IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 12, Original.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

REPLY TO MEMORANDUM IN REGARD TO CALIFORNIA'S ANSWER TO PLAINTIFF'S PETITION FOR SUPPLEMENTAL DECREE.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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The Memorandum filed March 25th by counsel for plaintiff raises questions of such vital importance to the State of California that the consideration by the Court of the following Reply Memorandum is urgently requested.

Plaintiff in effect proposes that a decree be entered fixing and describing the boundary line between lands owned by California and its grantees and land over which the Federal Government has paramount rights, on three segments of the California coast, on the basis of judicial notice and without the taking of any evidence as to the location of the low-water mark or as to the physical and his-

torical factors relating to the bays, ports, harbors and inland waters.

This proposal presents two distinct problems: (1) The necessity for taking evidence and (2) the necessity to define the boundary line along the entire coast of California.

1. The Necessity for Taking Evidence.

The line proposed to be fixed will be a property line dividing land *owned* by the State and its grantees from land subject to the paramount rights of the Federal Government. The fixing of this boundary line involves two factual elements: (a) The determination whether all or some portion of the areas in question comes within the category of inland waters, ports, bays or harbors, and the fixing of the seaward line of such waters; and (b) the location of the "ordinary low-water mark" along such portions of the coast as are not within inland waters, ports, bays and harbors.

Plaintiff proposes in its supplemental decree that the determination as to the inland waters be made by this Court on the basis of judicial notice and that nothing whatever be done to locate the line of ordinary low water except to embody the term "ordinary low-water mark" in the proposed supplemental decree without further definition. We respectfully submit that it is impossible for the Court accurately to describe a property line in the manner proposed.

The mere statement that a boundary line is the line of "ordinary low water" does not define or fix that line so that anyone can identify it on the ground. Judicially to fix and define such a line requires the taking of evidence. The same is true as to the line dividing the inland waters,

ports, bays and harbors from the open sea. A line drawn from "headland to headland" means nothing until the location of the headlands and the termini of the line are judicially fixed.

Plaintiff in its opening brief admitted (p. 18, footnote 8) that "certain 'historic bays' like the Delaware, Chesapeake, and Conception bays, are admittedly inland, even though more than ten miles across at their mouth." The line proposed by plaintiff as the limit of San Pedro Bay "extends over the water . . . approximately 6 miles." California claims that the bay is much larger, and bases this claim both on physical and historic grounds. To litigate all these matters fairly and properly it is necessary for the parties to present evidence, oral as well as documentary. California desires to call witnesses who will testify both as to physical and historic factors and it desires to cross-examine witnesses who may testify on behalf of plaintiff. To deprive California of this right would be to deprive it of due process of law.

Both counsel for plaintiff in oral argument and the Court in its decision stated that the pattern for carrying the Court's general decree into effect was found in *Oklahoma v. Texas,* 256 U. S. 602, 258 U. S. 582, 260 U. S. 625, and 261 U. S. 340. That case involved the determination of a boundary line between Oklahoma and Texas. The decision in the first instance determined the meaning and interpretation of a treaty. It was found that this treaty fixed the boundary in question along the south bank of the Red River. A Master was then appointed to take evidence and determine "what constitutes the south bank" and to locate the boundary line upon the ground. We pointed out in our "Objections to Decree Proposed by Plaintiff" (which were objections to the decree entered on

October 27, 1947), that up to the point of the issuance of the interlocutory decree the two cases were not parallel. The *Oklahoma* case was a justiciable controversy in that the boundary line between Oklahoma and Texas depended upon the interpretation of a written treaty between the United States and Mexico, whereas, in the present case the Court has determined in the abstract the existence of governmental power over an area of land as to which the Government had never attempted to exercise the declared power and which cannot be identified by reference to any statute, treaty or constitutional provision. While we believe the two cases are not parallel on this fundamental question, nevertheless, if the *Oklahoma* case is to be taken as a pattern for this case, the necessity of ascertaining the physical characteristics and historical facts relating to the area in dispute calls for the appointment of a Master and the taking of evidence in the present case, just as it did in the *Oklahoma* case.

We desire now to refer more specifically to the problems involved in the three areas described in plaintiff's petition for supplemental decree.

(a) Question as to Inland Waters.

Plaintiff's memorandum does not clearly present the situation that exists as to the Santa Barbara Channel. As to this area it must first be determined whether the Santa Barbara Channel, as a whole, constitutes an inland water. This is a mixed question of law and fact. Engineering and other expert testimony will be necessary to determine the characteristics of this channel from a physical standpoint. Evidence is also necessary to show its history and the uses to which it has been put in the past. Properly to present California's case on this vitally im-

portant matter, witnesses should be called and examined and documentary evidence and maps introduced in evidence and explained by the witnesses.

Even it were to be determined that Santa Barbara Channel as a whole is not inland water, there are numerous indentations in the coast in the segment between Point Conception and Point Hueneme which we believe constitute bays, ports or harbors. Plaintiff's counsel make the amazing statement that they

> "know of no present dispute between the parties as to any of the physical facts in this area. If there are any indentations in the coast along the 'channel' that are inland waters (such as rivers entering the Pacific in this area), the United States does not claim them, as is made clear by paragraph 1(a) of the proposed supplemental decree."

This statement completely misconceives the nature of the problem now before the Court. The statement that if there are any inland waters along this coast the United States does not claim them is meaningless until the exact location and area of all the inland waters, including bays, ports and harbors which are not claimed by plaintiff, are identified and described. For example, if the Court will refer to Appendix A of plaintiff's petition for a supplemental decree it will note the curve in the coast line at the town of Ventura. This map greatly misrepresents the curve that actually exists at that point—it is in reality a fairly deep bay and has been for many years developed, used and known as a bay or harbor. There is no oil involved at this point. It is vitally important to the City and County of Ventura, as well as to the State, to know whether this bay belongs to the State or whether it

is subject to the Federal paramount power. California believes that evidence can be presented which will establish both historically and factually that this is a bay. Until the Court has ruled on this point the titles to the bed of this bay and to all structures extending into it are in a state of confusion. Counsel's loose statement that plaintiff does not claim inland waters is, as above stated, utterly without value so far as clearing the title to any submerged lands in this area is concerned. Similar situations exist at Santa Barbara, Goleta, Capitan and other places. These bays do not show clearly upon Appendix A because this map compresses approximately eighty miles of coast line into eight inches. To adjudicate these questions, not only should evidence be taken but the Master should inspect the areas personally.

As to the second of the three segments, to wit, San Pedro Bay, similar problems are involved, but there are also additional problems of a different nature.

Plaintiff has admitted that there is a bay or harbor at this point but contends that the line shown on Appendix B of its supplemental petition marks the seaward limit of this bay. California claims that San Pedro Bay extends much farther seaward than this line. The historical development of this bay and harbor over a long period of time, the uses to which the area has been put, the way it has been treated by both State and Federal Government, and the physical characteristics of the entire area in dispute, all must be fully presented if the State is to have a fair trial of this important issue.

In this connection it may be said that evidence will show that in addition to the minimum line shown on plaintiff's Appendix B, there are two other possible lines

which must be considered in determining the limits of this bay. One is that fixed by the Federal District Court in *U. S. v. Carrillo,* 13 Fed. Supp. 121, the other that fixed by the United States Coast and Geodetic Survey which goes from Point Firmin to Point Lasuen. All circumstances surrounding the fixing of these lines should be examined.

An aerial photograph of San Pedro Bay showing these alternative lines and also the minimum line proposed by plaintiff is attached hereto, marked Exhibit A. It is important to note that this minimum line is substantially inside of the breakwater, leaving a large area within the breakwater which would be classed as "open sea" under plaintiff's proposed decree.

The problems involved in the third proposed area are similar to those in the first, namely, the existence of islands and a channel known as San Pedro or Catalina Channel and the possible existence of bays along the coast. California will also contend that substantially all of the area described in paragraph (c) of plaintiff's proposed decree is actually within the proper limits of San Pedro Bay.

A personal inspection of all these areas by the trier of facts is essential to a fair decision of the issues.

(b) Line of Ordinary Low Water.

Plaintiff's proposed decree would recite that the areas A and C, namely, Santa Barbara and San Pedro Channels, are "situated seaward of ordinary low-water mark." Even if it were determined that the Santa Barbara Channel and the San Pedro Channel are not inland waters, the location of the ordinary low-water mark would have to

be determined before "the dispute between the parties as to the status of these areas" could be determined. As stated in our answer to the supplemental petition, no marshal could enforce a writ of injunction until this line is judicially defined. The line of ordinary low water is a physical fact which can be ascertained only by taking testimony as to the range of the tides and the plane at which the mean low-water mark intersects the land as of some fixed date. This can, of course, be done—but not by judicial notice.

Furthermore, for the Court to decree that the dividing line is the low-water mark would be merely a repetition of what has already been adjudged in the decree of October 27, 1947. Plaintiff is unable now to enforce that decree because it is not known where the low-water mark is, and it cannot be determined which oil wells are bottomed seaward of that line until the line is actually located on the ground and a description of such line embodied in the Court's decree. Another decree adjudging that the low-water mark is the dividing line will add nothing to the decree of October 27, 1947.

Plaintiff's memorandum makes no mention whatever as to this question of fixing the line of ordinary low water.

Furthermore, plaintiff's memorandum makes no mention of how plaintiff proposes to deal with the numerous municipalities and private parties in actual possession of submerged land under color of title. It is again submitted that these parties are indispensable parties in any proceeding which purports to fix their boundaries.

(c) Appointment of a Master Will Hasten the Termination of the Litigation.

Plaintiff suggests that the appointment of a Master would result in "endless hearings, many of which might be wholly unnecessary." It is submitted that if a Master is appointed he need hear nothing that is unnecessary. If it is possible for the parties to agree on the status of a particular piece of coast line, they can make such agreement as well before a Master as anywhere else. Indeed, the appointment of a Master would facilitate the making of such agreements because it would afford ample opportunity for full discussion of the problems as they arise.

If it is possible for the parties to limit the scope of the controversy, that can be done only by stipulations in which the parties may agree as to the status of certain areas or segments of the coast line. One stipulation has already been made, in which *minimum limits* were fixed for San Diego, San Pedro and San Francisco Bays. *Even as to these well known bays no final agreement was reached.* The negotiations and discussions which led up to this one stipulation consumed several weeks of the time of representatives of the United States Attorney General's office and the Attorney General of California. California does not believe it is practicable to carry on further negotiations as to other portions of the coast line in the time which would be available at a pretrial conference, as suggested by plaintiff. But such negotiations could be carried on before a Master and the appointment of a Master would greatly facilitate the ultimate determination of all the issues.

The fact that this is an original proceeding does not make it any the less a subject for litigation in the usual sense. If the case were pending in any trial court the matter would be set down for trial on the disputed issues of fact. Unless this Court is prepared to sit as a trial court and hear such evidence as the parties believe should necessarily be presented, it should, we respectfully submit, appoint a Master to do so. To do neither of these things would simply deprive the State of a trial.

California therefore renews its request for the appointment of a Master to take evidence and make findings of fact and conclusions of law as to all the area covered by the Court's decree of October 27, 1947.

2. Necessity to Define Boundary Along Entire Coast.

With all respect to the Attorney General and Solicitor General, we further submit that their claim that the proposed decree should be limited to three small segments of coast line shows a lack of understanding of the meaning and effect of the Court's decree entered October 27, 1947, as related to conditions existing along the California coast.

The complaint in this case did not seek merely to establish the right of the United States to the oil off California's coast line, which oil exists only in the three areas described in the petition for supplemental decree. Plaintiff's complaint asked for a declaration of rights as to the entire three-mile belt along the California coast from Oregon to Mexico and for a decree enjoining the State and all persons claiming under it *in that entire area.* The Court's decree of October 27, 1947, adjudged that the United States has paramount rights and full dominion over

"the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles *and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California.* The State of California has no title thereto or property interest therein.

"2. The United States is entitled to the injunctive relief prayed for in the complaint."

Now counsel for plaintiff make the amazing statement that they are not interested in anything but the oil and that it is unlikely that any problems will ever arise as to any segments of the coast other than those where the oil is found.

Even if the three segments referred to in plaintiff's proposed decree were accurately defined and adjudicated it would still leave nearly 1000 miles of California's coast line subject to the Court's decree and to a possible injunction but without any description of the area affected.

Plaintiff apparently assumes that except for oil California's coast line is wholly undeveloped and unused and that there is no need of determining where State ownership ends and Federal paramount power begins. But this is emphatically not the case. Every city bordering on the coast and every landowner along the coast is vitally interested in this question. Fixing this line is necessary for purposes of taxation and in connection with the maintenance, repair and construction of improvements which extend below the water line or on filled lands. State records show that there are approximately 370 physical structures extending into the water below high-water

mark. These consist of buildings constructed on piers, outfall sewage systems, salt-water intake systems, storm drains, oil pipe lines, wharves, piers, jetties, sea walls and other structures. Wherever these are constructed by private interests, as they are in most cases (but with State consent), they are subject to taxation by the cities and counties. (It must be remembered that the boundaries of all coastal counties extend to the three-mile limit.) Until the dividing line is fixed it cannot be determined what property is subject to taxation or where jurisdiction over such structures lies.

In addition to such physical structures as those mentioned, there are a number of projects now under way for extending the beach seaward by filling. An example of one of these is along the Santa Monica coast line. This project is being carried on by the City of Los Angeles and the State, jointly. It involves an expenditure of several million dollars, and the extension of about two miles of beach for a considerable distance seaward. This fill was started on the assumption that the new upland thus created would belong to the City of Los Angeles as grantee of the State of all submerged lands within its boundaries. The City boundaries extend three miles from shore. This project is not within any of the three areas described in plaintiff's petition for supplemental decree. It is within the area commonly known as Santa Monica Bay, but plaintiff in its opening brief listed this bay in the doubtful class, so it is not known whether it is subject to the Federal power or whether it belongs to the State. Until this question is determined there is serious doubt as to whether this important project can be continued.

There are many places along the California coast where the beach has, in the past, been extended seaward by arti-

ficial means. Property thus created has always been considered as owned either by the State or its grantees. As matters now stand those in possession of such properties do not know whether the properties are within the area which will be adjudged "inland waters" or, if not, whether they are below the original low-water mark. Titles to all such properties are in suspense until the line of demarcation is fixed at all places where the Court's judgment applies.

If it was plaintiff's intention to assert the Federal paramount rights to only a few specific segments of California's coast line, these should have been described in its complaint and the suit should have been limited to these areas. Since it did not do this and since the decree applies to the entire coast line, it is submitted that California is entitled, as a matter of right, to have the line along the entire coast fixed at the earliest possible moment.

Plaintiff's counsel make the statement that California's request for the appointment of a master and the fixing of the entire line along California's coast "would serve only as a delaying tactic." This also is emphatically not the case. In view of the Court decree above quoted, this case will not be concluded until the entire area over which plaintiff has paramount rights is accurately defined and segregated from the lands belonging to California and its grantees and lessees. The procedure proposed by plaintiff of attempting to define piecemeal the area subject to the Court's decree, leaving the undefined parts indefinitely in suspension, will prolong the litigation interminably. The only way the litigation can be brought to a conclusion is to proceed under recognized forms of legal process and to determine judicially the limits of the area subject to the Court's decree.

PROPOSED DISCRIMINATION BETWEEN OIL LESSEES AND OTHER STATE LESSEES IS INEQUITABLE AND IMPROPER.

Plaintiff's proposal to limit its decree to the areas containing oil results in an unjustifiable discrimination against oil lessees and in favor of other lessees and grantees of the State. To take but one example: Kelp is an important product of California's three mile belt. Approximately 100 square miles of California's coastal waters are leased by the State for the production of kelp. (See map, p. 147, Brief of California in Opposition to Motion for Judgment.) Many of the areas leased are outside the three segments referred to in plaintiff's proposed decree. Until the Court adjudicates the question of "inland waters" on all parts of the coast where these leases exist it will be impossible to know which of these lands belong to California and which are subject to the paramount Federal power.

The Department of Agriculture, in an official report to Congress in 1911, declared that

> "The giant kelp beds of the Pacific Coast are . . . a national asset of the first importance." (Senate Document 190, 62nd Congress, 2nd Session.)

The report also stated that the Pacific Coast kelp beds were the most important potential source of potash salts available in this country.

In 1945 the kelp harvested from lands leased by the State amounted to 37,542 tons. [Appendix to California's Brief in Opposition to Motion for Judgment, pp. 137 to 140, and 152 to 155.]

Kelp is attached to the bed of the sea and belongs to the soil. It seems to us to be subject to the same para-

mount power as the oil. It appears also to come within the terms of the Court's decree of October 27, 1947. Potash is a product of national importance. Yet the Attorney General of the United States says that oil lessees are to be enjoined but kelp lessees will not be interfered with.

Obviously the Attorney General has no power to make such a distinction. He is not authorized to say that the United States needs the oil but not the potash. Nor is he authorized to say that he will enforce the Court's decree against one person but not against others equally subject to it.

Furthermore, kelp lessees cannot legally rely on the Attorney General's statement. They are entitled to a legal determination as to whether they are within the area of paarmount Federal power, under which their product may be "appropriated," or not.

California is equally interested in having this question determined, because it is now segregating and holding in a special fund all rentals received from its kelp leases. It cannot dispose of this fund or make any new leases until it is determined what part of the submerged lands belong to the State.

Kelp has been used as an example of the fallacy of plaintiff's position. The same situation exists as to all lands along the coast line and all minerals therein.

California did not bring this suit—but now that it has been brought and judgment obtained, California believes that it is entitled to have all its rights under the decree established and adjudicated.

The plea of plaintiff's counsel that the controversy be kept "within appropriate limits" (meaning only the three

areas where oil is involved), is wholly inconsistent with the decree sought by plaintiff and rendered by the Court, which applies to the entire California coast. That decree has already set the limits of the controversy. It is too late now for counsel to narrow these limits merely by asking the Court to hold its judgment indefinitely in suspension as to nine-tenths of the area as to which that judgment legally applies.

We submit also that it is late in the day for counsel to complain about the "endless confusion" that will result if an attempt is made to put the Court's decree fully into effect. With all respect, we submit that the endless confusion already exists and has been brought about by a decree which lays down a general principle affecting titles and rights in real property in advance of any determination or identification of the lands which are to be subject to that decree. That confusion will continue to exist until all of the lands subject to the decree are legally identified.

We think it is pertinent to call the Court's attention to the fact that what plaintiff is now attempting to do is exactly what we stated in our main brief (Appendices to Brief, pp. 1 to 32, incl.) it would do, namely, to use the Court's decree merely as an advisory declaration of Federal power which will constitute the basis for actions in specific areas and against particular parties to be selected later. Plaintiff says there is no need to exercise this Federal power now except as to areas where oil is known to exist. But at some time in the indefinite future oil may be discovered in other areas—or the need for potash may become acute. Then plaintiff will no doubt seek to exercise this Federal power at other places and against other parties, as the Attorney General may think advisable. This makes the Court's decree of October 27,

1947, not a judgment in the justiciable sense, but a mere advisory declaration or opinion upon which the Attorney General can act from time to time, or not, as he sees fit. If this is the meaning and effect which is sought to be given to the opinion of June 23, 1947 and the decree of October 27, 1947, then, we respectfully submit, the Court should exercise its reserved jurisdiction and recall that opinion and decree and dismiss the entire case without prejudice.

Respectfully submitted,

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EXHIBIT A.

AERIAL PHOTOGRAPH SHOWING LINE OF BAY EXTENDING FROM POINT FERMIN TO POINT LASUEN.

Taken from altitude of 8,000 ft.; direction E S E; time 12:15 P. M., December 27, 1947.

The breakwater appears seaward from the "Government Proposed Line." In the foreground is San Pedro and a portion of the inner Los Angeles harbor. At the left center is the City of Long Beach and its harbor. Adjoining the intersection of the line marked "Limit of Bay as fixed U. S. v. Carillo, 13 F. Supp. 121," with the shore line is the City of Huntington Beach. At the intersection of the line marked "Probable Limits of Bay as referred to by Board of Rivers and Harbors, Deep Water Harbor Report" with the shore line is the City of Newport Beach. It will thus be seen that practically all of the areas in Appendices B and C of the petition for supplemental decree are included within the outer line of the bay shown in this aerial photograph.

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Government Proposed Line
Limit of Bay as fixed U.S.v Carrillo 13F Supp-121-
Probable Limits of Bay as referred to by Board of Rivers and Harbors, Deep Water Harbor Report. Senate Doc. 18-55.1