No. 35, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

MOTION FOR RESERVATION OF JURISDICTION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

MOTION FOR RESERVATION OF JURISDICTION

The Solicitor General, on behalf of the United States of America, hereby requests that the Court reserve jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to the judgment entered in this case on March 17, 1975. This motion for further relief is made pursuant to the United States' original prayer in this case "for such other and further relief as may be proper in the premises." Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion, at page 10.

The question whether jurisdiction should be so reserved was first raised in the brief of the Associated Gas Distributors as *amicus curiae*, received by this Court by order entered on January 13, 1975. On February 13, 1975, the State of Massachusetts filed a typewritten document, designated "Reply Brief," requesting that the Court not reserve jurisdiction. In the meantime, Massachusetts had

also filed a complaint against the United States in the United States District Court for the District of Massachusetts, requesting that court to declare several adjacent bodies of water, heretofore regarded as high seas, to be inland waters of the State.[1]

At oral argument in this case on February 24, 1975, the Court requested the views of the United States on whether jurisdiction should be reserved. We undertook at that time to present our views formally in a post-argument submission. The decision of the Court, announced on March 17, 1975, does not address this question.

1. The Court's decision in this case settled the basic question of the applicability of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, to the Atlantic coast. It is now clear that the right of the Atlantic coast States to the natural resources of the seabed of the Atlantic Ocean are limited to those expressly conferred by that Act. The tidelands issues that remain subject to dispute between those States and the United States pertain to the determination of the geographical extent of the rights so conferred.

The Act grants to the Atlantic coast States the right to exploit the natural resources of the seabed lying within three geographical miles seaward of their respective coastlines. Section 2(c) of the Act defines "coast line" as "the line of ordinary low water * * * and the line marking the seaward limit of inland waters." It may be anticipated that the principal focus of future tidelands litigation will be the determination of the coastline and, in particular, the determination of the existence and extent of any inland waters.

---

[1]A copy of that complaint is appended to the State's reply brief.

In our view, such questions, because of their specialized nature and the effect they have on international rights, are more appropriate for resolution by this Court, working with one or a very small number of special masters, than by numerous district courts and courts of appeals.

a. Coastline determinations under the Submerged Lands Act directly affect international maritime rights. Such determinations are made in accordance with the principles set forth in the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606. See *United States* v. *California*, 381 U.S. 139. Accordingly, the determination of the coastline for the purposes of the Act ordinarily will be effective for the purposes of the Convention as well.

Coastline determinations under the Convention are of substantial importance to foreign nations. Foreign vessels have no rights, under international law, within the inland waters of another nation; in contrast, such vessels have the right of innocent passage within another nation's territorial sea. See generally Articles 14-23 of the Convention. The United States has distributed maps to foreign nations, indicating the location of the inland waters along its coast. Thus any final judicial finding of inland waters not previously claimed by the United States will terminate the right of innocent passage that had formerly existed in those waters. Moreover, since under the Convention the territorial sea is measured from the line marking the seaward limit of inland waters, such a finding would also have the effect of extending this nation's territorial sea into waters previously regarded as high seas. As a consequence, the freedom of the high seas enjoyed by foreign vessels in those waters would be terminated.

The international ramifications of these consequences could in many instances be substantial, especially where, as in the suit brought by Massachusetts, the water areas involved are relatively large and, in some places, comparatively remote from the mainland. Moreover, many State claims to offshore waters may rest upon principles contrary to those asserted by the United States in the conduct of its foreign affairs, as was the case, for example, with the Special Master's enclosure of island groups in *United States* v. *Florida*, No. 52, Original, decided March 17, 1975.

Because a coastline determination indirectly implicates the foreign-affairs powers of the federal government, and directly affects the legal rights of foreign nations, the final determination in all but the most trivial cases should be made by this Court and not by an inferior tribunal.

b. Speaking generally, State claims to inland waters may be made under either of two theories—that the claimant has historic title to the waters, or that the waters constitute a juridical bay. Historic title is established by showing that the claimant has claimed and exercised an open, notorious, and effective sovereign authority over the waters as against both local citizens and foreign nationals, that the authority has been exercised over a long period of time, and that foreign nations have acquiesced in the exercise of authority. See, *e.g.*, *United States* v. *California*, *supra*, 381 U.S. at 172. The existence of a juridical bay is tested by reference to the technical rules laid down by Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. See *United States* v. *California*, *supra*, 381 U.S. at 161-167. Accordingly, adjudication of these issues involves the application of complex principles of international law to a myriad of largely undisputed facts.

These are issues with regard to which this Court, working through a small number of special masters, has accumulated considerable expertise. In contrast, the district courts and courts of appeals have almost no familiarity with the range of problems these issues raise. Our one experience with the litigation of these issues in those courts has reflected that lack of familiarity and has required, in the end, review by this Court. See *United States* v. *Alaska*, No. 73-1888, petition for a writ of certiorari granted December 9, 1974.

It would be difficult for the district courts, with their crowded dockets, to attempt to develop an expertise in this area of the law comparable to that attained by this Court's special masters. It would, moreover, be a misallocation of judicial resources to require the district courts to do so: since each district court would be confronted with the tidelands claims of only a single State, the utility of its expertise over tidelands matters would be exhausted at the very time of its acquisition. A special master, on the other hand, is able to review the claims of several States.

c. Furthermore, district court adjudication of these cases would prove to be both cumbersome and unduly time-consuming. In some instances, the process of coastline determination requires the final disposition of one issue before related questions can be settled. See, *e.g.*, *United States* v. *Louisiana*, 394 U.S. 11. This process is accomplished relatively expeditiously when a special master's recommendations—which may, of course, be alternative or contingent in form—are subject to immediate final review in this Court. In contrast, since the district courts are not accustomed to making alternative or contingent findings, a series of remands might be required before all issues are resolved. Use of the district courts could therefore result in prolonged litigation, conducted in stages, even with regard to the claims of a single State.

Moreover, district courts are of course subject to two levels of appellate review. This consideration may be especially important when a State, or the United States, attempts to secure temporary injunctive relief. Massachusetts, in its reply brief (at page 8), strongly intimates that it intends to request such relief in the event of any federal effort to lease seabed rights near its shores; the two-level review to which any order granting or denying injunctive relief could be subjected might unduly prolong tidelands litigation arising in the district courts.

For these and other reasons, the progress of tidelands suits instituted in the district courts is likely to be slow and laborious, as compared with litigation that originates in this Court. For example, whereas both this case, which was instituted in this Court in 1969, and *United States* v. *Florida*, *supra*, instituted in 1971, have now both been finally adjudicated (with the exception of two relatively minor issues in the *Florida* case), *United States* v. *Alaska*, *supra*, which was instituted in district court by the United States in 1967, has not yet been heard by this Court. If, as Massachusetts claims in its reply brief (at page 10), the Atlantic coast States believe "[s]peedy resolution * * * to be clearly in both the national and the State interest," exercise by this Court of its original jurisdiction would seem to be indicated.

2. The exercise of original jurisdiction is made further appropriate by the intergovernmental nature of tidelands litigation and the possible unavailability of an alternative forum for the States.

a. Coastline determinations under the Submerged Lands Act are substantively equivalent to the resolution of intergovernmental boundary disputes. Within its coastline, a State generally has full sovereign authority as

against both citizens and foreign nationals. Beyond the coastline, a State's regulatory powers are circumscribed by international rights and the overriding foreign affairs powers of the federal government. See, *e.g.*, *United States* v. *California*, 332 U.S. 19; *United States* v. *Florida and Texas*, No. 54, Original. Similar boundary disputes between two States are, of course, within this Court's exclusive original jurisdiction. See 28 U.S.C. 1251. That provision, we believe, indicates the propriety of adjudicating these highly comparable tidelands disputes in the same manner.

In analogous situations in the past, this Court has appropriately reserved jurisdiction over coastline disputes. See *United States* v. *California*, 342 U.S. 891; *United States* v. *Louisiana*, 364 U.S. 502; *United States* v. *California*, 382 U.S. 448. This case differs in no essential respect from those earlier cases. The mechanism for the exercise of original jurisdiction—the employment of special masters for the making of recommendations on controverted questions of fact and law—is readily available and should, we believe, be used to resolve these disputes between the States and the United States.

b. In urging the contrary, Massachusetts asserts (reply brief, at page 5) that the States may bring quiet-title actions in the district courts, pursuant to 28 U.S.C. (Supp. III) 2409a, as an adequate means of resolving coastline disputes. But it is unclear whether the jurisdiction conferred by that statute extends to litigation under the Submerged Lands Act; if the jurisdiction does so extend, the States may in any event face substantial, perhaps preclusive, statute-of-limitations obstacles in invoking such jurisdiction.

i. The statute on which the Atlantic coast States apparently rely, 28 U.S.C. (Supp. III) 2409a, provides (in subsection (a)) that "[t]he United States may be named as a party defendant in a civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest * * *." Although the language of this provision is concededly general, its legislative history shows that Congress was concerned only with private quiet-title actions and did not contemplate that the district courts would exercise jurisdiction over Submerged Lands Act suits brought by the separate States. The purpose of the provision was to furnish private litigants with a forum for the adjudication of their land claims (S. Rep. No. 92-575, 92d Cong., 1st Sess., pp. 1, 2):

> Because of the common law doctrine of "sovereign immunity," the United States cannot now be sued in a land title action without giving its express consent. Grave inequity often has resulted to private citizens who are thereby excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs.
>
> * * * * *
>
> What this bill does is enable a citizen involved in a title dispute with the Government to have his day in court * * *.

See also H. Rep. No. 92-1559, 92d Cong., 2d Sess., pp. 6-7.

Moreover subsection (b) of that statute provides that "if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the per-

son determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control." It seems quite unlikely that Congress intended to confer upon the United States an option to repurchase the seabed rights that it had earlier expressly granted to the States under the Submerged Lands Act; yet that is the necessary consequence of Massachusetts' reading of the statute.

We believe that this quiet-title statute should not be read as extending to suits brought by a State to secure a determination of its coastline for Submerged Lands Act purposes. Congress may be presumed to have been aware that the difficulties facing private litigants were not shared by the States; the United States has consistently invoked the jurisdiction of this Court in order to resolve tidelands issues, without attempting to assert its immunity.

ii. A civil action under 28 U.S.C. (Supp. III) 2409a is barred (by subsection (f)) "unless it is commenced within twelve years of the date * * * the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." In our view, that provision bars the Atlantic coast States from bringing any Submerged Lands Act suit against the United States, with the possible exception, which we discuss below, of certain suits based upon the asserted existence of a juridical bay.

As we have summarized above, the Submerged Lands Act grants the States the right to exploit the resources of the seabed lying within three geographical miles seaward of their coastlines, and under the Act a State's coastline runs along the natural shoreline and the seaward limit of inland waters. At the time of the enactment of the Act in 1953, the Atlantic coast

States knew or should have known that the United States had disclaimed the existence of any inland waters along the Atlantic coast, except such waters as it had expressly claimed. By letter dated May 28, 1886, and published at 1 Moore, *Digest of International Law* 718-721 (1906), the Secretary of State had stated the position of the United States as follows:

> We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

Prior to the ratification of the Convention on the Territorial Sea and the Contiguous Zone in 1961, the only major deviations from that position were the claims that Long Island Sound and Chesapeake Bay constituted historic waters of the United States (see Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 388-391, 424-427 (1927)), and the recognition of juridical bays, such as Delaware Bay, with closing lines of ten miles or less. See generally Letter of November 13, 1951, from James E. Webb, Acting Secretary of State, to J. Howard McGrath, Attorney General (reprinted at pp. 6a-11a, Appendix to the Brief for the Unites States in Answer

to California's Exceptions to the Report of the Special Master, No. 5, Original, October Term, 1963). By ratifying the Convention, the United States for the first time adopted the international 24-mile standard as the maximum length for the closing line of a juridical bay. See *United States* v. *California, supra*, 381 U.S. at 161-167.

Accordingly, in 1953, at the time of the enactment of the Submerged Lands Act, the Atlantic coast States knew or should have known that the United States claimed for itself the exclusive right to exploit the resources of the seabed of the continental shelf lying more than three miles seaward of the low-water mark or of any ten-mile closing line of a juridical bay. Thus any State claim to that seabed is now barred by the twelve-year limitations provision of 28 U.S.C. (Supp. III) 2409a(f). Such State claims, therefore, are now maintainable only in suits brought by the United States.

The only arguable exception to this conclusion would appear to be State claims based upon the asserted existence of juridical bays having closing lines of between ten and 24 miles. The States were first put on notice that such longer closing lines are permissible on March 24, 1961, the date the United States ratified the Convention on the Territorial Sea and the Contiguous Zone, or, at the latest, on May 17, 1965, the date of this Court's decision in *United States* v. *California, supra.*

In short, few if any State claims under the Submerged Lands Act may be raised by the States as plaintiffs in civil actions in the district courts.

3. If this motion is granted, subsequent coastline disputes between the United States and the Atlantic coast States could be raised in this Court, by either party, by means of a motion for supplemental proceedings pursuant to the reservation of jurisdiction. But this Court would not, of course, be required to grant

every such motion. The Court would retain authority to decline to exercise its reserved jurisdiction over particular disputes by dismissing a motion for supplemental proceedings without prejudice to either party's right to bring a complaint in district court. But a reservation of jurisdiction here would forestall a proliferation of district court suits, such as that brought by Massachusetts, and would ensure that litigation of the most substantial of the remaining tidelands issues could proceed in the most expeditious manner and in the most experienced forum.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.