IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 6, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION AND BRIEF

and

MOTION FOR APPOINTMENT OF A MASTER TO CONDUCT HEARINGS

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I. LOCATION OF THE MARGINAL BELT IS A POLITICAL QUESTION WHICH MUST BE DECIDED BY CONGRESS.

In its opening brief in relation to the Report of the Special Master, California contended that the location of the marginal belt is a political question for the Congress because it involves a determination of our national external boundaries. This determination was shown to involve questions of international relations for which there are no presently established criteria for judicial decision.

In its brief, Plaintiff apparently concedes that the issues in the present proceedings are political questions involving matters of international relations. This is shown, in the first place, by its statement that there may be "implications with respect to *political and external matters*" in the fixing of the baseline of the marginal sea. (p. 19).

An even clearer indication that Plaintiff considers the issues in the present proceeding to be political is found in its statement that,

> " . . . the views of the Executive, as to the proper method, under international law, for measuring a Country's marginal sea and the outer limits of its inland waters should have great, if not conclusive, weight in this proceeding . . . " (p. 16)

California believes that Congressional action rather than "the views of the Executive" should control the determination of our national external boundaries. But in considering the primary question whether this issue is political, it is immaterial whether it be Congress or the Executive. If action by either is controlling, it is because the issue is political. Thus, plaintiff's argument as to the weight to be given Executive views only emphasizes the political nature of the problem.

Plaintiff's recognition that the issues are political is further shown by its reference to the international aspects of the issues here involved. This is illustrated by the statement in Plaintiff's brief that the choice between conflicting criteria for determining the outer limits of inland water "*directly depends on developments in the field of international law* as well as the position of the United States in respect to such developments . . . " (Brief, p. 24). It would appear, therefore, to be clearly established that the questions in this proceeding are political and involve international relations.

Plaintiff, in its brief, has endeavored in three ways to escape the consequences which flow from the political nature of the issues. First, Plaintiff repudiates the Master's

finding that the parties are in agreement that there are no established criteria for judicial decision, and it claims that such criteria do exist. Such criteria are said to be found in "the views of the Executive" which plaintiff states will be presented to the Court in connection with "the hearing on the merits" (p. 16). Second, Plaintiff argues that even if the views of the Executive are accorded "great, if not conclusive weight," the question is nevertheless justiciable because the Court may simply adopt the Executive's views as the basis for its decision (pp. 16-17). Third, Plaintiff takes what seems to be an inconsistent position by asserting that, under *United States* v. *Texas,* 143 U. S. 621, and the opinion of the Court in this case, the issues presented in this proceeding are justiciable and not political. Each of these three points will be discussed briefly.

A. Plaintiff's Argument That There Are Established Criteria for Judicial Decision is a Reversal of Its Prior Position.

Plaintiff's assertion that the mathematical criteria it proposes as the solution to the inland water question "have been adopted by the United States and are established rules of international law" will, we believe, come as a surprise to the Special Master, as it does to California. In his Report of May 22, 1951, the Special Master stated that it is "conceded that criteria now advanced by the parties have *not* heretofore been definitely adopted by the United States or established as existing rules of international law" (p. 34), and that, "Neither party contends or proposes to submit any evidence to prove, that criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitely adopted by the United States or established as customary rules of international law." (p. 8). In explaining the United States proposal, the Master noted that it was advanced "absent any such established criteria." (p. 34).

Faced by these unequivocal statements by the Master, Plaintiff states that they "reflect an aparent misunderstanding of the position of the United States in respect to this matter." (Brief, p. 2). It will be useful to review the materials submitted to the Master to determine how he could have reached this so-called misunderstanding.

Pursuant to the order of the Court of June 27, 1949, the Master ordered each of the parties to submit a *statement of "your position"* and "the nature and form of evidence you propose to submit" on the three questions set forth in the Master's Report of May 31, 1949 (Letter from Special Master, June 29, 1949). In compliance with this request, California filed a response setting forth a statement of its position and the nature and form of its evidence and this was later supplemented by two volumes entitled, "Summary of Testimony of Typical Witnesses" and "Citation of Documents". Plaintiff filed a memorandum on August 12, 1949, in which it said that the procedure for determining whether a particular indentation is a bay "should follow, insofar as it may be practicable, the method of delimitation *proposed* by the delegation of the United States at the Hague Conference in 1930." (p. 14). On the question whether particular channels are to be regarded as inland waters, Plaintiff stated that the answer "is to be found in *proposals* of the United States delegation at the 1930 Conference." (p. 19).

This memorandum stating Plaintiff's position does not contain a single statement or even a suggestion that the proposals advanced have "been adopted by the United States and are established rules of international law" as Plaintiff now asserts. (Brief in support of Motion for Hearing, p. 3). Every statement and every inference is to the contrary. Plaintiff accurately pointed out that "The Conference at the Hague in 1930 did not, of course, result in any treaty or convention . . . " (Memorandum of Aug. 12, 1949, p. 7). The memorandum repeatedly refers to the "proposal" and the "recommendation" of the United

States at the Conference. The fact that plaintiff did not at that time regard the proposal as having been adopted in American or international law is further evidenced by its quotation of Professor Charles Cheney Hyde to the effect that the proposal should receive "the faithful and unbiased consideration of all martime nations." (Memorandum of Aug. 12, 1949, p. 15).

The Special Master held conferences with the parties on September 19, 1949 and June 1, 1950 in his effort to comply with the Court's order of June 27, 1949. There is nothing in the record of either of those conferences which could have apprised the Master of the fact that Plaintiff contended that the criteria it proposed have been "adopted by the United States and are established rules of international law." In the Conference on September 19, 1949, the Special Master made the following statement which went completely unchallenged:

> " . . . Let us pass on to the determination of what is a bay.
>
> "The Government's position is very clearly stated on that. They are relying on the proposals of our representatives at the Hague. The State comes along and says those proposals were never accepted, and *that is true, nobody denies that,* but the Government says nevertheless that is our position. I suppose on the ground that is the nearest thing there is to a definition of the country's position on the subject." (Transcript, p. 135)

The failure of Counsel for Plaintiff to contradict this statement could have had no other effect than to indicate to the Master that the Plaintiff did not contend that the criteria it proposes have been adopted.

The sum of the record before the Master is that the Plaintiff has never, prior to the filing of its brief on August 1, 1951, contended that the criteria it proposes have been adopted by the United States or are established rules of international law. Far from reflecting an apparent misunderstanding of Plaintiff's position, the Master's Report

reflects the only conclusion that he could possibly have reached on the basis of the material submitted by the Plaintiff. The fact is that Plaintiff's present position that the criteria it proposes have been adopted and established constitutes an abrupt reversal of its prior position, as it was stated in response to the request of the Special Master.

The proceedings before the Special Master were in every respect comparable to the pre-trial procedure established by Rule 16 of the Federal Rules of Civil Procedure. At the hearing held by the Special Master September 19, 1949, the Master, after stating what the Court had ordered him to do, said, "I think that the idea is sort of a pre-trial conference (Transcript, page 112). (See also Master's Report of May 31, 1949, p. 7.) At one point in the hearing when a discussion arose as to how much of their respective cases the parties should disclose, the Special Master said, "You will not get the Supreme Court or any Federal court body to yield on that position that they want to *eliminate from trials before them any ambush.*" (Transcript, p. 156.) As the Master's statement suggests, the principal function of pre-trial procedure is to eliminate the element of surprise by apprising both the Court and the parties of the position which each side intends to take on all important issues in the case.

The record outlined above shows beyond dispute that Plaintiff, when called upon to do so, did not apprise the Special Master or California of the position it now takes with regard to the question whether the so-called Hague proposals have been "definitely adopted by the United States or established as existing rules of international law." Plaintiff's reversal of position on this important point would appear to be completely out of harmony with the Special Master's request and with the purpose and spirit of pre-trial hearings as contemplated by Rule 16.

Since Plaintiff has shown nothing as yet to support its newly announced position that the so-called Hague formula has been adopted and is the established rule in international law, it would be premature to debate the question at this

time. It is pertinent to point out, however, that since the so-called Hague formula was not adopted at the Hague Conference in 1930 and has not been adopted by any nation, it should be more properly called the Boggs formula, after its author, S. W. Boggs, geographer of the Department of State.

Mr. Boggs has written two articles for the American Journal of International Law regarding this formula. In the first article which was written immediately after the Hague Conference in 1930, Mr. Boggs stated that his proposal "is to be regarded as a first attempt" in the direction of a general solution of the problems involved in locating the marginal belt. (Boggs, Delimitation of the Territorial Sea, 24 A.J.I.L. 541). He admitted that it would be impossible to apply his general formula on the Norwegian coast because that coast is of such "unusual complexity" that the only possible solution there would be to draw arbitrary straight lines. (pp. 554-555). This, of course, suggests that there might be other coasts to which the formula would not be applicable.

In April 1951, Mr. Boggs wrote the second article describing the formula discussed at the Hague in 1930. (Boggs, Delimitation of Seaward Areas under National Jurisdiction, 45 A.J.I.L. 240). The following excerpts from this article show that at this recent date, the author of the so-called Hague formula continued to regard it as a tentative proposal which is being advanced for consideration by the United States and other nations:

> The author stated that the article dealt specifically with the "*lack of well developed, acceptable techniques and principles* for the delimitation of territorial sea, or of any contiguous zone or zones required." (p. 242)
>
> "Within the present necessary limits the *writer therefore seeks to suggest* the most workable solution of all types of water delimitation problems in the adjacent seas of which he is aware. In most particulars *the techniques go much further than the policy of any country is believed to have been formulated.*" (p. 243)

"The writer hopes that *what is here proposed* as good policy for the world as a whole *may be acceptable as good policy for the United States.*" (p. 243)

"Although it should be obvious from the context, the writer wishes to make it clear that *he alone is responsible for the opinions, viewpoints and proposed solutions* of problems in the present article." (p. 243)

"The principles and techniques which are formulated and explained below relate to emerging categories of water boundary delimitation that *have not hitherto claimed serious attention of students.*" (p. 246)

B. Congress, Not the Executive, Has the Responsibility for Locating the Marginal Belt.

Now that Plaintiff has reversed its position and is contending that the criteria it proposes have been "adopted by the United States," Plaintiff urges that the views of the Executive should have "great, if not conclusive, weight in this proceeding." As pointed out above, this argument only emphasizes that the questions in this proceeding are political. But California believes that Plaintiff is in error in assuming that the political branch which has the responsibility for fixing the location of the marginal belt is the Executive. It is California's position that Congress has this responsibility.

Under our Constitution, exclusive responsibility for acquiring or surrendering territory is vested in the Congress, not the Executive. The Constitution (Art. IV, Sec. 3, Cl. 2) explicitly vests in the Congress the power to dispose of property belonging to the United States.

Although no clause in the Constitution expressly provides for the acquisition of territory, every Constitutional provision under which the power to acquire territory has been implied requires Congressional action. The Supreme Court has said that, "the war power and the treaty-making power, each carries with it authority to acquire territory." (*Stewart* v. *Kahn,* 11 Wall. 493, 507 (1870); Chief Justice Marshall in *American Ins. Co.* v. *Canter,* 1 Pet. 511 (1828).

The war power is exclusively vested in Congress by Art. I, Sec. 8, Cl. 11 of the Constitution. Under Art. II, Sec. 2 of the Constitution, the treaty power can be exercised only with the concurrence of two-thirds of the Senators present. In *Dred Scott* v. *Sandford,* 19 How. 393, 446 (1856), the Court said that, "The power to expand the territory of the United States by the admission of new states . . . has been held to authorize the acquisition of territory . . ." This power, like the war and treaty-making power, is exclusively vested in Congress by the Constitution (Art. IV, Sec. 3, Cl. 1). It has also been held that Congress can exercise the inherent power of the United States to acquire territory by discovery and occupation. See *Jones* v. *United States,* 137 U. S. 202 (guano islands Act, 11 Stat. 119); *Mormon Church* v. *United States,* 136 U. S. 1, 42 (1890).

In contrast, the Executive has no authority under the Constitution to acquire or dispose of territory. The Supreme Court has held that the President's military powers do not authorize him to annex territory without Congressional authorization. *Fleming* v. *Page,* 9 Howard 603, 614-15. In that case, the Court said,

> ". . . The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. * * * [*H*]*is conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.*"

Moreover, the implied power of the President to conduct foreign relations has never been held to authorize him to assume the responsibilities of acquiring or disposing of

new territory which have been delegated to the Congress under the Constitution.[1]

The determination of the outer limits of inland water which will fix the baseline of the marginal belt is equivalent to either an acquisition or a surrender of our territory and therefore is the exclusive responsibility of the Congress. If the outer limits of inland waters are fixed as far seaward as possible within the limits of international law, that will be tantamount to the acquisition of new territory for the United States. If, on the other hand, the baseline of the marginal belt is located so that it hugs the shoreline, that will be equivalent to the surrender of territory which the United States might otherwise have claimed. As was said in California's opening brief, the decision made as to the location of the baseline "will *for the first time* define the limits of our sovereignty and is therefore akin to the annexation of new territory into the Union or the establishment of control over a new territory." (p. 19). Under established principles of the Constitution, as interpreted by this Court, this decision can be made only by the Congress, and not by the Executive.

C. Nothing in the Opinion in This Case or in United States v. Texas is Contrary to the Conclusion that the Issues in This Proceeding Are Political and Not Justiciable.

Notwithstanding its concession that the location of the marginal belt is a political question, Plaintiff takes the inconsistent position that the issue here is justiciable and not political on the authority of the opinion of the Court in this case and in *United States* v. *Texas,* 143 U. S. 621. Since

[1] The Department of State, through Secretary of State Charles Evans Hughes, has taken the position that only Congress can declare United States sovereignty over territory discovered and occupied by American nationals. (I Hackworth, Digest International Law, p. 399.) Moreover, the Secretary of State in 1918 stated the view that it would require the joint action of Congress and the Executive to extend jurisdiction of the United States over an island built in the high sea by a national. (II Hackworth, Digest, p. 680.)

both of these opinions were discussed in California's opening brief (See pp. 24-25, 15-16), they can be treated briefly here.

Plaintiff contends that the Court in the opinion in this case (332 U. S. 19, 26) "envisaged the possibility of boundary determinations such as are now before it," and that therefore it is the law of the case that such a determination is a justiciable and not a political question. (Brief, pp. 15-16). The fallacy in this argument is that the "political question" contention was never raised or discussed in the opinion in the case. (See California's Opening Brief, p. 24). The excerpt from the opinion quoted and relied upon by Plaintiff (Brief, p. 15) has reference to the clearly distinguishable argument made by California that there was no case or controversy because it was impossible to identify the subject matter of the action. None of the citations suggest that the Court considered or rejected the possibility that the location of the marginal belt was a political question.

In 1950, the Supreme Court said that, "The rule of the law of the case is a rule of practice, based upon sound policy that when *an issue is once litigated and decided* that should end the matter." (*United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 198 (1950)). As this recent statement of the rule indicates, the law of the case does not extend to issues which have not actually been raised and litigated in the prior action. (See *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 284-285 (1922); *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551, 553-4 (1904)). Since the issue as to whether the location of the marginal belt is a political question was not raised or litigated in the proceedings on the merits or any other prior proceeding in this case, there is no law of the case with reference to that issue.

Plaintiff relies on the holding in *United States* v. *Texas*, 143 U. S. 621, that a boundary dispute between the United States and one of its component states is justiciable to show that the issue in the present proceedings is not a political question. This argument overlooks the fact that the Court

in the *Texas* case sharply distinguished disputes over national external boundaries involving questions of international law and quoted Chief Justice Marshall in *Foster* v. *Neilson* (2 Pet. 253 (1829)) to the effect that such questions "respecting *the boundaries of nations*" are political and not justiciable. As California pointed out in its opening brief, the present proceeding involves our national *external* boundary and has international aspects which make it clear that the holding in *United States* v. *Texas* concerning an *internal* boundary dispute is not in point (pp. 15-16). Indeed, far from sustaining Plaintiff's position, the *Texas* case offers authoritative support for California's argument that the issues in present proceeding are political and beyond the scope of the judicial function.

II. PLAINTIFF'S MOTION SHOULD BE DENIED AND THE ISSUES REFERRED TO A MASTER OR OTHER INTERMEDIATE TRIBUNAL.

Plaintiff's motion for a hearing by this Court is in two parts: (1) a hearing "on the underlying principles which will resolve the three issues defined in the Report of the Special Master"; (2) a hearing to determine the historical status of the waters in the three segments of the Coast listed by the Master in Group 1. (Plaintiff asks that consideration of Group 2 be postponed.)

Despite the language of the first part of its motion, Plaintiff defines the first two of the three issues in terms which differ in important respects from the issues as defined by the Master. It will simplify the discussion if we set forth the three questions which Plaintiff refers to as "the three issues defined in the Report of the Special Master" and the three issues as actually defined by the Master.

The first issue as stated in Plaintiff's motion is as follows:

> "a) By what criteria is the status of channels and other water areas between the mainland and off-shore islands to be determined to be inland waters or open sea."

The Master's statement of the first issue is as follows:

> "1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?"

The second issue in Plaintiff's motion is as follows:

> "b) By what criteria is the status of coastal indentations to be determined to be bays, and therefore inland waters, or to be open sea."

The Master's statement of the second issue is as follows:

> "2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;"

The third issue is stated in the exact terms of the third issue as defined by the Master, namely,[2]

> "3. By what criteria is 'the ordinary low-water mark on the Coast of California' to be ascertained."

It will be seen that the issues presented by Plaintiff are not the issues defined by the Master. The issues defined by the Master call for a determination of the status of the particular channels, bays and harbors *in controversy in this case*. In contrast, Plaintiff's version of these issues calls for the determination in the abstract of general criteria which will apply to all channels and coastal indentations

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[2] California understands that a hearing on this issue will encompass the question whether "either artificial changes in the shoreline or natural accretions to artificial structures" should be included in the marginal sea. (See Pl. Br. p. 34). California's position is that the baseline should be determined on the basis of conditions as they exist at the present time or at any time in the future when the matter becomes the subject of controversy, while Plaintiff contends that the baseline should be determined on the basis of conditions as they existed prior to any so-called artificial changes in the coastline made after 1850. (Calif. Br., pp. 83-90).

without reference to the various problems and factors which exist in the particular areas under consideration.[3]

It was shown in California's opening brief that a determination of the seaward limit of inland waters involves consideration of data relating to such factors as (1) national security, (2) economic requirements, (3) international practices, (4) geography, (5) law enforcement, and (6) historical usage. Plaintiff, for the purpose of its present motion, has revised the Master's statement of the issues in such a way as to eliminate from the Court's consideration all evidence (except historical) of these factual and policy considerations which are necessary to resolve the issues as stated by the Master. Plaintiff itself argues that this will be the effect of its motion. (Br. p. 21).

This proposed procedure is based on the assumption that the Court should rule on the so-called Hague formula as the universal criteria which will govern every possible situation without consideration of data relating to the important factual and policy questions involved in each of the bays, harbors, and channels here in issue. Plaintiff asks the Court to adopt this formula as the "criteria" referred to in its motion, solely on the basis of what it proposes to present in briefs and oral argument regarding "developments in the field of international law as well as the position of the United States with respect to such developments." (Plaintiff's Brief, p. 24).

This proposal, in effect, completely repudiates the report of the Special Master. After long and exhaustive analysis

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[3] Another exceedingly important difference between the issues stated in Plaintiff's motion and the issues actually submitted to the court by the Master is the unexplained omission of all reference to ports and harbors in issue(b) of the proposed motion. Under the proposed motion, the Court would not even consider whether California's many important harbors, including those at Los Angeles and Long Beach, should be designated as within the inland waters rather than in the marginal belt. As California pointed out in its opening brief (pp. 64-68), Plaintiff's failure to make provision for treating port and harbors as inland waters is inconsistent with statements in the *California* opinion and with Plaintiff's prior assurances.

of the position of the parties as represented to him, the Master found that the issues require the determination of the status of seven coastal segments. The Master's selection of these seven segments and *his* statement of the issues makes it clear that he contemplated the necessity of an examination of *the particular conditions existing in each segment and of the determination of the status of each segment in the light of those conditions.* That is why he selected segments which would be representative of the various problems involved.

In contrast to Plaintiff, California urges that hearings be held on the true issues as submitted to the Court by the Master. California contends that a fair consideration of these issues requires that evidence of the actual conditions in each of the seven segments should be presented as contemplated by the Master, and that all factual and policy considerations which might influence the decision as to the proper criteria should be fully presented and weighed. Until such evidence is considered, no proper appraisal can be made as to whether Plaintiff's one-dimensional formula should be adopted as the sole criterion for determining the inland water question.

Whether the Court decides to accept the Master's statement of the issues or to consider the questions along the narrower lines proposed by Plaintiff, it will be faced with the problem of determining whether the hearing should be conducted by the Court itself or by a Master or other special tribunal which would take evidence and make findings of fact and conclusions of law, subject to review in this Court. Whatever course is adopted, it is California's view that the mass of data which must be sorted, analysed and weighed is so great that it will be impractical for the Court to undertake this task without the aid of a Master. This is so even as to the two categories of material which Plaintiff concedes will be necessary should the hearing be limited within the scope of its motion, namely: (1) evidence of developments in the field of international law, (2) evidence of the historical status of the waters.

Evidence of developments in the field of International Law. In its brief, Plaintiff points out "that the choice between the conflicting criteria offered in answer to Questions 1 and 2 directly depends upon developments in the field of international law as well as the position of the United States in respect to such developments. (Br. p. 24). Plaintiff's position is that the principles of the so-called Hague formula "are established rules of international law." (Br. p. 3). Plaintiff asserts that it will adduce evidence to this effect "when the issues are heard on the merits." (Br. p. 24).

California's position, on the other hand, is that no criteria for the location of the baseline of the marginal belt have (in the Master's language) "heretofore been definitely adopted by the United States or established as existing rules of international law." (1951 Report of Special Master p. 34). This conflict of viewpoint will call for the full consideration of the laws, treaties and practices of foreign nations. Consideration of the international materials is also necessary to show (a) the lessons and experience of other maritime nations which have considered the problem over a long period of time and (b) the range of choice which would be within the limits of international practice.

In the volume filed with the Court entitled "Citation of Documents," California has cited and quoted 92 laws of other countries, and these constitute only a portion of the international materials which the Court must consider. Problems involving the translation of these laws and their application to the coastal areas of foreign countries will inevitably be exceedingly complex and time-consuming.

Only last year, the Supreme Court stated that where the answer to a dispute in an Original action is to be found in international law, the Court would make provision for the introduction of evidence and a full hearing. *United States* v. *Texas,* 339 U. S. 707, 715 (1950). The Court said:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues

> of high public importance, has always been liberal in allowing full development of the facts. *United States* v. *Texas,* 162 U. S. 1; *Kansas* v. *Colorado,* 185 U. S. 125, 144, 145, 147; *Oklahoma* v. *Texas,* 253 U. S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."

This forceful statement makes it clear that to consider the broad range of material as to international practices, a full hearing is necessary.

Evidence of historical status of waters. Plaintiff's brief (p. 37) states that there is agreement between the parties "that the status of an area cannot be finally adjudicated until a determination is made of whether the waters have been historically considered to be inland waters." Consequently, in part (2) of its Motion, Plaintiff has asked the Court to make such a determination at the same time as the requested hearing on the "underlying principles" which plaintiff asserts will resolve the three issues defined in the Report of the Special Master.

In determining the historical status of a body of water, a broad range of evidence must be considered. Examples of the historical material were summarized in California's opening brief, pp. 72-81. A great many more illustrations are shown in the volume filed by Calfornia with the Court, titled "Summary of Testimony of Typical Witnesses." Examination of this material will make it apparent that it is not an exaggeration to say that the determination of the historical status of each segment is a complex factual question which might well be the subject of an entirely separate law suit. Indeed, the determination of the location of Point Lasuen, a subsidiary issue in connection with the determination of the historical status of San Pedro Bay, is a factual issue which by itself will require examination of a large number of maps, documents and other evidence.

Plaintiff's failure to appreciate the broad scope of historical materials which must be considered in connection with every segment is indicated by the statement in its brief that "data on use and occupancy will be irrelevant" if the Boggs formula is accepted. (p. 21). Since Plaintiff admits that there may be historic exceptions to this formula, it must follow that data as to use and occupancy will be relevant. Present and past use and occupancy have an important role in determining the historical status of an area.

To show the use and occupancy of even a single bay from the time of its discovery down to the present will require a formidable amount of factual data. The quotation from the *Texas* case set forth in discussing the international law materials also demonstrates that the Supreme Court regards the "introduction of evidence and a full hearing" to be essential where the answer to a dispute in an Original case depends upon "usage" and occupancy. (339 U. S. 707, 715).

All seven segments should be adjudicated. In its motion requesting the Court to determine the existence of historical exceptions, Plaintiff has asked that this consideration be limited to the three oil producing segments listed by the Special Master as Group 1. (1949 Report, p. 1-2). The only reason advanced by Plaintiff for ignoring four of the segments whose adjudication was recommended by the Master is that it will "reduce the immediate burden on the Court." (Brief, pp. 39-40).[4] This argument implies what California

[4] California has reasons equal to those of Plaintiff for regretting the delay in the adjudication of the baseline of the marginal belt. Although existing oil production has been continued without interruption since the *California* decision under a working agreement between the parties, the uncertainty of land titles in the coastal areas has held up the further development of oil production and other improvements by the State and its lessees. The record before the Master supports no inference that California is in any measure responsible for the delay. Moverover, information provided by M. D. Hughes, Chief Petroleum Engineer of the City of Long Beach contradicts the suggestion in Plaintiff's brief (pp. 42-43, Note 27) that the City of Long Beach is planning to take advantage

believes to be the fact: the adjudication of the historical status of the water areas in all seven segments would constitute too great a task for the Court without the aid of a Master to sort, analyze and weigh the evidence.

In asking the Court to determine the historical status of only the oil-producing segments, Plaintiff is seeking to reopen the question which the Special Master resolved against Plaintiff in the 1949 Report which was filed by the Supreme Court without any exceptions being taken to it. (337 U. S. 952). Plaintiff first proposed that only the three oil producing segments be adjudicated when it petitioned for a Supplemental Decree in January, 1948. When California opposed this petition, the Court authorized the appointment of a Special Master to make recommendations to the Court "as to what particular portions of the boundary call for precise determination." (334 U. S. 844). In a trial brief submitted at the request of the Special Master, California described 104 segments along its coast whose status requires definition, but it requested the Master to submit to the Court for immediate adjudication only six segments in addition to the three segments recommended by the Plaintiff.

After a hearing in which both parties presented their contentions as to the number of segments which should be adjudicated, the Master rejected Plaintiff's contention that only the three segments which contain oil should be adjudicated at this time and recommended the adjudication of

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of the delay by drilling "more than 100 additional wells from a recently completed extension of Pier A" which "will seriously increase the drainage of oil" from the area claimed by the United States to be in the marginal belt. He advises that only 16 new wells are contemplated from the extension of Pier A. All but five of these are slanted landward and are designed to develop an area considerably landward of the boundary claimed by Plaintiff. None of the five will be bottomed within 400 feet of that claimed boundary. The drilling program in the field calls for but one well to ten acres and no well bottomed closer than 400 feet from the boundary claimed by Plaintiff, thus assuring that there will be no appreciable drainage from beyond that line.

four of the six segments proposed by California (1949 Report).[5] The Master explained his decision, as follows:

> "I have not been able to accept the Government's contention that only the boundaries of the three segments of Group 1 above should be determined and adjudicated at this time. It has seemed to me that *a wiser and fairer procedure would be to make now an intelligent selection adequate to present in reasonably significant variety the principal questions* that will have to be decided before particular boundary lines or locations can be precisely determined."

In discussing Question 2 relating to bays and harbors, the Master went on to indicate that consideration of the four segments selected by the Master from the six proposed by California was essential if the proceedings were to present the problem in sufficient variety. The Master said:

> "The segments listed in Group 2 above present that question in a variety of aspects and not, I think, in excessive number. It seems reasonable to suppose that the development and the application of criteria in the recommended areas might be expected to lead to generalizations applicable without too much difficulty to other areas."

Although Plaintiff failed to take any exceptions when the Master's Report was ordered filed by the Supreme Court, it raised the question of the number of segments to be adjudicated again in the Conference with the Special Master on June 1, 1950. The following excerpt from the transcript of that Conference is illuminating with regard to the position of the Master and the Plaintiff on the subject:

> "Mr. Raum: . . . The Government's position throughout in connection with the areas to be adjudicated

[5] In explaining his reasons for not recommending to the court the other two segments proposed by California, the Master quoted the statement of the Solicitor General that the dispute concerning those two segments "would seem to be formal in character, awaiting only an agreement by the parties as to the status of the areas as inland waters." (1949 Report, p. 4).

was that the three segments comprising group 1 are the only segments from which oil is being taken . . . "

"The Special Master: . . . *All of these arguments were made prior to the first report.* . . . I did not think it was necessary in my report to enlarge on the arguments and I did not do it, but I made a decision about it, and that decision was that whether or not oil was being taken was not the only criterion, and I felt that segments should be chosen in such a way as to give a fairly typical representation of the different criteria that had to be adjudicated, and I said so in my report. *The report was not excepted to,* and it has been approved by the Court, and I am not going to reopen it."

"Mr. Raum: I did not understand that the report had been accepted and my understanding was that the Court simply ordered the report filed. . . . "

"The Special Master: . . . I regard that, so far as I am concerned, this is a new idea that you express that the Court did not accept my report, but at any rate the report was made and no exceptions were taken, and you could not get me to go back and ask them to open it up." (Transcript, pp. 194-6)

The reasons which persuaded the Special Master to certify to the Court that the seven segments in Groups 1 and 2 require present adjudication are still valid. All of the seven segments involve important ports and harbors which contain piers, wharves, breakwaters and other structure and improvements. In view of the fact that the Plaintiff claimed and the Court decreed that the United States has paramount power over the entire "coast of California," it has always seemed to California that it is entitled, as a matter of fairness and good faith, to know the limits of its authority along the entire coastline. But, at the very least—and this was the view accepted by the Master—California is entitled to know the limits of its ownership in areas where there are valuable improvements either existing or contemplated. The urgency of the adjudication of the historical status of all such areas is heightened by the fact that Plaintiff's proposed method of determining the baseline and the questions stated in its motion for a hear-

ing make no provision for determining ports and harbors to be inland waters. Moreover, all seven segments are necessary to afford the Court a "reasonably significant variety" of illustrations of the inland water questions.

The conclusion which must be reached is that there is no justification for the Court to reverse now, two years after it was reported to the Court, the Master's decision that seven segments require adjudication.

The volume of essential material requires reference to a Master. The above discussion of the data relating to international law and historic exceptions shows the broad range of materials which will be necessary to a consideration of even those two factors. But as pointed out above, no proper appraisal of the problems involved in the location of the marginal belt can be made without the consideration of numerous other factors which will greatly increase the range and volume of the materials necessary for a decision.

Subject to its argument that these proceedings involve political questions, California believes that this material can most expeditiously be sifted, analyzed and weighed by a Master or some other intermediate tribunal. Under the Court's modern volume of work, it is not feasible for the Court itself to hear and study the broad range of data necessary to an appreciation of the factors involved in locating the marginal belt. If Plaintiff's motion to have the Court decide the inland water question on briefs and oral argument is granted, a proper development of the facts relating to this issue will almost inevitably be foreclosed. The Court's responsibility of considering 1000 appellate cases and hearing argument on approximately 100 of them every year does not make any other result possible.

In support of its argument that the Supreme Court can pass on the historical material in the first instance, Plaintiff points to the fact that Courts in California have made determinations of the historical status of bays. (See *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722; *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941; *United*

States v. *Carrillo,* 13 F. Supp. 121 (S. D. Cal.). But there is little analogy between the problems involved in those cases and the problem of locating the marginal belt which is now before the Supreme Court of the United States. In all three cases, the Courts were adjudicating the status of only a single bay. One of the decisions cited (*United States* v. *Carrillo*) was by a federal district court which is a trial court whose normal function is to receive and weigh factual evidence. A second decision (*People* v. *Stralla*) came up through the trial and lower appellate courts in California. All three Courts were sitting in the State of California and had a first-hand familiarity with the coastline conditions. None of the three courts is burdened with anything like the volume of national litigation which comes before the Supreme Court.

In recognition of the obstacles involved in nine Justices sitting as trial judges, the Court has always exercised its original jurisdiction sparingly. This is shown by the fact that the Court has not promulgated rules of procedure for Original actions similar to those which govern actions in the lower federal district courts.

When there have been factual issues in Original actions, the Court has almost invariably delegated them to a Master or other special tribunal. Three illustrations of the many instances in which the Court has referred such questions to a Master are: *Oklahoma* v. *Texas,* 253 U. S. 465, 471; *Kansas* v. *Colorado,* 206 U. S. 46, 49 (1907); *New Jersey* v. *Delaware,* 291 U. S. 301 (1934). The nature of the problem which was referred to the Master for the taking of evidence in these three cases is set out in the margin.[6] The problems involved in the present proceeding are more complex than those which existed in any of the three cases, and

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[6] In *Oklahoma* v. *Texas,* the Court appointed a commissioner to hear "testimony in respect to the governmental practices on the part of all governments and states concerned at the time, bearing on the construction and effect" of the Treaty of 1819 between the United States and Spain on the question whether the boundary between Oklahoma and Texas is "along the mid channel of Red River or along the South bank of said river." In *Kansas* v. *Colorado,* a Commissioner was appointed to take evidence on the ques-

thus stronger reason exists here for the appointment of a Master.

The Court itself has accurately summed up the difficulties in its acting as a trier of fact in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, as follows,

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."

For the reasons set forth in the foregoing brief and in California's brief in relation to Report of the Special Master, (1) California asks the Court to abate these proceedings pending a decision of the political questions involved by the Congress, and (2) in the event that the Court should reject California's argument and hold the questions justiciable, California makes the motion for the appointment of a Master set forth on the following page.

Respectfully submitted,

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Dated August 15, 1951.

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tion "as to whether Colorado is herself threatening to wholly exhaust the flow of the Arkansas River in Kansas" and kindred questions. In *New Jersey* v. *Delaware*, the Court referred to a Master the following questions: (a) Within a circle 12 miles from the town of New Castle, is the boundary between New Jersey and Delaware the low water mark on the New Jersey side or the mid-channel line? (b) down stream from the 12-mile circle where the river broadens into a bay, is the boundary the geographical center of the bay or is it the track taken by boats in their course down stream (the Thalweg)?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 6, Original.

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF CALIFORNIA.

MOTION FOR APPOINTMENT OF A MASTER TO CONDUCT HEARINGS

California, by its Attorney General, respectfully moves the Court to appoint a Master or other intermediate tribunal to conduct a full hearing on the three issues stated in the Report of the Special Master submitted May 22, 1951, said Master or tribunal to have authority to summon witnesses, issue subpoenas, take such evidence as may be introduced and call for such evidence as may be deemed necessary.[7]

Said Motion is based on all the grounds set forth in the foregoing brief and in California's brief in relation to the Report of the Special Master.

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Dated August 15, 1951.

[7] This motion follows language of the references by the Court to the Master in this case on July 2, 1948 and February 12, 1949.