

ORIGINAL

In the
Supreme Court of the United States

KAISER AETNA, ET AL.,

PETITIONERS,

v.

UNITED STATES

RESPONDENT.

No. 78-738

Washington, D. C.
October 1, 1979

Pages 1 thru 52

Hoover Reporting Co., Inc.

*Official Reporters
Washington, D. C.*

546-6666

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:
3 KAISER AETNA, ET AL., :

4 Petitioners, :

5 v. :

No. 78-738

6 UNITED STATES, :

7 Respondent. :

8 -----:
9 Washington, D. C.

10 Monday, October 1, 1979.

11 The above-entitled matter came on for oral argument
12 at 11:06 a.m.

13 BEFORE:

14 WARREN E. BURGER, Chief Justice of the United States
15 WILLIAM J. BRENNAN, JR., Associate Justice
16 POTTER STEWART, Associate Justice
17 BYRON R. WHITE, Associate Justice
18 THURGOOD MARSHALL, Associate Justice
19 HARRY A. BLACKMUN, Associate Justice
20 LEWIS F. POWELL, JR., Associate Justice
21 WILLIAM H. REHNQUIST, Associate Justice
22 JOHN PAUL STEVENS, Associate Justice

23 APPEARANCES:

24 RICHARD CHARLES BOCKEN, ESQ., Damon, Key, Char &
25 Bocken, 810 Richard Street, Honolulu, Hawaii
96813; on behalf of the Petitioners

KATHRYN A. OBERLY, ESQ., Land and Natural Resources
Division, Department of Justice, Washington, D. C.;
on behalf of the Respondent

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear argument
3 next in 78-738, Kaiser Aetna, et al., v. the United States.

4 Mr. Bocken, you may proceed whenever you are ready.

5 ORAL ARGUMENT OF RICHARD CHARLES BOCKEN, ESQ.,

6 ON BEHALF OF THE PETITIONERS

7 MR. BOCKEN: Mr. Chief Justice, and may it please
8 the Court:

9 This case is here upon a grant of a writ of
10 certiorari to the Ninth Circuit. I believe that this is a
11 unique case which will require this Court to distinguish be-
12 tween federal regulatory authority and the public navigation
13 servitude.

14 The issue presented is as follows: Does the pri-
15 vately funded improvement of a private pond which is the
16 legal equivalent of fast land when that pond is connected to
17 navigable waters of the United States thereby become burdened
18 with a public navigation servitude even though no public
19 funds are involved.

20 QUESTION: Mr. Bocken, was there a natural opening
21 between the pond and the bay?

22 MR. BOCKEN: Pre-development, Your Honor?

23 QUESTION: In its natural state.

24 MR. BOCKEN: In its natural state, it was separated,
25 the pond was separated from the bay, from the sea by a

1 barrier, a beach barrier. There were -- and whether they were
2 natural or not, I don't know, but an ancient Hawaiian history
3 in the use of the pond as a fish pond, there were sluice
4 gates that were narrow in nature which did exist when they
5 were placed there -- history doesn't tell us, Your Honor.

6 QUESTION: This is way down on the southeast tip of
7 the island, isn't it?

8 MR. BOCKEN: That's right, Your Honor.

9 QUESTION: Is there any place in the record that in-
10 dicates the distance between the high water mark and the be-
11 ginning of the seaward edge of the pond?

12 MR. BOCKEN: Well, the seaward edge of the pond is
13 the barrier -- yes, the sea went to the barrier beach. True,
14 it is an admitted fact that there was some tidal action in
15 the pond, the waters of the pond, however, were brackish and
16 included fresh water runoff.

17 QUESTION: Well, the reason I ask the question is in
18 the case of United States v. Rands, which Mr. Justice White
19 wrote for the Court several years ago, the land condemned was
20 referred to as riparian land, that is presumably having access
21 to navigable water or at least having access to water. Would
22 you describe this as riparian land?

23 MR. BOCKEN: No, I don't think so, Your Honor. I
24 think this is a private pond which had no access to the sea
25 prior to the development stage in the sixties. At that time,

1 there was no evidence -- and I think the government will con-
2 cede this -- there was no traffic between the pond and the
3 sea except I suppose you could physically somewhere carry a
4 small flat bottom boat over the barrier beach and place it in
5 the sea. But certainly three sides it was just land and then
6 the barrier beach which had been there for centuries separated
7 the pond from the ocean.

8 QUESTION: But it was opening up to the sea, that
9 some artificial barriers were placed between the pond and the
10 sea?

11 MR. BOCKEN: Well, I don't know, Your Honor, if they
12 would be referred to as artificial barriers.

13 QUESTION: Well, were they barriers enough to keep
14 fish in?

15 MR. BOCKEN: That's correct, they were sluice --

16 QUESTION: So if they hadn't placed the barriers
17 there they would have lost some fish?

18 MR. BOCKEN: That's correct, Your Honor.

19 QUESTION: By their swimming to the ocean.

20 MR. BOCKEN: They may have flushed out with the tide,
21 Your Honor, right.

22 But for centuries and under unique Hawaii law, the
23 fish ponds were always considered to be private property.
24 They were never considered to be part of the sea. They were
25 considered to be part of the land and under Hawaii law these

1 ponds, the title to them could be transferred. In some cases
2 they were described in land commission awards, some of them,
3 as this pond was, was included within a parcel of land which
4 was owned by the Bishop Estate, the Bishop Estate being an
5 educational trust created for the supporting of the Hawaii
6 Kamehameha School System, and this particular pond was located
7 within a parcel which was owned and had been owned for a long
8 period by the Bishop Estate, and while owned by the estate it
9 was leased out to various individuals for use as a fish pond.

10 It was, as I mentioned before, not navigable in its
11 natural condition and its private nature had been recognized
12 for centuries, through ancient Hawaiian custom as outlined
13 extensively in our brief by Hawaii law and by federal law
14 upon annexation of the territory as a state in the union, and
15 that annexation act is codified, which is called the Organic
16 Act, is codified at 48 U.S. Code 506, and it recognized these
17 ancient Hawaiian rights to fish ponds. In short, they were
18 treated as private land, as the equivalent, the legal
19 equivalent of fast land just as a farm or a house lot would
20 be considered. They were not considered separately as part
21 of the sea.

22 QUESTION: If the government were to come in and
23 have condemned this particular fish pond, the items which
24 were compensable and went to measuring compensable value, it
25 would have been determined by federal law, wouldn't they?

1 MR. BOCKEN: No, Your Honor, I think that they would
2 be determined by the state law. I think what would be taken
3 would have to be valued in accordance with state law in the
4 valuation.

5 QUESTION: But how about your concept of riparian
6 servitude which descends from the Commerce Clause regulation
7 of the -- Article I of the Constitution, even if state law
8 recognized the value as a hydroelectric site in the various
9 cases we have decided as a compensable item, if the state were
10 taking under the cases from this Court, the federal condemna-
11 tion would not have to include that in valuation, isn't that
12 correct?

13 MR. BOCKEN: Would not have to include what, Your
14 Honor?

15 QUESTION: The value of particular land as a site
16 for the construction of a hydroelectric dam.

17 MR. BOCKEN: I don't know -- whatever purpose it
18 would be taken for, it would have to be compensated -- the
19 owner would have to be compensated.

20 QUESTION: Well, sure he would have to be compensated,
21 but the question is what elements go into the making up of
22 that value that he is ultimately paid.

23 MR. BOCKEN: Well, I think that it would relate to
24 comparable values in the state of Hawaii, whatever the com-
25 parable values might be for --

1 QUESTION: In each determination the -- in answer
2 to my Brother Rehnquist's question, whether or not something
3 is property at all depends upon state law. I mean Hawaii
4 law might have been --

5 MR. BOCKEN: That's correct.

6 QUESTION: -- that these fish ponds were not the
7 property of the fee owner or the lands surrounding them, and
8 if they had been not property at all then there would be zero
9 compensation.

10 MR. BOCKEN: That's correct. I concede that.

11 QUESTION: Even though the federal government tried
12 to condemn them. But as you say, the money law did recognize
13 them as part of the fee.

14 MR. BOCKEN: That's right.

15 QUESTION: The land fee title.

16 MR. BOCKEN: That's correct.

17 QUESTION: And now when the federal government con-
18 demns them, it is its property, but the elements to be con-
19 sidered in the condemnation, certainly in the light of our
20 cases, are matters of federal law and when you come to the
21 discounting the value of the property by the navigational
22 servitude.

23 MR. BOCKEN: Except that we --

24 QUESTION: I think that is --

25 MR. BOCKEN: -- navigation servitude there for a --

1 QUESTION: I know, but assuming there is one.

2 MR. BOCKEN: Oh, yes.

3 QUESTION: And the hydroelectric example given by my
4 brother is one --

5 MR. BOCKEN: Yes.

6 QUESTION: -- or the riparian right in the Rand case
7 is another.

8 MR. BOCKEN: Yes.

9 QUESTION: Those are discounted as a matter of
10 federal law. Whether or not the item to be taken is property
11 at all is a matter of state law.

12 MR. BOCKEN: That's correct, Your Honor.

13 QUESTION: Mr. Bocken, to go back a little, in the
14 old law and the present law of Hawaii, federal law not being
15 involved, could you drain it and build something?

16 MR. BOCKEN: Yes, Your Honor. As a matter of fact,
17 some of the ponds were filled in, some of them were abandoned
18 and no longer used as fish ponds, some of them were --

19 QUESTION: Well, what is the law in Hawaii?

20 MR. BOCKEN: That is the law in Hawaii. They remain
21 as fish ponds.

22 QUESTION: If I have a pond of --

23 MR. BOCKEN: Yes, Your Honor.

24 QUESTION: -- 500-and-some acres, I can fill it in
25 if I want to, right?

1 MR. BOCKEN: It has been done.

2 QUESTION: I know a lot of things that have been
3 done that are illegal.

4 MR. BOCKEN: Yes, Your Honor, it could be done
5 legally.

6 QUESTION: All right, that is what I was asking for.
7 That's all.

8 QUESTION: Mr. Bocken, in your view could the Corps
9 of Engineers have blocked off access to the pond without pay-
10 ing compensation?

11 MR. BOCKEN: Blocked off the access, at what period
12 at this period?

13 QUESTION: Any time.

14 MR. BOCKEN: Blocked off the sluice gates that we
15 have mentioned?

16 QUESTION: Yes.

17 MR. BOCKEN: I would imagine that had they done so,
18 it might have and would have interfered with the private
19 property right which would be compensable.

20 QUESTION: Private property right being the right
21 of access to the sea, is that your point?

22 MR. BOCKEN: Being a destruction of the pond as it
23 was being used at that time, Your Honor. I suppose it might
24 be compared to if the federal government had taken any other
25 fast land or blocked in some way or interfered with the use or

1 a property right of a private property owner by some action of
2 the Corps of Engineers. I think the difficulty we have in
3 this case is the seding of water as fast land, and that is
4 what I am urging upon this Court. The petitioners are for a
5 law that treats this pond as fast land. I think if we think
6 of it as fast land, that --

7 QUESTION: Until you drain it, it is not land.

8 MR. BOCKEN: Pardon me?

9 QUESTION: Until you drain it, it is not land.

10 MR. BOCKEN: Maybe I misstate -- it is the legal
11 equivalent of fast land and it is treated as fast land. It is
12 sold as fast land and its ownership has the same property
13 rights as fast land.

14 QUESTION: It is just like a farm pond out in the
15 middle of Ohio.

16 MR. BOCKEN: That is right. In fact, the owners of
17 the --

18 QUESTION: Well, were there sharecropped in the
19 pool?

20 MR. BOCKEN: No, but there are property taxes and
21 there have been real property taxes paid on this pond for I
22 don't know how many years, forever as far as I know, and the
23 real property taxes are paid just like any other real
24 property taxes. So it is treated the same as the farm in
25 Iowa, the land in Florida. There is no legal difference in

1 the treatment of the two.

2 QUESTION: You are saying then that Congress, even
3 exercising its commerce power, could not have provided for
4 public access to this pond?

5 MR. BOCKEN: That's true, Your Honor, without
6 condemnation and compensation.

7 QUESTION: So you think the answer is the same then
8 under the commerce power or under the navigation servitude?

9 MR. BOCKEN: Your Honor, I think regardless of which
10 it is, the position that we take is that no federal naviga-
11 tion, no federal public navigation servitude ever existed on
12 this property.

13 QUESTION: I know, but I ask you what if Congress
14 passed a statute that said that there would be public access
15 to this fish pond, to this pond the way it is now.

16 MR. BOCKEN: Well, I think they would have to pay
17 for it.

18 QUESTION: But what if we decided that they would
19 not have to pay for it if the commerce power were exercised?

20 MR. BOCKEN: Well, if this Court said that they
21 didn't --

22 QUESTION: Would that answer the navigation question
23 too or not, the navigation servitude question or not?

24 MR. BOCKEN: I don't know how the two can be
25 separated.

1 QUESTION: So you agree then with the court below
2 that you can't separate the two?

3 MR. BOCKEN: No, I disagree with that. I think the
4 federal regulatory authority, if you want to regulate any
5 activities with the pond, you can do that the same as you
6 could with another --

7 QUESTION: Well, how about authorizing public access
8 though --

9 MR. BOCKEN: No.

10 QUESTION: -- by statute?

11 MR. BOCKEN: No.

12 QUESTION: So for that purpose the servitude and the
13 commerce power are identical?

14 MR. BOCKEN: Identical.

15 QUESTION: Well, the servitude is -- there is
16 nothing in Article I of the Constitution that says anything
17 about navigational servitude, is there?

18 MR. BOCKEN: Well, it is an established law that --

19 QUESTION: It is established by reason of the power
20 of Congress to --

21 MR. BOCKEN: To regulate commerce.

22 QUESTION: -- to regulate interstate commerce.

23 MR. BOCKEN: Right.

24 QUESTION: And navigational servitude is simply
25 shorthand for the fact that when you are condemning land or

1 when you are making land or water highways navigable, you do
2 not have to pay certain elements to the landowner.

3 MR. BOCKEN: And the reason for that being that the
4 navigation servitude always existed on public navigable
5 waters. That is why the government doesn't have to pay for
6 it, because it always had that right. They didn't have that
7 right in Kuapa Pond, for two reasons: One, because it was
8 not navigable in fact, nor could it be made susceptible to
9 navigability with reasonable resources, but primarily because
10 of Hawaii law which is recognized by the federal --

11 QUESTION: When did it become navigable?

12 MR. BOCKEN: Pardon me?

13 QUESTION: When did it become navigable?

14 MR. BOCKEN: It became navigable in fact -- and I
15 want to stress that, Your Honor, in fact -- during the
16 sixties, during the development stage by --

17 QUESTION: When the water from the sea came in?

18 MR. BOCKEN: There is no question about it. That
19 is a conceded fact, that after the pond and the surrounding
20 area was leased to Kaiser Aetna for development, then it did
21 become navigable in fact. I might add that that development
22 stayed within total complete coordination with the Corps of
23 Engineers.

24 QUESTION: Let me try another hypothetical on you
25 which may or may not shed light. Suppose an inland landowner

1 had a large area that was low, below sealevel. Could he with-
2 out the approval of the United States Corps of Engineers run
3 a channel from his low land to the sea to let water in to
4 make a navigable --

5 MR. BOCKEN: No, I think the Corps of Engineers has
6 every right under those circumstances where it might interfere
7 with navigable waters of the United States, either by dumping
8 waste out into navigable waters, out into the sea, or causing
9 pollution or whatever reason that is a legitimate reason to
10 the federal government, that they have a right to go to that
11 owner and say, look, you're going to dig and you are going to
12 discharge or pollute the sea and you have to get a permit and
13 we are not going to let you have one until we are assured that
14 it is not going to affect navigable waters of the United
15 States.

16 QUESTION: Well, that is their regulatory power.

17 MR. BOCKEN: And if they decide that is all right
18 and the person can in fact connect to the open sea without
19 some problem or effect on navigable waters, then there is
20 nothing wrong with that and it doesn't subject the owner's
21 pond, may it be a pond in the State of Minnesota connected to
22 the Mississippi River for the farmer's ingress and egress,
23 that doesn't make his little fish pond or that little pond of
24 whatever nature he has it for public navigable waters.

25 QUESTION: But this little fish pond had 1,500

1 marinas.

2 MR. BOCKEN: Well --

3 QUESTION: This little fish pond had 1,500 marinas.

4 Am I right?

5 MR. BOCKEN: It has --

6 QUESTION: Well, when does it become a big fish pond?

7 MR. BOCKEN: Pardon?

8 QUESTION: It has got 1,500 marinas in there now.

9 MR. BOCKEN: No, Your Honor, it --

10 QUESTION: Well, how many?

11 MR. BOCKEN: Let me just describe a little bit

12 about --

13 QUESTION: Well, describe how many marinas there are.

14 MR. BOCKEN: There are slips for -- well, there is
15 one marina. I think you were referring to the number of slips
16 for boats.

17 QUESTION: Leases, yes.

18 MR. BOCKEN: About 600.

19 QUESTION: But when does it become a big fish pond?

20 MR. BOCKEN: Well, it was always --

21 QUESTION: When you say "a little fish pond," to me
22 it doesn't have boats --

23 MR. BOCKEN: No, I was talking about the little fish
24 pond that Justice Burger gave as an example.

25 QUESTION: Well, I am not talking about his example.

1 I am talking about this case.

2 MR. BOCKEN: Now, this is about 500 acres and it is
3 in its original state --

4 QUESTION: It is not a small fish pond.

5 MR. BOCKEN: No, no, no. No, sir, it was from zero
6 to about --

7 QUESTION: It is a big --

8 MR. BOCKEN: -- at high tide and at low tide the --

9 QUESTION: Well, who has control of navigation on
10 this little fish pond?

11 MR. BOCKEN: Well, in this pond today the residents
12 pay an assessment for the non-exclusive use of the pond waters,
13 and this assessment pays for a patrol boat which picks up
14 debris, it pays for a patrol boat which tries to manage and
15 to --

16 QUESTION: Well, who decides which boat passes to
17 the right and which boat passes to the left?

18 MR. BOCKEN: Well, they have internal rules which
19 have been established for the residents, Your Honor, and they
20 are all aware of these and they are printed and the people are
21 well aware of them.

22 QUESTION: You've got a little state going there,
23 huh?

24 MR. BOCKEN: No, Your Honor.

25 QUESTION: A little federal government going there?

1 MR. BOCKEN: The Coast Guard since the Ninth Circuit
2 decision has come in and out occasionally.

3 QUESTION: But without that --

4 MR. BOCKEN: But generally speaking, it is an
5 internal control by --

6 QUESTION: You could keep the Coast Guard out,
7 couldn't you? You could keep the Coast Guard out, couldn't
8 you?

9 QUESTION: With the Ninth Circuit decision, you
10 can't.

11 MR. BOCKEN: Under the Ninth Circuit decision, you
12 could not.

13 QUESTION: I said without the Ninth Circuit, you
14 couldn't --

15 MR. BOCKEN: Without the Ninth Circuit decision, I
16 think as a matter of good comity we could not keep the Coast
17 Guard out, Your Honor.

18 QUESTION: Comity between states.

19 MR. BOCKEN: We couldn't keep the Coast Guard out,
20 Your Honor.

21 QUESTION: I don't understand how this is not
22 navigable. How many boats do you have to have before it be-
23 comes navigable?

24 MR. BOCKEN: Pardon me?

25 QUESTION: How many boats do you have to have on the

1 pond before it becomes a navigable pond?

2 MR. BOCKEN: Well, I don't think -- we are not argu-
3 ing that it isn't navigable. It is navigable in fact, Your
4 Honor, and there is --

5 QUESTION: You admit that it is navigable in fact?

6 MR. BOCKEN: Yes, I admit that, Your Honor, and a
7 small portion of the pond is devoted to a marina for the
8 residents to make their pleasure boats, but this isn't a big
9 commercial harbor, this is just an internal pond which is
10 used for local residents --

11 QUESTION: So the only question --

12 MR. BOCKEN: -- who I might add -- it was created
13 as a result of \$9 million, at the time of trial almost \$9
14 million had been spent to build walls around the pond, to
15 make channels where channels never existed, to make islands
16 for houses, to pay for patrol boats to pick up debris and
17 flotsams floating around, to keep it a clean environment and
18 for safety purposes and to pay for a variety of other services
19 that these people who had the leases around the pond needed
20 and paid through their assessments to the Bishop Estate. I
21 want to emphasize that it was privately created --

22 QUESTION: Mr. Bocken, your position if I understand
23 it is that really this case is the same as the Chief Justice's
24 hypothetical, you have an owner of a large piece of dry land
25 who builds an artificial lake, digs a canal to some navigable

1 waters and it all becomes navigable -- that is the same case
2 as this?

3 MR. BOCKEN: That's right. As the Chief Justice
4 said, if the pond is in Minnesota or Iowa --

5 QUESTION: The question is whether when somebody
6 does that he has dedicated it to the public or not, that is
7 the --

8 MR. BOCKEN: No, he does not dedicate it to the
9 public.

10 QUESTION: Well, that is what we are going to decide.

11 MR. BOCKEN: That is the question.

12 QUESTION: Well, what if you reversed the Chief
13 Justice's hypothetical and have this inland pond separated by
14 distinctly fast land from navigable ocean water and the Corps
15 of Engineers decides that it wants to improve Maunalua Bay
16 and so it dredges a channel through the fast land to connect
17 it to the interior pond, do you think it has to pay compensa-
18 tion?

19 MR. BOCKEN: Yes, Your Honor.

20 QUESTION: For what? For the fast land and for the
21 pond?

22 MR. BOCKEN: Well, the pond is fast land. That is
23 what is --

24 QUESTION: But do you think it has to pay both for
25 the concededly non -- the land that never had any water on it

1 at all and also for the interior pond that was not navigable
2 at the time?

3 MR. BOCKEN: That's right, Your Honor, it is all
4 fast land for the purposes of law.

5 QUESTION: Well, your answer would be the same if
6 the pond were navigable in fact before the canal was build,
7 wouldn't you?

8 MR. BOCKEN: That's true, Your Honor. That's true,
9 exactly true. However, we have our back-up position that it
10 wasn't, just for safety reasons.

11 QUESTION: But this is true every time the federal
12 government builds a dam and floods 3,000 or 300,000 acres,
13 they have to pay the owners of the land which is now as a
14 result of the dam covered by water, is that not true?

15 MR. BOCKEN: That's right, Your Honor. I think that
16 is the case as we have cited. I think Kansas City Light, as
17 I recall, is one of those cases.

18 I have reserved some time, Your Honor. Thank you.

19 MR. CHIEF JUSTICE BURGER: Very well, Mr. Bocken.
20 Ms. Oberly.

21 ORAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.,

22 ON BEHALF OF THE RESPONDENT

23 MS. OBERLY: Mr. Chief Justice, and may it please
24 the Court:

25 At the outset, I would like to stress what is not

1 disputed by petitioners in this case. They have not in any
2 way challenged the government's position that the public has
3 a right stemming from the common law and protected by the
4 Commerce Clause to navigate all navigable waters of the
5 United States. What they do contest is whether Kuapa Pond
6 is a navigable water of the United States. But even as to
7 that question, counsel has just conceded that they don't argue
8 that the pond is not navigable for all purposes. They now
9 concede that it is a navigable water of the United States for
10 purposes of the Corps of Engineers --

11 QUESTION: Well, they concede it is a navigable
12 water but not a navigable water that belongs to the United
13 States.

14 MS. OBERLY: Your Honor, the Court of Appeals' de-
15 cision was that this pond --

16 QUESTION: Well, that is the decision that we are
17 now reviewing.

18 MS. OBERLY: There were two parts to the Court of
19 Appeals' decision. The court first held that this is a
20 navigable water of the United States and therefore subject to
21 federal regulations. That question has not been presented to
22 this Court by the petitioners. The only question they are
23 presenting is whether a different test of navigable waters
24 of the United States should be applied when we are talking
25 about the public right of navigation as opposed to the federal

1 government's authority to regulate.

2 Our position is that the same test of navigability
3 that this Court has developed under the Commerce Clause for
4 purposes of regulatory jurisdiction also determines the
5 public's right of navigation.

6 QUESTION: They both stem from the Commerce Clause.

7 MS. OBERLY: That's correct. We believe that the
8 public right to navigate predates the Commerce Clause. It
9 existed before the Constitution was written, but it finds
10 protection in the Commerce Clause against state intrusion
11 and --

12 QUESTION: Well, what if adjacent to this point on
13 land that was concededly never covered by water there was a
14 house in which King Kamehameha had slept, do you think the
15 government could by exercise of its Commerce Clause power
16 tell the private owner of that house that he would have to
17 have it open from 9:00 to 5:00 to tourists because it was a
18 very important historical monument?

19 MS. OBERLY: If this house was always on fast land
20 above the boundaries of the navigable waters, which in coastal
21 areas is the line of mean high tide, if his house was above
22 that area, to make it into navigable waters I would concede
23 that we would --

24 QUESTION: They don't want to make it into navigable
25 waters, they simply want to make it available to tourists who

1 are on the Island of Oahu. Under the commerce power, do they
2 have that right?

3 MS. OBERLY: They may have that right under the
4 commerce power, but that doesn't settle the question of
5 whether there has been a compensable taking.

6 QUESTION: You said they might have to pay.

7 MS. OBERLY: That's correct, if the government under-
8 took an activity that was truly on fast land, but our position
9 here is that this fish pond has always both before and after
10 the improvements been a navigable water of the United States
11 and for that reason compensation would not be owed for any-
12 thing that the government might choose to undertake in the
13 fish pond.

14 QUESTION: Penn Central Depot was on quick dry land,
15 was it not?

16 MS. OBERLY: That's correct, but that was a regula-
17 tory case in which no compensation was owed as an exercise
18 of --

19 QUESTION: Well, don't you ultimately get down to
20 Justice Holmes' distinction in Mann v. Pennsylvania called
21 whether this is just regulation or whether it is so substantial
22 regulation that you have to treat it as a taking?

23 MS. OBERLY: You get to that question only if you
24 assume that the pond is fast land and always has been. If
25 the pond itself is navigable waters of the United States, then

1 the whole line of this Court's compensation cases such as
2 Rands dictate that the government does not pay when it ex-
3 ercises the navigation servitude in those areas. The reason
4 no compensation is owed is not because we are exercising the
5 Commerce Clause power but because we are exercising the
6 navigation servitude.

7 QUESTION: But the navigation servitude depends on
8 the commerce power.

9 MS. OBERLY: It pre-dates the Commerce Clause, al-
10 though it is protected by the Commerce Clause, but our posi-
11 tion is that we would agree with petitioners that the servi-
12 tude is not as broad as the government's powers under the
13 Commerce Clause. I think what the petitioners want the Court
14 to believe is that our position is the navigation servitude
15 goes as far as the government's Commerce Clause powers on
16 dry land, and that is not what we are saying at all.

17 QUESTION: The government did institute a condemna-
18 tion proceeding for the Port of Portland, but it is just a
19 question of how much the fast land owner should be paid. It
20 wasn't the idea that the Columbia River could simply be
21 enlarged by plowing into it a whole bunch of fast land under
22 the commerce power and the government pay nothing.

23 MS. OBERLY: We concede completely that when the
24 government takes fast land above the line of mean high tide
25 under the Commerce Clause, we would pay for that, although as

1 of Rands we would not pay any special value for its riparian
2 access. But that is not the situation we have in this case.
3 The government has not taken fast land. The situation we
4 have here is that both before and after the improvements made
5 by Kaiser Aetna, this has always been navigable water of the
6 United States. Before the improvements, just merely by re-
7 moving the sand bar which separates the bay from the pond,
8 we would have had the navigable waters of the bay flowing
9 into the pond, we could have easily made the pond suitable
10 for use of commerce simply by removing the --

11 QUESTION: That was not the Court of Appeals' theory,
12 as I remember it, was it?

13 MS. OBERLY: No, the Court of Appeals --

14 QUESTION: They assumed it was fast land and it
15 was dedicated to the public when it was made navigable.

16 MS. OBERLY: That's correct. And our case does not
17 depend upon it being navigable before the improvements. That
18 is our alternative submission.

19 QUESTION: I think that is the more interesting
20 problem, to assume it was fast land -- don't you also agree
21 that even though you may have regulatory power when it became
22 navigable, that does not necessarily answer the servitude
23 issue?

24 MS. OBERLY: If the reason we have regulatory power
25 is because it is navigable waters of the United States, then

1 we also argue that it is subject to the public right of navi-
2 gation. We agree with petitioners that there are reasons for
3 regulatory power which go beyond navigation, but those are
4 not the --

5 QUESTION: Do you take the position that if water is
6 sufficiently navigable to give the United States regulatory
7 power over it, that it is necessarily subject to servitude?

8 MS. OBERLY: That's correct.

9 QUESTION: You do take that position, that the two
10 are coextensive?

11 MS. OBERLY: Yes.

12 QUESTION: I didn't read your Footnote 18 that way.

13 MS. OBERLY: My Footnote 18 concedes that there
14 are regulatory powers under the Commerce Clause which have
15 nothing to do with navigation and as to those obviously we
16 don't contend that the public has a right to navigate. It is
17 a practical impossibility. What we are saying is that when
18 the Corps of Engineers regulates in navigable waters of the
19 United States, the reason it regulates is for the purpose of
20 keeping those waters open and usable for public navigation.

21 QUESTION: So you contend that when we are dealing
22 with navigable water, the two are coextensive?

23 MS. OBERLY: Yes, but only when we are dealing with
24 navigable waters of the United States.

25 QUESTION: Aren't the navigable waters of the United

1 States owned by the United States?

2 MS. OBERLY: They really aren't owned by anyone.
3 The United States has paramount authority over them.

4 QUESTION: Right. Well, why isn't a fact in this
5 case that you are condemning somebody's land without paying
6 for it?

7 MS. OBERLY: We did not condemn --

8 QUESTION: Well, suppose you started out to condemn
9 it, what would you have done? You would have put the money
10 up and gone through condemnation, wouldn't you?

11 MS. OBERLY: Yes.

12 QUESTION: And for that money you would have gotten
13 control of that pond, wouldn't you?

14 MS. OBERLY: If the United States had wanted to make
15 this pond into a marina, we would have an entirely different
16 case, assuming that it was originally fast land.

17 QUESTION: Well, what do you --

18 MS. OBERLY: But the United States did not under-
19 take the improvements of --

20 QUESTION: That's right, but what do you want by
21 this declaratory judgment?

22 MS. OBERLY: Our position is that once petitioners
23 chose to take advantage of the public's waters in the bay and
24 brought them onto their property, that they thereby subjected
25 their -- they made their property become a navigable water of

1 the United States.

2 QUESTION: And what does the United States want done?

3 MS. OBERLY: We want two things in this case. We
4 want them to commence applying for permits under the Rivers
5 and Harbors Act for any future dredging or filling in of the
6 pond or at the connection of the pond to the bay, and we want
7 them to acknowledge that they have made the pond a navigable
8 water of the United States and that it was therefore open for
9 public navigation, and that is the important one. And it is
10 only the second question that --

11 QUESTION: And that would be free, they couldn't
12 collect any more money?

13 MS. OBERLY: No, because by statute, 33 U.S.C.,
14 section 565, Congress has provided that private parties may
15 undertake improvements at their own expense but if they do
16 that, first of all the improvements have to be approved by
17 the Corps of Engineers and, second of all, they can't take
18 control --

19 QUESTION: No, I mean as of now they couldn't charge
20 people for these slips?

21 MS. OBERLY: I want to make it clear that our posi-
22 tion is not that the public has a right to use the slips. As
23 you pointed out before, this is a 523-acre water body now.
24 Our position is that the public has a right to use the open
25 water, which is perhaps 500 of the 523 acres. We are not

1 contending that the public has a right to use the privately
2 built slips and docks that comprise maybe the other 23 acres
3 of the --

4 QUESTION: Why not if they are navigable waters?

5 MS. OBERLY: Well, first of all we believe that so
6 far as the Corps of Engineers is aware, this is not even a
7 problem. The Corps is not aware of any examples of public
8 using --

9 QUESTION: Maybe they don't want to exercise the
10 power, but as a matter of raw power wouldn't the United
11 States have the right to say even the slips are owned by the
12 public?

13 MS. OBERLY: It could but we believe that the public
14 right needs to be accommodated with the private interests in
15 the piers and we believe there are several ways that could be
16 done. The first is that the Corps has regulatory power under
17 33 United States Code section 1 --

18 QUESTION: But it is no broader than the servitude,
19 so the public can go right into the slips.

20 QUESTION: That's right.

21 MS. OBERLY: No, the Corps --

22 QUESTION: You just told me that, it is no broader
23 than the servitude.

24 MS. OBERLY: The Secretary of the Army through the
25 Corps of Engineers is authorized to regulate public use of

1 navigable waters in the interest of safety, protection of
2 property, protecting navigation, whatever interests he thinks
3 are relevant.

4 QUESTION: Then suppose the petitioners here were
5 going to build a hundred additional slips, would they have
6 to get the approval of the Corps of Engineers?

7 MS. OBERLY: Yes, indeed, and I think they concede
8 that now.

9 QUESTION: But they didn't get the permission to
10 build the 500, did they?

11 MS. OBERLY: They originally started their activi-
12 ties in the pond itself before the connection to the bay and
13 at that time, according to an affidavit of their employees,
14 they were advised by the Corps that no permission was needed
15 for work in the pond itself. But beginning in about 1966 or
16 '67, when they wanted --

17 QUESTION: After the opening?

18 MS. OBERLY: After the opening -- the Corps from
19 that time on advised them that permits were required. They
20 obtained permits under protest, still contending that they
21 didn't need them, but they have in fact been obtaining them.

22 QUESTION: Ms. Oberly, if I own farm land in Ohio
23 and there is a small lake on it which is navigable and I
24 drive around the lake in my outboard motorboat and so on,
25 there is no question about the fact that that lake belongs to

1 me and it is entirely in Ohio. Would you agree with that?

2 MS. OBERLY: And it doesn't connect to any other
3 navigable waters.

4 QUESTION: Right.

5 MS. OBERLY: Yes.

6 QUESTION: Now, let's say that my farm lies both in
7 Ohio and Indiana, which many farms do down where I came from,
8 the southwestern corner of Ohio, and the lake happens to be
9 part of it in Indian and part of it in Ohio. Does that lake
10 automatically belong to the United States?

11 MS. OBERLY: If it can be used as a highway for
12 commerce --

13 QUESTION: Well, it can be. I said you can ride
14 your outboard motor around the lake and it is now interstate.

15 MS. OBERLY: You still own the lake but subject to
16 paramount federal --

17 QUESTION: And anybody in the public can come in
18 without my permission and ride around in that lake, is that
19 correct?

20 MS. OBERLY: Well, they may not be able to get there.
21 They can --

22 QUESTION: Well, let's assume they can get there.

23 MS. OBERLY: Well, we are not presuming they have a
24 right of access over your farm.

25 QUESTION: No, no. I say let's assume they can get

1 there legally. They can ride around that lake without my per-
2 mission, without paying me anything, is that correct?

3 MS. OBERLY: If they can get to the lake without
4 crossing your dry land, yes.

5 QUESTION: Simply because it is partly in Ohio and
6 partly in Indiana.

7 MS. OBERLY: That's correct.

8 QUESTION: Well, they couldn't if it was entirely
9 in Ohio?

10 MS. OBERLY: And if it had no connection with another
11 navigable water.

12 QUESTION: Right. But now the lake is partly in
13 Ohio and partly in Indiana, it is a rather small lake but it
14 is navigable. Is that correct?

15 MS. OBERLY: That is correct.

16 QUESTION: Ms. Oberly, is the same true of a rail-
17 road, say, that goes from Ohio to Indiana? Concededly, the
18 Commerce Clause authorizes a great deal of regulation which
19 has been exercised by the Interstate Commerce Commission. Do
20 you think the Congress can say to the railroad, we want you
21 to carry all passengers free on this railroad without exer-
22 cising any condemnation authority?

23 MS. OBERLY: Our position is not that the regulatory
24 power under the Commerce Clause authorizes the free access, it
25 is the public's right to navigate which pre-dates the Commerce

1 clause.

2 QUESTION: But you concede that when we are looking
3 at the Constitution, the only thing that talks about author-
4 izing Congress to enforce any right to navigate is the
5 Commerce Clause.

6 MS. OBERLY: That's correct, but the public right
7 pre-dates the Commerce Clause.

8 QUESTION: Well, what does that mean in terms of
9 constitutional law?

10 MS. OBERLY: Our position is that the public right
11 came from common law, the commonese adopted it as their
12 common law, the states had it as their common law, and in
13 the Commerce Clause they surrender to the federal government
14 the power to protect that right against state infringement
15 and --

16 QUESTION: So this is just something that the
17 Commerce Clause picked up and it is --

18 MS. OBERLY: Yes.

19 QUESTION: Ms. Oberly, if you get what you want, can
20 he sell this pond?

21 MS. OBERLY: He can't sell the water in it, because
22 that --

23 QUESTION: Can he sell the pond? He could sell it
24 before, couldn't he?

25 MS. OBERLY: Apparently under Hawaii law --

1 QUESTION: Couldn't he sell it before?

2 MS. OBERLY: Well, now there is no pond to sell.

3 QUESTION: So now he can't sell it now if you get
4 your way?

5 MS. OBERLY: No, because he has voluntarily converted
6 it into navigable waters of the United States.

7 QUESTION: And voluntarily gave up his right to sell
8 it?

9 MS. OBERLY: He does not have to change the pond to
10 the navigable waters of the United States -- if he decides
11 to stop --

12 QUESTION: He could drain the water out?

13 MS. OBERLY: No, but he doesn't have to --

14 QUESTION: Then how could he do it?

15 MS. OBERLY: -- he doesn't have to do the dredging
16 operations.

17 QUESTION: Well, could he sell the water?

18 MS. OBERLY: No, he doesn't own the water.

19 QUESTION: He did up until now.

20 MS. OBERLY: It wasn't the same water. He had his
21 own water in the fish pond but once he opened up the connec-
22 tion he brought the public's waters from the bay and the
23 ocean.

24 QUESTION: And how much public water is in there?

25 MS. OBERLY: I assume it is quite a bit.

1 QUESTION: Well, you don't know, do you?

2 MS. OBERLY: It is 500 acres, deepened from two feet
3 to six feet.

4 QUESTION: Well, you don't want me to have the job
5 of separating it, do you? Now, suppose he wants to sell his
6 water, he can't sell it.

7 MS. OBERLY: That is because he has merged his water
8 with the public's waters, at no cost to him he has obtained use
9 of the public's waters. Our position is simply that no
10 private person has a right to connect his land or his water
11 to the public's waters without the government's permission,
12 and that as a condition for that permission it is not at all
13 unreasonable to require that the public's waters from the
14 bay which have now been brought onto his pond be kept open to
15 the public.

16 QUESTION: Well, even if he didn't get permission,
17 you would make the second assertion, if he got no permission
18 from anybody, if he had a pond and he dug a navigable ditch
19 to the sea, then under your submission that is open to the
20 public?

21 MS. OBERLY: Well, he certainly can't benefit from
22 the fact that he --

23 QUESTION: The answer is yes, isn't it?

24 MS. OBERLY: That's correct, with or without per-
25 mission.

1 QUESTION: With or without permission.

2 MS. OBERLY: That's right.

3 QUESTION: Well, wouldn't you go further and say if
4 the government had dug the ditch, that the pond would then be
5 open to the public?

6 MS. OBERLY: Yes, that's correct, and the compensa-
7 tion question arising out of the government's digging the
8 ditch would depend upon whether or not the water was always
9 navigable water of the United States --

10 QUESTION: Right.

11 MS. OBERLY: -- or whether the government took fast
12 land and made it navigable water of the United States. But
13 in either event, the government could dredge the pond, the
14 opening and then provide for public access.

15 QUESTION: I thought I caught something you said a
16 few moments ago that if the aperture to the sea were sealed
17 off, then this would be restored to the private status with-
18 out servitude, without federal servitude?

19 MS. OBERLY: As it stands now, the petitioners do
20 not have the authority to close off the opening to the sea,
21 but if the government wanted to close off the opening for the
22 interests of navigation, then the government would have the
23 authority to do that. The petitioners would be denied access
24 to the opening and they would not be entitled to compensation
25 because they do not own access, but they probably would be

1 free to return to their fish pond operations and use it as a
2 fish pond.

3 QUESTION: But they are still using that public
4 water that you placed so much reliance on.

5 MS. OBERLY: Well, we would be cutting off their
6 use of the waters from the bay and they would no longer
7 continue to flow in.

8 I would like to go back for a minute to explain why
9 we believe the Commerce Clause test of navigability is the
10 one that also governs the test for public right of naviga-
11 tion, and it is simply a matter of common sense.

12 We believe that the principal reason the govern-
13 ment's regulatory power over navigation even exists is to
14 protect the public's right to navigate. It doesn't make much
15 sense to give the Corps of Engineers sweeping powers to pro-
16 hibit obstruction to navigable waters as Congress has done
17 in the Rivers and Harbors Act if the public is not entitled
18 to use those same waters. We are confident that it must have
19 been the assumption of Congress in 1899 that the waters it
20 was directing the Secretary of War to keep free of obstruc-
21 tions were the same waters that the public had a right to
22 navigate.

23 QUESTION: And the Corps of Engineers can require
24 that the slips be kept free of obstacles, can't they?

25 MS. OBERLY: Yes, they can.

1 QUESTION: And then doesn't it follow that the
2 public can get in the slips?

3 MS. OBERLY: No, we are willing to concede that the
4 public right is subject to reasonable regulations. One theory
5 would be that the Corps of Engineers' permit to the slip
6 owner to build implies a right of exclusive use of the slip
7 and mooring area there. The permit does not run to the gen-
8 eral public, it runs to the person who built the pier and for
9 it to be a meaningful permit he has to be able to find his
10 parking space open when he gets there.

11 Another thing would be the Corps could set regula-
12 tions under the authority of section 1 of Title 33 that would
13 put those slips off limits to the public in order to foster
14 navigation in the open channel. If riparian owners had no
15 place to park their boats and had to instead park them in
16 the open channel, that would itself or could turn into an
17 obstruction to navigation.

18 QUESTION: But that is a matter of regulatory dis-
19 cretion and judgment.

20 MS. OBERLY: That's correct.

21 QUESTION: It is not a matter of power.

22 MS. OBERLY: It is a matter of regulatory discretion
23 with the Corps or if the Corps didn't chose to promulgate that
24 type of regulation, we would also agree that it is the type
25 of strictly local matter rather than a burden on interstate

1 commerce, that the states would be free to provide for by
2 regulation. Again, it would not be an impediment to naviga-
3 tion but it would rather foster navigation by keeping the --

4 QUESTION: Well, there might be an argument about
5 it and in any event that would be a matter of policy and not
6 of power.

7 MS. OBERLY: That's correct, but our position here
8 is that the petitioners have never asked the Corps of
9 Engineers to set reasonable limits on the public's use of the
10 pond.

11 QUESTION: I don't see the difference logically be-
12 tween saying an owner of a slip can control the slip and an
13 owner of fifty slips can control the fifty slips. That is
14 what you have got here, is fifty slips or 500, whatever the
15 number is.

16 MS. OBERLY: All of the --

17 QUESTION: When is one different from 600?

18 MS. OBERLY: All of the slips are for the same pur-
19 pose, of mooring boats in order to keep them from being
20 parked in the --

21 QUESTION: And the whole purpose of the petitioner
22 here is to have an area in which he can moor boats and so
23 forh --

24 MS. OBERLY: And here --

25 QUESTION: If he owned all 600 boats himself, would

1 that be different from having one slip?

2 MS. OBERLY: No, and we are not asking that the
3 public be able to use either one or 600 of the slips. We are
4 talking about the approximately 500 acres of open water, and
5 that is all that the government's position is.

6 QUESTION: Suppose the open water were useful only
7 for parking 600 boats, you would still have legally the same
8 position, wouldn't you?

9 MS. OBERLY: If it were so small that that was all,
10 that you would only have room for 600 slips, that might be a
11 different case. But here we have a pond that is over 500
12 acres, it is two miles long, it serves as access to the
13 Pacific Ocean and we simply don't have that limited case
14 before the Court now.

15 QUESTION: But the access to the Pacific Ocean is
16 both what gives you the power and also what makes it as a
17 reason for the development, both.

18 MS. OBERLY: And petitioners -- the reason for the
19 development being access to the Pacific Ocean, the petitioners
20 have gotten a substantial benefit by that access which they
21 have not paid for, the result of which sustaining petitioners'
22 position is basically to sanction private ownership of the
23 waters of the bay that they have brought on their land.

24 QUESTION: But they have paid for it, just as when
25 I buy land in Hawaii that is contiguous to the ocean, I pay

1 for that augmented value of the land when I buy it. And if I
2 buy land which is not but I legitimately build a waterway to
3 the ocean, I pay for it.

4 MS. OBERLY: If you buy land as a riparian owner,
5 you basically take it as you find it, but that is not the
6 situation with petitioners. They actually ---

7 QUESTION: But they did pay for it. They paid for
8 knocking down the seawall and for dredging the lake and
9 everything else.

10 MS. OBERLY: But they had no private entitlement to
11 use the public's waters in the bay and the ocean, and that
12 is what they have done here. Their result basically sanctions
13 private ownership of the waters of the bay that they have
14 brought onto their land. This Court has held in United States
15 v. Chandler-Dunbar that private ownership of navigable waters
16 is inconceivable and yet that is what petitioners are ---

17 QUESTION: Suppose it was conceded that this pond
18 was always open to the ocean and was always navigable and
19 always been used. If the company had come in and got a permit
20 to build a marina and to have 400 slips, that wouldn't --
21 those slips could be limited to the people that the company
22 leased them to, wouldn't it?

23 MS. OBERLY: If they got a permit from the Corps of
24 Engineers for the slips, we would concede that the public
25 itself implies a right to the permit holder to use those

1 slips --

2 QUESTION: Sure.

3 MS. OBERLY: -- and the permit does not run to the
4 general public.

5 QUESTION: Right. But the water would, just like
6 you are contending here that it does.

7 MS. OBERLY: The open waters do, yes.

8 QUESTION: Let's extend that a little. Suppose a
9 class action is brought by some nearby yacht club, a group of
10 boat owners and they insist on the right to build a hundred
11 slips in there for their own convenience. Do you think the
12 federal authority can permit them to build a hundred slips?

13 MS. OBERLY: Well, the federal authority can pro-
14 hibit their building the slips in the first place. They need
15 the permit. But once --

16 QUESTION: The other way around. Now, the outsiders
17 who don't own any of the land, never owned any of the land,
18 say this is a fine place to park our boats and this is public
19 water which exists only because the Corps of Engineers let
20 the water come in, and we want slips in there, does federal
21 authority, federal servitude require that?

22 MS. OBERLY: It certainly does not require the Corps
23 of Engineers to grant the permit. The granting of the permit
24 to build the slip is entirely within the discretion of the
25 Corps.

1 QUESTION: All right, then, the Corps exercises the
2 discretion and says we can build a hundred slips. To what do
3 they attach the slips?

4 MS. OBERLY: The probably can't because they don't
5 have the riparian ownership of the surrounding land and for
6 the Corps to grant a permit in those circumstances would
7 interfere with the riparian owner's access to the water. I
8 think it is unlikely that the Corps would authorize building
9 a hundred slips by someone who had no land connection to this
10 water. In any event, the slips could not be built without
11 the Corps' permission.

12 The final point I would like to stress is that --

13 QUESTION: Do you think that, as this case comes to
14 us, it has been decided and not disputed that the United
15 States could establish the rules of the road and the rules
16 about navigation in this pond?

17 MS. OBERLY: As the case comes to you from the
18 Ninth Circuit, but as it comes to you from the District
19 Court the United States apparently has no more business in the
20 pond navigating and --

21 QUESTION: But now you think it is conceded that --
22 or at least it hasn't been challenged?

23 MS. OBERLY: It is a matter of courtesy to the Coast
24 Guard that they let Coast Guard boats in, but I am not sure
25 under the District Court decision we would have that right.

1 QUESTION: No, but that issue isn't here, I guess,
2 as to whether the Coast Guard could or couldn't establish the
3 rules of the road in the pond?

4 MS. OBERLY: They do concede that the Corps of
5 Engineers has regulatory jurisdiction. I would take that to
6 include a concession that the Coast Guard can establish the
7 rules of the road, but in fact they are establishing their
8 own rules of the road for this pond.

9 QUESTION: Who could authorize shrimping and lobster
10 pots and seine fishing, for example?

11 MS. OBERLY: I would say that would be a matter of
12 state law.

13 QUESTION: Even though it is federal water in your
14 submission?

15 MS. OBERLY: As long as it wasn't done in such a
16 way as to be a burden on interstate commerce as in the cases
17 decided last year by this Court Hughes v. Oklahoma or Douglas
18 v. Sea Coast Products. But barring that, the state would be
19 able to set fishing regulations.

20 QUESTION: Ms. Oberly, I take it that the government
21 takes the position that this pond always was navigable water?

22 MS. OBERLY: That's right, but our case does not
23 depend upon the Court agreeing with that.

24 QUESTION: Do you have any particular preference for
25 the test of navigability, or is it your position here that it

1 doesn't make any difference which test applies, it is still
2 navigable?

3 MS. OBERLY: We are happy with the Court's tradi-
4 tional test, which is navigability in fact at any point in
5 time, either in the past or present or in the future with
6 reasonable --

7 QUESTION: Now, traditionally I thought the ebb and
8 flow test was the traditional one.

9 MS. OBERLY: That still survives, but traditional
10 since the law, it is navigability in fact at any given point
11 in time and we believe clearly this was susceptible to
12 reasonable improvements because Kaiser Aetna made the im-
13 provements and we have to assume they were reasonable or they
14 wouldn't have been made.

15 QUESTION: If the private owner loses this case,
16 could it decide it wanted to close the canal connecting with
17 the ocean?

18 MS. OBERLY: No, it could not because it would be
19 affecting the navigable waters of the United States. It
20 could decide that it chose not to spend any more money
21 dredging the canal.

22 QUESTION: That also would be true of the ditch
23 connecting Justice Stewart's pond in Ohio to the Ohio River?

24 MS. OBERLY: The private owner has no obligation to
25 maintain it if he doesn't want to, but he can't fill it up

1 himself without --

2 QUESTION: He can't close it off?

3 MS. OBERLY: No.

4 The final point is petitioners' reliance on Hawaii
5 law. We have explained in our briefs why we think Hawaiian
6 law does not require the result they are arguing for, but
7 even if it did the question for this Court is simply whether
8 Congress meant to adopt that rule in the Hawaii Organic Act,
9 and again our brief adequately explains that Congress was only
10 dealing with the fishing rights in the Hawaiian Organic Act,
11 it was not dealing with the public right of navigation. So
12 there is no reason for assuming that Congress intended to
13 forfeit the public right based on an act dealing with fishing
14 ponds when today we have no fish pond in existence any more.

15 Thank you.

16 MR. CHIEF JUSTICE BURGER: Very well. Thank you.

17 We will resume at 1:00 o'clock if you have any
18 rebuttal at that time.

19 (WHereupon, at 12:00 o'clock noon, the Court was
20 recessed until 1:00 o'clock p.m.)

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AFTERNOON SESSION -- 1:00 O'CLOCK

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2 MR. CHIEF JUSTICE BURGER: Mr. Bocken, you have
3 about six minutes.

4 ORAL ARGUMENT OF RICHARD CHARLES BOCKEN, ESQ.,
5 ON BEHALF OF THE PETITIONERS -- REBUTTAL

6 MR. BOCKEN: Thank you, Your Honor.

7 We would just like to clarify a few things and bring
8 home a few points. One is that there has been reference made
9 to 525 acres of pond, a body of water consisting of that and
10 that simply isn't true, Your Honors. I think the record will
11 reflect that it is considerably less than that. There are
12 islands, there was much dredging done and residential islands
13 made throughout there, so the pond --

14 QUESTION: For the purposes of this case, does it
15 make any difference whether it was 500 or 300?

16 MR. BOCKEN: It doesn't make any difference really
17 because the farmer's pond of half an acre, as I illustrated
18 the pond in Minnesota, or a larger pond I think is really
19 immaterial. But I would like to clarify that one point be-
20 cause it did seem to make some difference.

21 Furthermore, there was a misstatement made concern-
22 ing the number of slips. The number was 600-plus slips, and
23 that is inaccurate, as I think the record reflects. We are
24 talking about licenses for boats, not slips. There are some
25 slips there, but there are certainly not 600-some slips, and I

1 think the record will clarify that.

2 As to the permit activity, I do not want to have the
3 Court led to any misconception that Bishop Estate and Kaiser
4 were somehow slipping through and creating things without
5 coordination with the Corps. The Corps was fully aware at all
6 times of the activities in the pond. In fact, when the pro-
7 posal was being made to build a bridge which required some
8 dredging on the bay side, which was clearly navigable waters,
9 Kaiser Aetna wrote to the Corps of Engineers and advised them
10 of what they were going to do, that they were going to build a
11 bridge across that area and that it would require some
12 dredging on the ocean side, and that permit was granted. And
13 interestingly enough, the defendant's Exhibit 15 in our joint
14 appendix states that -- in this fashion -- it is addressed to
15 the Department of the Army, and it is dated April 26, 1966,
16 subject, Hawaii-Kai Bridge, to the Corps of Engineers:

17 "By your letter of April 5, 1966, you indicated
18 general concurrence with our proposal for the Marina Bridge.
19 It is our understanding that no separate federal permit will
20 be required for this construction, and that there will be no
21 requirement for public use or control of any waters on the
22 Kuapa Pond side of the bridge. Very truly yours, D. M. Snow,
23 Project Engineer." And I invite the Court's attention to that
24 particular --

25 QUESTION: And he is the project engineer for what?

1 MR. BOCKEN: For Kaiser Aetna.

2 QUESTION: As to the total dredging process, the
3 total development of this lake --

4 MR. BOCKEN: Pardon me?

5 QUESTION: The total developmental project, was he
6 the project director --

7 MR. BOCKEN: He was the project director for Kaiser
8 Aetna at that time, Your Honor, right.

9 QUESTION: Well, what do you get from that letter?
10 Does that letter bind the United States government in any
11 form or fashion?

12 MR. BOCKEN: I think I am pointing this out to the
13 Court because counsel referred to --

14 QUESTION: I am asking as to what purpose --

15 MR. BOCKEN: -- because they said that we dedicated
16 that pond when we made an opening to the ocean.

17 QUESTION: Well, does that --

18 MR. BOCKEN: We affirmatively deny that it was
19 dedication.

20 QUESTION: This is a letter to whom?

21 MR. BOCKEN: This is a letter to the Corps of
22 Engineers.

23 QUESTION: To whom?

24 MR. BOCKEN: Department of the Army, Honolulu
25 District, Corps of Engineers.

1 QUESTION: Does that bind the federal government?

2 MR. BOCKEN: It does -- I can't argue estoppel,
3 Your Honor. I am not saying that estoppel applies in this
4 situation. But I am arguing that certainly it indicates
5 that we didn't intend to dedicate the pond to public use.
6 That was never our intention, never the petitioners' inten-
7 tion.

8 I would like to also point out that there is some-
9 thing more involved here than merely the taking of a naviga-
10 tion servitude, much more involved. What is being taken is
11 the use of all of the tremendous amount of improvements that
12 have been made totalling over \$6 or \$7 million, and likewise
13 if the government should prevail, if there is a public navi-
14 gation servitude imposed on these waters, who is going to
15 pay for the maintenance of this pond from now on? The
16 channels will silt, the walls will deteriorate, debris will
17 accumulate in the pond, security will be impaired. Can you
18 require private lessees to continue to pay for a public pond?
19 I don't think that is fair, Your Honors.

20 The Corps of Engineers -- it is a matter of record,
21 they said we don't have any funds for maintenance, we don't
22 have -- we have no intention of -- there are no funds in the
23 future projected for this. So what you are going to have is
24 an impairment or deterioration of the environment.

25 Just in conclusion, Your Honors, I just want to

1 conclude with this thought: If Kuapa Pond is burdened with
2 the public navigation servitude, as the government urges,
3 there will be, one, a public confiscation of private property
4 for public recreational use of an area that was conceived,
5 built, paid for and maintained by private funds, and
6 confiscation would not only be servitude of the waters but
7 the use of all of these improvements to which I just made
8 mention.

9 And, two, such a result is constitutionally pro-
10 scribed by the Fifth Amendment. It is not justified by any
11 legitimate public interest and reeks of inequity.

12 MR. CHIEF JUSTICE BURGER: Your time is expired now,
13 Mr. BOcken.

14 Thank you, counsel. The case is submitted.

15 (Whereupon, at 1:07 o'clock p.m., the case in the
16 above-entitled matter was submitted.)

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