes (Record 9, 112). Sand Key denies this (Record 11,114). There has as yet been no trial to resolve this disputed fact issue.

SUMMARY OF ARGUMENT

The district court's conclusion that:

> Where title to oceanfront property is derived from a federal patent, federal law determines the extent of that title including title to all future accretions and all such accretions belong to the littoral landowner

(Appendix 13), is based on Hughes v. Washington, 389 U.S. 290 (1967), and California ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982). Neither decision is binding or persuasive authority for the application of federal law in this case. Hughes is no longer good law because its rationale was renounced in Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977). California ex rel. State Lands Commission is not authority for the choice of law in a case of title derived from a federal patent because its statements on that subject were dicta. Corvallis is the best reasoned and most persuasive authority on the choice of law for title questions involving real property once obtained from the federal government. State law, according to Corvallis, must be applied to determine real property boundary questions, and the fact that Sand Key's coastal property can be traced to an 1883 federal patent does not authorize the use of federal law.

ARGUMENT

STATE LAW, NOT FEDERAL LAW, DETERMINES WHETHER COASTAL ACCRETION BELONGS TO AN UPLAND OWNER EVEN THOUGH TITLE IS DERIVED FROM A FEDERAL PATENT

Two United States Supreme Court cases, Hughes v. Washington, 389 U.S. 290 (1967) and California ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982), appear to support the district court's holding that federal law determines Sand Key's rights here. These cases are not determinative, however, because the authority of Hughes was ended by Oregon v. Corvallis Land and Gravel Co., 429 U.S. 363 (1977); because the pertinent parts of California are dicta, not binding on this Court; and because Corvallis remains persuasive authority for the proposition that state law should govern in real property disputes, even when title to the real property originated with the federal government.

The source of the controversy over whether federal or state law should govern ownership of accretion to land once derived from the federal government is a case that did not involve accretion, Borax Consolidate, Ltd. v. Los Angeles, 296 U.S. 10 (1935). In Borax, the Court ruled that the boundary of land granted by a federal patent is a federal question because:

> 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.

296 U.S. 22.

The United States Supreme Court first considered whether federal or state law controlled the ownership of accretion to land conveyed by the United States thirty-two years after Borax, in Hughes v. Washington. In Hughes, the successor to a federal grant of ocean-front property sued to establish her right to future accretion despite a Washington Supreme Court ruling that the Washington constitution vested accretion in the state. The U.S. Court held the choice of law to be dictated by Borax. The Court found "no significant difference" 389 U.S. 292, between the determination of the boundary of land conveyed by a federal patent in Borax and the right to future accretion attached to land conveyed by a federal grant in Hughes. Thus, Hughes held that federal law applies to decide who owns accretion to land once conveyed by the federal government. Hughes also considered but refused to select the state rule as the federal rule, relying on Borax and on the following analysis:

> 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. 293.

The Hughes case happened to deal with ocean-front property. In Bonelli Cattle Company v. Arizona, 414 U.S. 313 (1973), the U.S. Court addressed the choice of law question again, this time in the context of accretion to land abutting the Colorado River. The Bonelli Cattle Company owned the upland as successor to a federal patent. Arizona had obtained the land submerged under the river from the federal government by virtue of the equal footing doctrine upon Arizona's admission as a state. The dispute was over land formerly belonging to Bonelli Cattle that had been submerged by gradual migration of the river, and then uncovered by a rechannelling project. The Arizona Supreme Court had applied state law and ruled the land Arizona's. As in Hughes, the Court in Bonelli Cattle reversed the state court and, following Borax, determined that federal common law governed ownership of newly emerged land because the land had once been derived from the federal government.

Under Hughes and Bonelli Cattle, the U.S. Supreme Court carved out a significant part of state real property law and replaced that law with common law created by the federal courts. The displacement of state law in Hughes and Bonelli was not mandated by Congress. It did not facilitate any Congressional

program. It was based on the 1935 precedent of Borax, though Borax preceded the drastic reduction of the role of federal common law in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), and though Borax can easily be read to govern merely the geographic extent of a federal grant, not the perpetual legal rights of the federal grantee.

In Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977), the Court set a new course. Corvallis expressly overruled Bonelli Cattle and reestablished the primary role of the state in the area of real property. Neither Borax nor the equal footing doctrine, the Corvallis Court ruled, was justification for application of federal law to determine boundary questions for land that had long been conveyed out of federal ownership. As the Court declared:

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. . . . This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of Swift v. Tyson, an exception was carved out for the local law of real property.

429 U.S. 378-379 (citations omitted). Quoting Wilcox v. Jackson, 13 Pet. 498 (1839), the Court said:

> We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States

> has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

429 U.S. 378 quoting 13 Pet. 517 (emphasis by the Corvallis Court).

The return to state law of accretion questions on river-front property logically should apply to ocean-front property as well. The Corvallis Court declined to expressly rule on the status of Hughes however, and suggested in a footnote that application of federal common law might be justified for ocean-front property by the language in Hughes, quoted above, concerning waters that lap the international sea. This contention was addressed by Justice Marshall, dissenting in Corvallis, at 429 U.S. 383, ftn. 1. Justice Marshall correctly points out that land above the mean high tide does not touch the international sea. It is submerged land below the mean high tide that extends to international water, and this land is clearly owned by the state. Accretion, such as that involved in Hughes, California ex rel. State Lands Commission v. United States, and the instant case, all lies above mean high tide. As Justice Marshall stated, "There are no international relations implications in the ownership of land above the line of mean high tide" 429 U.S. 383, ftn.1. Even if international water did come up to touch the

shore, there is no apparent federal interest in determining whether the state or a private person tracing title to a remote federal grant is the current owner of the land that touches water.

Justice Marshall, dissenting in Corvallis, argued that Corvallis had in effect overruled Hughes. The majority in Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) reflected the understanding that Corvallis had restored state law to its primary role by describing Corvallis as holding that:

> absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways.

442 U.S. 669. After Corvallis and Omaha Indian Tribe, Hughes has been so completely undermined that there can no longer be said to be a binding precedent for application of federal law to coastal accretion even when the upland is derived from a federal grant.

The U.S. Court's most recent discussion of the choice of law in accretion cases, California ex rel. State Lands Commission v. United States, did indicate a renewed interest in injecting federal common law into local real property disputes. But the actual holding of California does not have this effect, because the case involved accretion to land currently owned by the United States government. In that situation, there is a direct federal interest that may properly override local law. In

Wilson v. Omaha Indian Tribe, the Court had held federal law to apply in such circumstances, and California could have been decided based on Wilson alone. The Court went beyond the facts of the case, however, to consider the choice of law for ocean-front accretion where the upland owner derives title from the federal government. The Court rejected the notion that Hughes had been undermined by Corvallis. The "international sea" language of Corvallis, which had been criticized by Justice Marshall, was used to distinguish ocean-front property. The Court stated in California that ownership of accretion to ocean-front property derived from the federal government would be decided by federal law.

This Court should not feel bound by the parts of the California opinion that go beyond the ruling of the case. In the typical accretion situation, when the United States is not a party, there is no real federal interest. The part of the California opinion that deals with Hughes and land derived from a federal grant is simply dicta, as Justice Rehnquist's cogent concurrence, joined by Justice Stevens and Justice O'Conner, observed.

There is no good reason for grantees of federal river-front land to be subject to state law while grantees of federal ocean-front land and their successors forever are subject to federal common law. Neither does it make sense for ocean-front neighbors to have their ocean boundaries determined by different

bodies of law, due simply to the happenstance that one can trace title back to a hundred year old federal grant, while the other cannot.

CONCLUSION

Whether or not federal common law supercedes the state law of coastal accretion when an upland owner can trace title to a federal patent is ultimately a question for the United States Supreme Court. It seems likely that however this Court decides the choice of law question, either Sand Key or the State will seek certiorari in the U. S. Court, assuming this Court construes section 161.051, Florida Statutes as the State has requested in Case No. 66,372. If this Court were to decide that federal common law governs, then it would nonetheless be important for the Court to rule on the state law question of Case No. 66,372. Without an authoritative interpretation of section 161.051, it would be more difficult to persuade the U. S. Court to grant review. A final decision from this Court based solely on federal law would leave both state and federal law unsettled. In the interest of getting a definitive resolution for the parties to this case, as well as for the clarification of the law of accretion, this Court should decide both the state and the federal issues raised by these two appeals.

This Court should decide the choice of law question in favor of state law. If any area of law, by tradition and by practicality, ought to be governed by state law, it is the law

of real property boundaries. The inconsistent decisions of the United States Supreme Court leave the choice to this Court, and the common sense approach of Oregon v. Corvallis Sand and Gravel, Co., suggests that the choice should be for state law.

Respectfully submitted,

STEVEN A. BEEN
Assistant General Counsel
Department of Natural Resources
Suite 1003, Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32303
(904) 488-9223

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner has been furnished by U.S. Mail on RICHARD J. SALEM, 111 Parker Street, Suite 301, Post Office Box 3399, Tampa, Florida 33601 this 31st day of March, 1986.

STEVEN A. BEEN
Assistant General Counsel