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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. ~~12~~, Original.

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

OBJECTIONS TO DECREE PROPOSED BY PLAINTIFF AND MEMORANDUM IN SUPPORT OF OBJECTIONS TO PROPOSED DECREE.

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UNITED STATES OF AMERICA,

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STATE OF CALIFORNIA.

OBJECTIONS TO DECREE PROPOSED BY PLAINTIFF.

The State of California makes the following objections to the entering of the decree proposed by plaintiff:

1. The State of California objects to the entry of such decree because of the pendency of its petition for rehearing. The state is very earnest in its appeal to this court that it grant such rehearing in this matter of such vast importance.

Without changing its position in this regard the state makes the following additional objections to the proposed decree:

2. It objects to the words "of proprietorship" contained in paragraph I of the decree proposed by plaintiff.

3. It objects to the words "and full dominion and power over" in paragraph I of said decree.

4. It objects to paragraph II of said decree *in toto*.

5. In addition to the foregoing specific objections the State of California objects to the entry of any decree at this time.

MEMORANDUM IN SUPPORT OF OBJECTIONS TO DECREE PROPOSED BY PLAINTIFF.

The Court has accorded the parties or either of them permission to submit a form of decree to carry the Court's opinion into effect.

Defendant has been unable to draft any form of decree which it believes would constitute a valid judicial decree and which would carry the Court's opinion into effect, and defendant respectfully submits that no such decree can be made at this time.

The reasons why it is believed that no valid decree can be made at this time and the grounds of defendant's objections to the proposed decree are set forth in the following memorandum:

I.

The Proposed Decree Does Not Conform to the Court's Opinion or the Plaintiff's Complaint and Would Not Carry the Court's Opinion Into Effect.

The present case came before the Court on plaintiff's motion for judgment on the pleadings. The decree, if one can be entered at this time, should therefore conform to the allegations and prayer of plaintiff's complaint.

The proposed decree is inconsistent in material respects both with the complaint and the opinion.

A. The Proposed Declaration as to "Paramount Rights of Proprietorship."

Plaintiff, by the allegations of Paragraph II of its complaint, tendered two separate and distinct issues, *alternatively,* as follows:

> 1. That plaintiff "is the owner in fee simple of, *or*[1]
>
> 2. possessed of paramount rights in and powers over, the lands, . . ." (*not* "paramount rights of proprietorship," but "paramount rights and powers.")

The defendant traversed both of these allegations.

This Court, by the decision rendered herein, has decided only the second of the issues thus framed. It holds that

> ". . . the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited." (67 S. Ct. 1664.)

But it does *not* hold that the Federal Government *now* has any proprietary rights or interests in that area. The existence of an *unexercised* power to acquire or create a proprietary interest in property (even if such power exists) is obviously not the equivalent of *present* ownership. As pointed out by Mr. Justice Frankfurter in the first paragraph of his dissenting opinion:

> "The Court . . . grants the prayer but does not do so by finding that the United States has proprietary interests in the area." (67 S. Ct. 1669.)

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[1]Italics herein are added.

It follows that when the plaintiff asks for a decree adjudging that the United States is possessed of "paramount rights of proprietorship" in the disputed area, it is asking for a decree that does not conform to its own complaint or to the opinion of the Court, and for a finding which the Court apparently found unnecessary to make and which is not supported by the record.

B. The Proposed Declaration as to "Full Power and Dominion Over the Lands, Minerals and Other Things Underlying the Pacific Ocean."

The allegations of Paragraph VII of the complaint taken in connection with the prayer make it clear that the issues to be adjudicated involve all the respective governmental powers of the State and Federal Government over the entire 3,000 square mile area of coastal submerged lands within California boundaries.

It is alleged in Paragraph VII that California

> "possesses only those governmental powers which it has with respect to other lands of the United States within the territorial jurisdiction of the State."

This is equivalent to an allegation that all other governmental powers lie with the Federal Government.

It is true that the complaint alleges that California has, pursuant to its laws, executed numerous leases for the recovery of oil, but these are cited merely as instances of the exercise by California of rights claimed by it which are alleged to be in violation of the rights of the United States [complaint, Par. IV]. The prayer of the complaint is not limited to the rights of the parties with relation solely to natural resources. The declaration prayed for is one which would adjudge and declare *all*

the rights of the Federal Government in the entire area and the injunction prayed for is one to prevent trespass upon *any part of the three-mile belt* in violation of *any rights of the United States.*

If the relief prayed for by plaintiff were to be granted on the basis of the allegations of Paragraph VII it would be necessary to ascertain what the governmental powers of California are with respect to all "other lands" of the United States within California's boundaries. This would obviously be impossible on the present record.[2] Indeed, as we pointed out in State's Brief (App. A., p. 8) any decree which purported to adjudge and declare all the governmental powers of the Federal Government over the area in controversy would have to deal with a multitude of matters not before the Court and would be a practical impossibility.

A declaration such as that prayed for would require the adjudication in the abstract of innumerable questions concerning navigation, fisheries, sanitation, wharves and other structures, and public and private interests which are involved in the coastal waters of the State.

Counsel for plaintiff apparently recognize the difficulty of adjudging and declaring all the particular rights of the Federal Government and the proposed decree makes no attempts to do so. Instead, it contains the sweeping

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[2]There are hundreds of areas of land within the State which belong to the Federal Government. The powers of the State and hence of the Federal Government as to these lands vary greatly depending on the manner of acquisition by the United States. Therefore, even if all the evidence of these Federal holdings were before the Court, such evidence could not furnish any general criterion of Federal power.

and unqualified declaration that the United States is possessed of

> "full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean."

This, we submit, goes far beyond both the allegations of the complaint and the "relief prayed for" and also goes beyond the Court's opinion. If this sweeping decree were put into effect it would take away even those powers which plaintiff admits in Paragraph VII may be exercised by California over "other lands of the United States within the territorial jurisdiction of California." The result would be that the Federal power would extend to every interest and activity in the three mile belt both local and national and would supersede and destroy the entire police power of the State in and over this vast area. Such a decree would entirely destroy the constitutional division of powers between States and Federal Government.

Obviously no valid decree can be entered here which ignores or purports to supersede the police powers of the State and it is clear from the opinion that the Court intended no such result.[3]

On the other hand if the phrase "full dominion and power" is intended to mean merely that the Federal Government has all the powers vested in it by the Constitution, then this portion of the decree would indeed be abstract and would be merely a pronouncement of something as to which there is no controversy.

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[3]The opinion recognizes that the State "has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, . . ." (67 S. Ct. 1667.)

If we look to the Court's opinion to determine what sort of declaration of powers was contemplated, it will be found that the Court, although it stated at the close of the opinion that plaintiff is "entitled to the relief prayed for," did not purport to make either such a detailed declaration and allocation of powers as is asked for in the complaint or such a sweeping over-all declaration of general and undefined power as plaintiff now asks for in its proposed decree.

The Court did say that the Federal Government has paramount rights in and power over the area "an incident to which is full dominion over the resources of the soil." (67 S. Ct. 1668.) However, in the light of the entire opinion it would appear that the only specific application given by the Court to this broad statement of power is that the Federal Government has the power "to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited," a determination which obviously can be made only by the Congress.

The statement as to "full dominion," as used in the opinion would appear to be only an abstract statement of general constitutional power. The only *specific* right or power declared or defined in the opinion is the power to determine in the first instance who shall develop the natural resources. It follows that the only decree which would conform with the Court's opinion would be a decree containing such a statement. We shall show under the next heading that such a decree, and indeed any form of decree which could be entered at this time and in this case would be no more than the *declaration of the exist-*

ence in the abstract of powers which might or might not be exercised at some future time by the Congress of the United States. Such a decree would be merely an advisory declaration of law incapable of enforcement and beyond the jurisdiction of the Court to make.

II.

Congressional Action Is Necessary Before Any Valid Decree Can be Made Which Will Carry the Court's Opinion Into Effect.

The power to determine in the first instance how and by whom the natural resources in 3,000 square miles of territory within the State of California and, likewise, in 65,000 square miles around the entire coast of the United States, if such power exists at all in the Federal Government, *can only be exercised by Congress,* and Congress has never exercised this power or authorized any department or officer to act under it. We cannot believe that the Court would undertake to say who shall develop the natural resources in this vast area. The Executive, likewise, has no power to do so, without Congressional authority. (Constitution, Art. IV, Sec. 3.).

It follows that until Congress acts to exercise this power any decree that can now be entered will remain an abstract declaration incapable of being put into effect by anyone.

Plaintiff asserts in its Memorandum in Support of Proposed Decree (p. 5), that "the parties expect legislative action pertinent to the subject matter of this litigation." So far as the State is concerned this statement is correct, but only in the sense that it is defendant's belief,

as above stated, that the decree sought or any other decree at the present time could not be given practical effect until Congress acts.

With all respect we submit that the proposed decree reveals the correctness of the argument advanced by the State in its brief,[4] namely, that the only purpose the decree sought by the complaint can serve (and it is equally true of the decree now proposed) is to advise the Executive Department and through it the Congress as to the constitutional powers which Congress may exercise at some period in the future. This, we submit, is in accord with the entire theory of plaintiff's case as shown by its complaint and its briefs. We respectfully refer the Court to the statement in the footnote of page 207 of plaintiff's opening brief where it is stated:

> "It should be noted in the present case that the complaint seeks merely a declaration of rights and relief looking to the future;".

The opinions both of the majority of the Court and of one of the dissents clearly recognize that future action of Congress is essential to carry the claimed powers into effect.

The majority opinion, in discussing the equities created by the improvements made at vast public and private expense in the area claimed, states that:

> "But beyond all this we cannot and do not assume that *Congress,* which has constitutional control over

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[4]State's Brief pp. 1 and 2 and App. A. pp. 2-10.

> Government property, *will execute its powers* in such way as to bring about injustices to states, and subdivisions or persons acting pursuant to their permission." (67 S. Ct. 1669.)

As to this point the dissenting opinion of Mr. Justice Frankfurter is in full accord with the majority opinion. In this dissent it is stated that if it be assumed that California does *not* own the area in dispute, then:

> ". . . the determination to claim it on the part of the United States is a political decision not for this court." (67 S. Ct. 1670.)

And again:

> "The *disposition* of the area, the rights to be created in it, the rights heretofore claimed in it through usage that might be respected though it fall short of prescription, all *raise appropriate questions of policy,* questions of accommodation, *for the determination of which Congress and not this Court is the appropriate agency."* (67 S. Ct. 1671.)

It appears to us therefore that in the present state of the case the majority of the Court as well as Mr. Justice Frankfurter and both plaintiff and defendant are of the view that Congress is the only agency which can *"execute the powers"* claimed by the Federal Government in this case and that *legislation will be required to execute these powers.*

III.

The Constitution Does Not Permit the Court to Advise Congress as to the Scope and Extent of Powers Not Yet Exercised by It.

The powers vested in the Federal Government exist by reason of the grants in the Constitution and the State possesses all powers not so granted. It has never been considered within the Court's jurisdiction to define in the abstract and in advance of the attempted exercise thereof, the scope and extent of the federal powers. This is illustrated graphically by the history of the Court's interpretation of the federal power over interstate commerce. Obviously it would have been impossible at any time in the nation's history for the Court to declare and define all the respective powers and rights which the States and the Federal Government might exercise in relation to this subject. The States have always exercised valid powers in that field prior to action thereon by Congress. The extent of the federal power could not possibly be pronounced in any declaratory judgment in advance of Congressional action, but has had to be established point by point as one sovereign or the other has attempted to exercise its power and thus cases presenting specific facts came before the Court.

No decree which the Court could issue would add anything to the powers of Congress. If Congress does have the power to determine how and by whom the natural resources in California's three-mile belt shall be developed, it does not need any declaration of this Court to enable it to act. The only purpose such a declaration could possibly serve would be to advise the Congress, in advance of action, of the scope and extent of its powers. No one

has a right to ask this Court for an opinion as to the unexercised powers of Congress. Yet that is what plaintiff has done and in fact, it is all that plaintiff can do in this case. It can do nothing more until Congress acts. Thus, we respectfully submit that if the Court grants the prayer of the complaint or issues the proposed decree, it will exceed its constitutional jurisdiction.

If and when Congress does act, then the validity of its legislation and the powers attempted to be exercised under it will constitute justiciable questions appropriate for judicial decision.

IV.

No Enforceable Decree Can be Entered Until the 3-Mile Belt Is Described and Identified.

It should also be pointed out that (irrespective of Congressional action) *nothing* can be done toward carrying *any* decree into effect until the three-mile belt is defined and identified. No Federal official today knows the limits of this area. As immensely valuable and improved properties are involved, the description of the area must be made accurately in the manner in which real property is described for the purpose of private sale or of taxation by a public body. This process will involve two distinct steps:

1. The establishment of legal criteria for the definition of "bays," "ports," "harbors" and "inland waters" and for the ascertainment of "ordinary low water mark." This, as we will show is, in the first instance, a matter for legislative determination.

2. Describing and locating on the ground the precise areas to which the above-mentioned legal criteria properly

apply. This would necessitate the taking of evidence and the making of findings of fact as to the physical characteristics and historical data relative to all areas in dispute.

It should be mentioned that San Francisco, San Pedro and San Diego Bays have, in part, already been determined and admitted by stipulation to be inland waters. Plaintiff was under the necessity in its complaint and briefs of admitting in general that bays, ports, harbors and inland waters belong to the State in order (1) to escape the holding of numerous cases which specifically affirm the State ownership of lands within particular bays and harbors in California and in other states, (and as to which cases plaintiff contended that the broad declarations of State ownership did not apply to the three-mile belt) and (2) in order to escape the adverse effect of various acts of federal officials, including acts of the United States itself through its Congress, which recognized State ownership of lands within several of the bays and harbors of California (see State's Brief, Appendix G, pp. 149 *et seq.*). We entertain no doubt therefore that it was within the power of plaintiff in bringing this suit to exclude from its claim certain areas thus recognized and likewise to stipulate with defendant, as was done recently, that certain recognized commercial harbors of California, all of which had been the subject of court decisions upholding State ownership and had been admitted in plaintiff's brief as belonging to the State, were not to be considered as "claimed by plaintiff in this litigation" (see stipulation accompanying Memorandum in Support of Plaintiff's Proposed Decree, p. 21).

Nevertheless the fact remains that even as to the bays covered by the stipulation it has been impossible for the

parties to locate the seaward limit of these bays and that has been left open for future determination. There remains to be determined the identification of a large number of other bays, ports, and harbors and also the location of the "low water mark" along the open coast.

Plaintiff in its brief, and the Court in its opinion, referred to the case of *Oklahoma v. Texas* (256 U. S. 70) as furnishing a pattern for the procedure to be followed in the present case. With all respect we submit that the *Oklahoma* case is inapplicable and the procedure there cannot be followed here.

The *Oklahoma* case was a suit "to establish the boundary between two states * * * *as fixed by the treaty* of February 22, 1819" (256 U. S. 70). A prior decision, to wit, *United States v. Texas* (162 U. S. 1) had already interpreted and construed this treaty as fixing the disputed boundary "along the south bank * * * of Red River." The controlling question in the first decision in *Oklahoma v. Texas* (256 U. S. 85) was whether the decree of the Court in *United States v. Texas* was *res judicata* as against Oklahoma. This was obviously a justiciable controversy. The Court held that the doctrine of *res judicata* applied and that its former decision settled the construction of the treaty as against Oklahoma.

The case being an original suit in this Court, it was then ordered that "the parties may submit within thirty days a proper form of decree for carrying this decision into effect." An interlocutory decree was presented which, in accordance with the earlier decision of *United States v. Texas,* declared the boundary *as fixed by the treaty* to be along the south bank of the Red River and included the

appointment of a commissioner to take evidence as to the location on the ground of the south bank of the river.

After evidence had been taken, the question was brought before the Court as to "what constitutes the south bank" of the Red River, *i.e.* whether the water's edge or the bluffs along the river. As to this question the Court said (260 U. S. 625) "Its solution involves a consideration of *what was intended by the treaty provision* and of the physical situation to which the provision is to be applied."

It will be seen that the Court was there not undertaking to decide *in the first instance* where the boundary line between the two states should be located, a question obviously political in its nature; nor did the Court undertake to lay down in the abstract any general rule as to what constitutes the "bank" of a river. On the contrary what the Court did was (1) to determine the original intent of the parties as evidenced by the treaty and (2) to ascertain the physical situation to which the treaty provision was to be applied. This is a perfect example of the judicial process.

In the present case the situation is reversed. Here, Congress has never acted. The question as to what constitutes bays, ports, and harbors and inland waters and the question as to what constitutes the low water mark do not depend upon the interpretation of any existing statute, treaty or contract. And as pointed out in the State's Brief (Appendix A, p. 27) there is no existing law upon which the Court can predicate a decision. Nobody knows in the abstract what really constitutes a bay, much less a "true bay." These terms standing alone have no legal significance. They are merely popular descriptive terms such as "desert," "mountain" or "prairie."

It is true there are a few federal statutes which define "ports" for the purpose of identifying ports of entry, for revenue and similar purposes. Likewise, the term "inland water" has been used in a federal statute for the purpose of the application of inland rules of navigation as contrasted with international rules. (See State's Brief, App. A, p. 19). The term "bay" has been used in some state constitutions and statutes. The Courts have, in a number of cases, rendered decisions defining these terms, but in every instance such cases arose over *the application of the term as used in a constitution, statute, treaty or contract to particular physical facts which were submitted to the Court* exactly as outlined in the case of *Oklahoma v. Texas.*

Likewise, the term "low water mark" has no fixed legal significance. Before the dividing line between what plaintiff has called "tidelands" along the open coast and the marginal sea can be fixed, not only the meaning of the term "low water mark" must be defined, but it will have to be determined *as of what date* the line is to be fixed and what principles are to be applied to artificial and natural accretions and erosion.

"Low water mark" may refer either to "mean low water" or "mean lower low water." There is a substantial difference between these lines on any sloping coast. Similar determinations have been made as to "ordinary high water mark." The line of ordinary high water[5] generally

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[5]Defined in *Borax Consolidated v. Los Angeles* (296 U. S. 10, 26) as the average over a period of 18.6 years "of all the high waters."

constitutes the dividing line between upland and state owned submerged lands around the United States and in almost all states this line has been fixed either by statute or by court decisions construing statutes, patents, or grants, but no such definition has ever been made as to the meaning of such terms as "mean low water" or "low water mark"[6] and this would have to be determined before a master could take evidence as to the location of the proposed line.

For the Court, *ab initio,* to lay down general legal criteria for the establishment of the low water mark and of the ports, bays, and harbors, would amount to a series of abstract and advisory declarations of law on matters which are purely legislative in character.

Plaintiff asserts that it expects to seek "a more detailed" decree later after its study of the "physical characteristics" of the area are completed. (Memorandum in Support of Proposed Decree, p. 5).

We are unable to see how plaintiff's study of the physical characteristics can furnish the basis of any decree in this case. Such a study could only provide plaintiff with evidence to present to the Court and this evidence as above stated could not result in a decree until Congress had acted and until it had been established by law what is meant by the low water mark and what legally constitutes bays, ports, harbors and inland waters.

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[6]There are a few states where private land holdings have been held to extend to low water mark, but this is by virtue of state law. In such instances the line has, of course, been fixed by statute or by decisions construing state statutes, patents or grants.

V.

The Proposed Decree Declaring Federal Rights and Powers to Be Paramount "Outside of the Inland Waters" Is Based on a Fundamental Fallacy.

Plaintiff's entire case rests upon the theory that there is a constitutional distinction between the three-mile marginal belt on the one hand and ports, bays, harbors and inland waters on the other. But the truth is no such constitutional distinction exists. This is demonstrated by the fact that a body of water may acquire the legal status of a bay on historic grounds as is admitted in plaintiff's opening brief (p. 18, footnote 8). This is further demonstrated by the fact that ports or harbors are frequently established either in whole or in part by artificial means and are frequently abandoned. No constitutional distribution of powers could be predicated on such a shifting and uncertain basis.

Constitutional powers to determine who shall develop the resources of the coastal waters *within a state* cannot shift from one sovereign to the other as a result of the establishment on historic grounds of bays or the creation or abandonment of ports and harbors. None of the many cases which uphold state ownership of land beneath navigable waters are predicated on any distinction between inland waters and the three-mile marginal belt. All such cases are predicated upon the theory that the state is the owner of the lands beneath all *navigable* waters within its boundaries. The state boundary is the limitation of state power and ownership of these lands. The powers and rights of the state are the same as to lands beneath *all* navigable waters within those boundaries, and likewise, the constitutional right and powers of the Federal Government are the same as to lands beneath all navigable waters within a state's boundary.

It follows that paragraph 1 of the proposed decree declaring that the United States has paramount rights and full power and dominion over the lands "outside of the inland waters" of the state is based on a fundamental fallacy and no such decree should be entered herein.

VI.

The Proposed Decree Should Not Include Any Provision for an Injunction.

Paragraph 2 of plaintiff's proposed decree recites that "the United States is entitled to the injunctive relief prayed for in the complaint." We respectfully submit that such a decree would be premature in advance of action by Congress specifying how and by whom the resources of the area in question are to be developed.

Furthermore, we submit that paragraph 2 of the proposed decree is improper because at this time it is nothing more than an abstract statement which cannot be given effect until the three-mile belt is located and identified and until the parties in possession thereof are before the Court.

Any statement as to the rights of the United States to an injunction should await the ascertainment of the specific area and parties as to whom the injunction can be made effective.

Furthermore, in view of the recent "operating stipulation" (plaintiff's Memorandum in Support of Proposed Decree, page 12) no injunction would be proper at this time and apparently none is contemplated by plaintiff. For this as well as the other reasons above set forth the abstract declaration that plaintiff is entitled to an injunction can serve no purpose at this time. The Court should not enter a decree which serves no purpose.

VII.

No Enforceable Decree Can be Made in This Case Against Persons Now in Possession Who Are Claiming Under California.

Even after Congress shall have acted and the three-mile belt is defined and located no decree in this case can be carried into effect against the numerous public and private parties now in actual occupation and possession of large portions of the three-mile belt under grants and leases from the State of California.

The State has made some twenty-five legislative grants of tide and submerged lands to municipalities and counties. Several hundred leases and licenses are outstanding under which persons and corporations are occupying important and valuable areas of submerged lands or lands formerly submerged. Over ten per cent of the State's 3,000 square miles of submerged lands has been actually occupied and possessed by persons claiming under the State. None of these persons, corporations or municipal bodies are parties to the present action.

It must be perfectly obvious that no decree in this case could be carried into effect against persons who are not parties to this action. Neither plaintiff nor the Court can know what special defenses such parties may have. Each one of them has his constitutional right to appear and be heard. To proceed against these parties by injunction or ejectment would require new and separate lawsuits. Hence, as to all persons claiming under California *a decision in this case* is abstract and hypothetical and incapable of being carried into effect.

Conclusion.

For all the above reasons counsel for defendant have found themselves unable to draft any form of decree which would "carry into effect" the opinion rendered herein, or any form of decree which, consistently with that opinion, would be anything other than a declaration of abstract rights concerning an unidentified three-mile belt.

Our analysis of plaintiff's proposed form of decree leads us to believe that counsel for plaintiff have encountered like difficulties.

The considerations above outlined demonstrate that befor any enforceable decree can be entered four necessary steps must be taken:

(1) Action by Congress determining how and by whom the natural resources in the three-mile belt shall be developed.

(2) A legal definition of the three-mile belt involving necessarily the establishment of legal criteria for defining "low water mark," "inland waters," "ports," "bays" and "harbors."

(3) Taking evidence as to the location of the low water mark as legally defined and as to the physical characteristics and historic facts relating to California's ports, bays and harbors and the application of legal criteria to those facts.

(4) Bringing within the Court's jurisdiction and adjudicating the rights of all grantees, lessees, and other persons in possession or occupation of any portion of the three-mile belt claimed under the State of California.

The above considerations indicate that the opinion rendered on June 23, has necessarily precipitated a series of extremely important and complex controversies all of which would, sooner or later, have to be decided by this Court. Many of these, as stated in one of the dissenting opinions, are questions "not readily resolved by the materials and methods to which this Court is confined."

We desire to state that in our belief the opinion of Mr. Justice Reed holding that California is the owner of the lands in question is the correct view of the case. Nevertheless, having regard for the views expressed in the majority opinion and the other dissenting opinion and the views expressed both by plaintiff and defendant, that *Congressional action is necessary to the exercise of the powers claimed by plaintiff,* we respectfully urge upon the Court a consideration of the advisability, as well as the legal necessity, of granting our petition for rehearing and dismissing the bill of complaint without prejudice. Congress may then exercise those powers which the Court now says it possesses and may fully and finally settle all rights in the three-mile belt, not only in California, but around the entire coast of the United States. By such a course, many years of extremely burdensome and expensive litigation may be avoided and property rights settled in order that substantial portions of these areas may be promptly improved and used for the public good.

If, on the other hand, the powers of Congress should be exercised in such a way as to precipitate further con-

troversy between States and Federal Government, then the Court will have before it specific and justiciable questions as to the legal authority conferred by Congress and the nature of the area where the authority is sought to be exercised and can render a final and enforceable judgment.

Respectfully submitted,

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