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Conflict of Laws--Equal Footing Doctrine Does Not Require Application of Federal Common Law to Resolve Ownership of Land Underlying Navigable Waterways Which Are Not Interstate Boundaries

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RECENT DEVELOPMENTS

CONFLICT OF LAWS—EQUAL FOOTING DOCTRINE DOES NOT REQUIRE APPLICATION OF FEDERAL COMMON LAW TO RESOLVE OWNERSHIP OF LAND UNDERLYING NAVIGABLE WATERWAYS WHICH ARE NOT INTERSTATE BOUNDARIES. *Oregon* ex rel. *State Land Board v. Corvallis Sand and Gravel Co.*, 97 S. Ct. 582 (1977).

In *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*,[1] Oregon brought an ejectment action against the Corvallis Sand and Gravel Company, claiming title to two separate parcels of land in question. The land was part of the riverbed of the Willamette, a navigable waterway. The first parcel had been part of the Willamette riverbed since before Oregon was admitted to the Union. The second parcel, known as the Fischer Cut lands, had become a riverbed in 1909, after statehood, following a major flood.[2] The trial court awarded the former parcel to the state, after finding that sovereign title to the riverbed had vested in the state at the time of its admission to the Union, and that it had never conveyed that title. The Fischer Cut lands, however, were awarded to the company under the doctrine of avulsion.[3]

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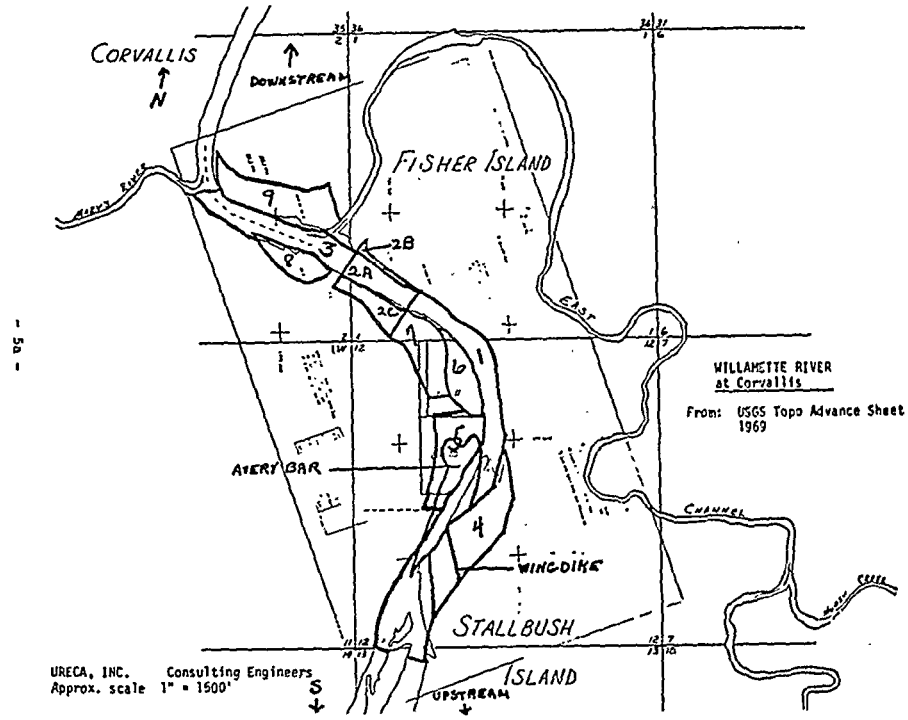
1. 97 S. Ct. 582 (1977).

2. The parcels of land in question and the general topography of the immediate area are depicted in the map below, which is reproduced from State v. Corvallis Sand & Gravel Co., 18 Or. App. 524, —, 526 P.2d 469, 473 (1974). As the court stated:

> Prior to the latter part of 1909, the northerly portion of the Willamette River now shown . . . as the East Channel was the main channel of the river. Prior to 1909 the main channel veered to the east from a point just south of . . . Parcels 2A, 2B and 2C, went around the east side of Fischer Island and rejoined what is now the main channel at a point to the northwest of . . . [those parcels]. . . . Parcels 2A, 2B and 2C . . . described as the Fischer Cut area was a minor non-navigable channel which was submerged only seasonally. However, following a storm and flood in late 1909, the area known as Fischer Cut became the main channel of the river and the East Channel gradually became non-navigable. *Id.*

3. Avulsion occurs when "a stream suddenly and perceptibly abandons its old channel." Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912). If the waterway was a boundary, avulsion has no effect on it; the boundary remains where the pre-avulsion channel was situated. *Id.*; Arkansas v. Tennessee, 246 U.S. 158, 173 (1918); St. Louis v. Rutz, 138 U.S. 226, 245 (1891).

The Oregon Court of Appeals affirmed the trial court.[4] Believing that it was bound by *Bonelli Cattle Co. v. Arizona*[5] to apply federal common law to the dispute, the intermediate appellate court held that the company had acquired title to the Fischer Cut lands either by virtue of the federal theory of avulsion[6] or the federal exception to its accretion rule.[7] The Supreme Court of Oregon affirmed with minor modifi-



4. 18 Or. App. 524, 526 P.2d 469 (1974).

5. 414 U.S. 313 (1973). *Bonelli* was decided while an appeal to the state intermediate court was pending in *Corvallis.*

6. *See* note 3 *supra.*

7. The accretion rule vests title in the riparian owner of the newly formed land created "by the gradual deposit of soil due to the action of a bounding river or other body of water." Bauman v. Choctaw-Chickasaw Nations, 333 F.2d 785, 789 (10th Cir. 1964) (footnote omitted). The exception to the accretion rule holds:

> [W]here a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the

cations[8] and the United States Supreme Court granted certiorari.[9] The majority[10] overruled *Bonelli*, holding that Oregon law should be applied on remand to resolve the question of title of the riverbed.[11] In so holding, the Supreme Court returned to a firmly established doctrine, thereby declining to follow a decision which could have a disruptive effect on many land titles and which ignored the varying policies of the states with regard to riparian lands.[12]

The issue before the Court in *Corvallis* was whether federal common law should have been applied to determine the ownership of the riverbed in dispute. Resolution of this issue turned on the proper application of the equal footing doctrine. Equal footing requires that "new states since admitted [to the Union be afforded] . . . the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders."[13] In *Pollard's Lessee v. Hagan*,[14] the Supreme Court applied the equal footing doctrine to hold that newly admitted states acquired title to the riverbeds of all navigable waterways within their boundaries.[15] With vesting of title in the states, state law would be determinative of questions relating to the transfer of title and other property matters.

Yet federal common law has been applied to decide issues regarding riparian rights and title to lands adjacent to or underlying navigable waterways. However, cases where federal common law supplied the rule have involved situations where the public interest required a uni-

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boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water remains a running stream.

18 Or. App. at —, 526 P.2d at 477 (*quoting* Commissioners v. United States, 270 F. 110, 113-14 (8th Cir. 1920)).

8. 272 Or. 545, 536 P.2d 517, *rehearing denied*, 272 Or. 545, 538 P.2d 70 (1975). The modifications dealt with certain factual questions relating to the precise amount of land to be included in one of the parcels.

9. 423 U.S. 1048 (1976).

10. *Corvallis* was a 6-3 decision. Justice Rehnquist wrote the majority opinion and was joined therein by Chief Justice Burger and Justices Stewart, Blackmun, Powell, and Stevens. Justice Brennan filed a dissenting statement and Justice Marshall wrote a dissenting opinion in which Justice White joined.

11. 97 S. Ct. at 592.

12. *See, e.g.*, Note, *The Federal Rule of Accretion and California Coastal Protection*, 48 S. CALIF. L. REV. 1457 (1975).

13. Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867) (footnote omitted).

14. 44 U.S. (3 How.) 212 (1845).

15. *Id.* In *Mumford*, the Court reaffirmed its view by holding that the thirteen original colonies succeeded to the rights and title of the English Crown in all soils underlying navigable rivers and that these rights also passed to the later-created states. 73 U.S. (6 Wall.) at 436. The foundation of the equal footing doctrine is the tenth amendment. *See id.* at 436.

form rule for the nation. Thus it has been applied in cases involving navigable waters which formed interstate boundaries[16] and where conflicting claims to the same land were made by federal and state patentees.[17] Moreover, until recently, except in situations involving interstate boundaries, federal law only defined the boundaries of the states when they were admitted into the Union; thereafter, state law controlled subsequent issues of title and dispositions of that land.[18]

Bonelli Cattle Co. v. Arizona[19] expanded the situations where federal common law would control. In *Bonelli* the question was whether the state or plaintiff Bonelli held title to certain riparian land on the east bank of the Colorado River, a navigable waterway which, like the Willamette in *Corvallis*, was not an interstate boundary. The land had originally been granted under a federal patent to Bonelli's predecessor in title. Much of this land was submerged by the gradual eastward movement of the river, with Arizona automatically acquiring title to the newly created riverbed. In 1959, a project of the Federal Bureau of Reclamation resulted in the re-emergence of the Bonelli land.[20] Application of the state's rule of avulsion did not divest the state of title to this land;[21] the United States Supreme Court, however, held that federal common law applied, awarding title to Bonelli under the federal rule of accretion.[22]

The *Bonelli* Court agreed that the equal footing doctrine vested title to the changing riverbed in the state, but the majority[23] took a further step and framed the issue as follows:

> The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters.[24]

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16. *See, e.g.*, Arkansas v. Tennessee, 246 U.S. 158 (1918); Nebraska v. Iowa, 143 U.S. 359 (1892).
17. *See, e.g.*, Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935).
18. *See* cases cited at notes 16-17 *supra.*
19. 414 U.S. 313 (1973).
20. *Id.* at 316.
21. State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971).
22. 414 U.S. at 325-32.
23. *Bonelli* was a 7-1 decision. Justice Stewart dissented, while Justice Rehnquist did not participate. Justice Stewart joined in overruling *Bonelli* in *Corvallis.* See note 10 *supra.*
24. 414 U.S. at 319-20. The Submerged Lands Act, 43 U.S.C. §§ 1301-1303

The Court thus assumed that the equal footing doctrine not only vested title to submerged lands in the states, but also that the doctrine determined the rules to be applied to resolve ownership disputes arising from subsequent alterations in those submerged lands.

Armed with this assumption, the Court criticized the state court's interpretation of the equal footing doctrine, which allowed application of state law to vest title to the re-emerged land in the state. The Court held, in this regard, that the "equal-footing doctrine was never intended to provide a State with a windfall of thousands of acres of dry land exposed when the main thread of a navigable stream is changed."[25] Furthermore, the Court found that no state interest would be served by awarding the land to the state.[26]

Mr. Justice Stewart dissented in *Bonelli*. He asserted that the equal footing doctrine gave Arizona sovereignty over the beds of all navigable rivers within its boundaries; therefore, the state must necessarily have the power to apply its own law to resolve any subsequent disputes over title to that property.[27] In short, the federal law determines only the original extent of the absolute grant to the state; thereafter state law must control any disposition of the land.[28]

Justice Stewart's dissent is the position now espoused by the *Corvallis* majority. The Court cited *Wilcox v. Jackson*[29] for the proposition that while federal law must control the determination of whether title to land has passed from the national to the state government, state law must control all subsequent dispositions of the property that has been absolutely vested in it by the equal footing doctrine.[30] The Court proclaimed that it was returning to a rationale based on a line of cases dating back to 1845.[31] With the repudiation of *Bonelli*'s expansive ap-

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(1970), had no bearing on the outcome of *Bonelli* or *Corvallis*. As the Court in *Corvallis* observed:

> [T]he Submerged Lands Act did not alter the scope or effect of the equal footing doctrine, nor did it alter State property law regarding riparian ownership. The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government.

97 S. Ct. 587, n.4.

25. 414 U.S. at 322 (footnote omitted).

26. *Id.* at 323-25.

27. *Id.* at 333.

28. *Id.* at 336-37.

29. 38 U.S. (13 Pet.) 498 (1839).

30. 97 S. Ct. at 587.

31. *Id.* at 592. However, federal common law *may* still supply the applicable rule for ocean-front property under the rationale of Hughes v. Washington, 389 U.S. 290 (1967) (applying federal rule of accretion to such land). The majority in *Corvallis*,

plication of federal common law, state law will hereafter govern the impact that accretion, avulsion and re-emergence will have on the ownership of land surrounding or underlying navigable waterways which do not form interstate boundaries or are otherwise situated so as to call for the application of a national uniform rule.

The importance of this doctrinal reversal is emphasized by an illustration of the differences which result from the application of federal common law and state law in California.[32] For example, the California rule of accretion classifies, as a general rule, all artificial coastal accretions as tidelands,[33] thereby subjecting the land to the California tideland trust.[34] The state rule gives upland owners the benefit of all natural accretions.[35] The federal rule of accretion, on the other hand, makes no distinctions between artificial and natural accretions and classifies all accretions as uplands, thereby avoiding subjection to the state trust.[36] Thus, the application of the federal common law thwarts the express state public policies of coastal protection[37] and free beach access[38] which the California tideland trust attempts to promote.

Other states also have their own unique interests in riparian lands and in implementing their own varying public policies with respect to

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while recognizing that *Hughes*, like *Bonelli*, gave an expansive interpretation of prior case law in order to apply federal law, declined to address the issue, noting that *Hughes* was neither considered by itself in *Bonelli* nor relied on by the Oregon courts in the present case. 97 S. Ct. at 590, n.6. The dissent took the position that *Hughes* was overruled by the majority's holding in *Corvallis*. 97 S. Ct. at 593.

32. The State of California, concerned about the potential impact of *Corvallis*, moved for permission to participate in the case as amicus curiae. The Supreme Court denied its motion. 424 U.S. 963 (1976).

33. City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789 (1929); *see generally* 65 C.J.S. *Navigable Waters* § 82(1-2) (1966).

34. The tidelands trust is essentially a land-use restriction. It has been defined as a tripartite restriction on the government's authority over the land:

> [F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses . . . such as navigation, recreation, or fishery, or . . . uses . . . in some sense related to the natural uses peculiar to that resource.

Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970). *See also* Comment, *The Tideland Trust: Economic Currents in A Traditional Legal Doctrine*, 21 U.C.L.A. L. REV. 826 (1974).

35. *See* note 33 *supra*.

36. *See, e.g.*, Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966).

37. California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30010 (West Supp. 1977); *See* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

38. CAL. PUB. RES. CODE §§ 30000-30010 (West Supp. 1977). *See* Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

those lands.[39] The great geographical diversity and needs of states, the tenth amendment,[40] and the rationale of the line of cases extending over a century and a half all point toward permitting each state to decide questions such as the ones presented by *Corvallis*.

The equal footing doctrine and certain factual patterns, such as the presence of prestatehood foreign patents, may require a federal determination of the extent of original land holdings. Once this decision has been made, however, all subsequent changes in title brought about by such changes as accretion or avulsion should be governed by the law of the state involved.[41] The United States Supreme Court has returned to this salutary rule in *Corvallis*.

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39. *See, e.g.*, Hughes v. State, 67 Wash. 2d 799, 816, 410 P.2d 20 (1966), *rev'd sub nom.* Hughes v. Washington, 389 U.S. 290 (1967) (Washington state rule classifies *all* accretions, both natural and artificial, as tidelands, subject to the tidelands trust); Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (duscussing state's multiple interests in its navigable waters and creation of a public trust to promote those interests).

Oklahoma appears to follow the federal rules of accretion and avulsion in advancing its interests in its waters, although there is scant authority on the question. *See* Olsen v. Jones, 412 P.2d 162 (Okla. 1966); State *ex rel.* Commissioners of Land Office v. Warden, 200 Okla. 613, 198 P.2d 402 (1948); City of Tulsa v. Commissioners of Land Office, 187 Okla. 82, 101 P.2d 246 (1940); Goins v. Merryman, 183 Okla. 155, 80 P.2d 268 (1938); Willett v. Miller, 176 Okla. 278, 55 P.2d 90 (1936). *See also* Bauman v. Choctaw-Chickasaw Nations, 333 F.2d 785 (10th Cir. 1964).

40. See note 15 *supra*.

41. The federal rules will still govern interstate boundary disputes involving navigable waterways. *See* note 16 *supra* and accompanying text.