IN THE

Supreme Court of the United States

October Term, 1947.

No. ~~12~~ Original

16

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Motion of City of Los Angeles, a Municipal Corporation, for Leave to File a Memorandum, as Amicus Curiae, and Memorandum of Amicus Curiae in Support of Answer of State of California to Petition for the Entry of a Supplemental Decree.

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Motion.

The City of Los Angeles, a municipal corporation, organized and established under and by virtue of the laws of the State of California, and appearing herein through the following named counsel, respectfully moves that it be permitted to file a memorandum as *amicus curiae,* pursuant to Rule 27(9) of this Honorable Court, in support of the Answer of the State of California to the Petition for the Entry of a Supplemental Decree.

RAY L. CHESEBRO,
City Attorney of the City of Los Angeles.

Of Counsel:
ARTHUR W. NORDSTROM,
Assistant City Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 12—Original

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Memorandum of Amicus Curiae in Support of Answer of State of California to Petition for the Entry of a Supplemental Decree.

The plaintiff, the United States of America, on January 29, 1948, filed a Petition for the Entry of a Supplemental Decree with respect to submerged lands along three segments of the California coast, as therein designated.

Thereafter, the State of California filed its Answer to that Petition, alleging, among other things, that the areas described in paragraphs 1(a), 1(b) and 1(c) of the proposed supplemental decree do not constitute segments of the Pacific Ocean as described in paragraph 1 of the decree of this Court entered on October 27, 1947, but constitute inland waters of the State of California not claimed in this proceeding, and that the large area lying seaward of the straight line described in paragraph 1(b) of the proposed supplemental decree is a part of and within the

inland waters of the Bay of San Pedro; and that issues of fact exist as to whether any of said areas constitute segments of the "marginal sea" or inland waters of the State of California, and as to the location of the ordinary low-water mark of the Pacific Ocean. The Answer further alleges that numerous municipalities (among them being the City of Los Angeles), corporations and individuals are in physical possession, under claim of right as grantees, lessees or licensees of the State of California, of large portions of said disputed areas, and that, since the Court decree of October 27, 1947, applies to the entire California coastline, an urgent necessity exists for now fixing the entire line dividing the State's inland waters from the "marginal sea."

These allegations are correct, in both their conclusions of law and of fact.

Interest of the City of Los Angeles.

The City of Los Angeles has been, since 1911, the owner of all of the right, title and interest of the State of California in and to all of the tide and submerged lands lying within its boundaries. (Cal. Stats. 1911, p. 1256; Cal. Stats. 1917, p. 159; Cal. Stats. 1929, p. 1085.)

The City of Los Angeles' boundaries extend into the Pacific Ocean to the boundary of the State of California three miles off shore, as set forth in the Constitution of the State of California. A segment of the Bay of San Pedro and segments of the Bay of Santa Monica, lying to the north of Point Fermin, together with comparable segments of the Pacific Ocean lying seaward of those bays, are within the boundaries of the City of Los Angeles.

That segment or portion of the Bay of San Pedro, lying within the boundaries of the City of Los Angeles and

landward of a great breakwater extending southerly from the general location of Point Fermin on the north, has been placed by the Charter of the City of Los Angeles under the control, jurisdiction and supervision of the Board of Harbor Commissioners of the City of Los Angeles and has been developed as a large commercial harbor and port of entry of the United States, mainly at the expense of the City of Los Angeles. Local tariffs, rules and regulations have been promulgated for the administration of Los Angeles Harbor and these have since 1911 been enforced and administered by the Board of Harbor Commissioners of the City of Los Angeles for the benefit of the City of Los Angeles, the State of California, and the United States in the interests of commerce, navigation, fishery and national defense.

The proposed supplemental decree seeks now to have it adjudicated that a portion of Los Angeles Harbor inside the breakwater lies outside of the inland waters of the State, and is a part of the high seas surrounding the State of California, and hence is subject to the decree of October 27 to the effect that the State of California is not the owner thereof. (See Petition for Entry of Supplemental Decree, Appendix B (map).)

The total investment of the City of Los Angeles on tide and submerged lands in this harbor, a portion of which is now claimed to lie outside of the inland waters of the State of California, is approximately $33,000,000, and in the current year the City has budgeted $9,125,000 for new construction.

The City of Los Angeles, by and through its Board of Recreation and Park Commissioners, operates and maintains a large system of public recreational facilities for the use and enjoyment of its citizens and the public generally.

Among these facilities are public beaches in the Bays of San Pedro and Santa Monica lying within the City's municipal boundaries. The total assets of the City involved in these public beaches in those bays as of June 30, 1947, were in the sum of $10,505,568.55. Santa Monica Bay is not within the segments sought to be adjudicated by plaintiff's petition for supplemental decree.

In 1944 the Regional Planning Commission of the Los Angeles County Regional Planning District formulated and adopted a Master Plan of Shoreline Development providing for an integrated and unified program for the development of the ocean shoreline of Los Angeles County from its northern to its southern boundary. This plan was officially approved by the City of Los Angeles. The plan involves an ultimate expenditure estimated in the neighborhood of $100,000,000 of which approximately one-half, it is estimated, will be for fills and improvements on the submerged lands in the Bays of Santa Monica and San Pedro. The City of Los Angeles has already filled in on submerged lands in Santa Monica Bay with approximately 3,000,000 cubic yards of material. Unless and until it is determined that Santa Monica Bay constitutes inland waters, the entire recreational enterprise, contingent upon reclaiming large areas of submerged lands therein, may have to be held in abeyance.

In San Pedro Bay, the City of Los Angeles, pursuant to said Master Plan, has entered into a $200,000 contract with the United States Army Engineers for filling submerged lands along Cabrillo Beach, just outside the breakwater and partially in an area which is now claimed in the said Petition of the United States to be outside of inland waters, and to be not owned by the State of California or its grantee, the City of Los Angeles.

The Necessity for First Determining Certain Questions of Law.

The petition for supplemental decree involves an adjudication of the boundaries of the inland waters in the three segments therein referred to, and of the location of the ordinary low-water mark along such portions of the coast in those three segments as may not be within inland waters.

The ordinary low-water mark cannot be determined factually, until it is determined what ordinary low-water mark is referred to. Is it the ordinary low-water mark as of 1850, when California was admitted as a State; is it the present ordinary low-water mark; or is it the ordinary low-water mark as it shifts and changes from year to year and day to day, by reason of accretion and reliction, both natural and artificial?

The marginal sea concept, according to this Court's opinion in this proceeding, was and is a creation arising out of international relations:

> "It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, * * *.
>
> "Not only has acquisition, as it were, of the three-mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty. See *Jones v. United States,* 137 U. S. 202; *In re Cooper,* 143 U. S. 472, 502. The belief that *local interests*

are so predominant as constitutionally *to require state dominion over lands under its land-locked navigable waters* finds some argument for its support. But such can hardly be said in favor of state control over any part *of the ocean or the ocean's bottom.* * * * The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars raged on or too near its coasts. *And insofar as the nation asserts its rights under international law,* whatever of value may be discovered *in the seas next to its shores and within its protective belt,* will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nations may enter into and assume treaty or similar international obligations. * * *" (Italics supplied.)

Since the three-mile belt is one primarily for protection of the land of the littoral nation from foreign aggression, the belt should move seaward if the land is built up seaward. If such were not the case, a three-mile-wide fill into the ocean along our shores would leave the nation no marginal sea at that point for protective purposes. Conversely, as soon as the ocean's bottom is raised above water and becomes joined to the mainland as upland, it is apparent that local state interests became so predominant,

as upon inland waters, "as constitutionally to require state dominion" over such former submerged lands.

Therefore, the marginal sea can never include uplands or reclaimed submerged lands, and hence the United States can never, either by precedent or reason, continue to be possessed of paramount rights and powers transcending mere title, as against a state, in and to any lands not actually covered by navigable waters outside of inland waters.

The foregoing is presented as illustrating that legal definitions of "marginal sea," "inland waters," "bays," "harbors," and "ordinary low-water mark," are required before anyone can undertake to ascertain factually just where on the water or land at any given time state dominion ends and federal dominion begins along the ocean shoreline of California under this Court's decree of October 27, 1947.

The Necessity for Taking Evidence and Appointing a Master to Hear Same.

After preliminarily determining what is meant by the "marginal sea" and what line is referred to as being "the ordinary low-water mark," two questions of fact must then be determined:

1. The location on the ground of the low-water mark, with surveyor's accuracy; and

2. The location on the water of the line separating inland waters, *i. e.*, bays, harbors, etc., from the open sea, with surveyor's accuracy.

Judicial notice is no aid. No unsurveyed line can be judicially noticed. Bays and harbors, as such in general, may possibly under certain circumstances be judicially

noticed, but the location of the exact line separating even such bays and harbors from the open sea would require the location of the exact ordinary low-water mark at each terminus or headland and require the plotting of such connecting line with surveyor's accuracy. Neither the ordinary low-water mark nor the bays and harbors of California have ever been so located, mainly because, prior to this Court's decree of October 27, 1947, neither line had any significance with reference to any conflicting property or paramount rights as between sovereignties or individual persons.

If judicial notice is taken of the general extent of San Pedro Bay, it can only be in accord with the reports of Army Engineers or the decisions of the courts. (See *United States v. Carrillo,* 13 Fed. Supp. 121, describing generally San Pedro Bay; *People v. Stralla,* 14 Cal. (2d) 617, defining generally Santa Monica Bay; and *Ocean Industries, Inc., v. Superior Court,* 200 Cal. 235, describing generally Monterey Bay.) Certainly, judicial notice cannot be taken of the Government's proposed line for separating the Bay of San Pedro (Petition for Supplemental Decree, Appendix B) from the open sea, for that line has never before been suggested or referred to anywhere as being the limits of San Pedro Bay. Being a new and novel proposal, now made for the first time, and at variance with all previous determinations, extensive evidence of great and overpowering weight will be required, in our opinion, to establish any such separating line as is now proposed by the United States in San Pedro Bay.

The line proposed by the United States for San Pedro Bay, if established, would be detrimental not only to local, but national interest. A determination that a portion of a harbor of refuge, a harbor for navy anchorage and housing a navy base, is a part of the open sea, subject to international rules of the road and the freedom of the seas, would seem to be adverse to national security, defense, and commerce.

There have been, from time to time, actions instituted requiring a determination as to whether certain areas of the ocean are bays or not. In every such case the question arose in connection with the interpretation of a statute, constitution or treaty, and the factual determination was only arrived at after extensive and exhaustive historical, customary, and engineering evidence and data had been received, analyzed, and considered. The same is true of actions involving the establishment of the location of the mean high tide line and boundaries between states. We are unable to conceive of any Court being able to fix the ordinary low-water mark or the outer limit of a bay or harbor along the California coastline without resort to extensive evidence upon all pertinent matters. Such evidence has, in every case heretofore tried of a similar character, always been so voluminous and technical in nature as to lead us to the ineluctable conclusion that any practical approach to the factual problems raised by the Petition of the United States will require the reference of the matter to a Master for the reception of evidence and report thereon. Certainly, due process can only be accorded the interested parties by such a reference.

Necessity of Expanding the Issues to Include the Whole California Coastline.

In the Reply of the State of California to Memorandum in Regard to California's Answer to Plaintiff's Petition for Supplemental Decree, the necessity for the immediate settlement and determination of where the State's ownership of inland waters ends and of the location in other areas of the ordinary low-water mark, is very ably explained and illustrated. We thoroughly concur with the position of the State of California.

One of the segments of the sea coast of California in which the City of Los Angeles is presently greatly interested in developing recreational beach facilities and which the City is even now so developing, lies in Santa Monica Bay. This segment, as above stated, is not included in the three segments described in plaintiff's petition for supplemental decree. The Brief of the United States, filed in this proceeding, characterized that bay as "doubtful." This is an indication that the United States, when the issue is presented, will claim that the landward boundary of the "marginal sea" in that bay is the "ordinary low-water mark." Thus a cloud has even now attached to the ownership by the City of Los Angeles, under State grant, of any of the waters and submerged lands in Santa Monica Bay below the ordinary low-water mark. Moreover, many existing improvements may even now be seaward of the ordinary low-water mark, depending upon the legal defition of what and where that line is. It is hardly consonant with justice and reason that the right to occupy and use

such an area should be left in suspense merely because of the election of the Attorney General of the United States so to do, leaving vast local programs for public improvements dangling in abeyance, and the right to maintain existing improvements so beclouded.

We urge that this and many other similar situations more than justify the request of the State of California that the ordinary low-water mark and the inland waters of the State, from Oregon to Lower California, be now fixed once and for all.

Conclusion.

We urge that this Honorable Court pursue the further course in this proceeding requested by the State of California, and that a Master be appointed to take evidence relative to the location and exact shoreward boundary of the "marginal sea" along the entire coast of California.

Respectfully submitted,

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