IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. ~~12~~ Original

[redacted]6

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Brief of Amici Curiae in Opposition to Plaintiff's Motion for Judgment.

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By leave of the Court, this brief is submitted in support of the defendant's position and as a supplement to the brief of the Attorney General of the State of California.

The Question at Issue is the Government's Proprietary Right to the Bed of the Marginal Sea—Not Its Sovereign Rights Over the Waters of the Marginal Sea.

We believe it is essential, at the outset, to recall the Government's attention to the question before the Court for decision. This is made necessary by the erudite discussion in the Government's brief, in which the historical and polemical aspects of the concepts regarding the

sovereign rights of nations over the *waters* of the "marginal seas" are confusingly, and almost inextricably, bound up with the concepts of the proprietary rights of the same nations to the beds underlying the same waters.

There is no controversy here as to the paramount rights of the Federal Government in the exercise of its sovereignty over the waters of the marginal seas.

On the contrary, this case is wholly concerned with the right of the United States to the ownership and possession of lands within the territorial limits of the State of California, which are under the waters of the marginal sea and below the line of mean low tide.

The question is one of proprietary right in the bed and not of sovereign rights over the waters of the marginal sea.

The Government Must Rely on the Strength of Its Own Title.

In order to recover title and possession of these submerged lands, the United States must rely on the strength of its own title.

It is not entitled to judgment by reason of any defect in the title of the State of California.

In flagrant disregard of this basic principle of law, the major portion of the Government's brief is devoted to showing that the State of California does not own the lands in dispute. There is not a word in the brief to show when or how the United States acquired title to the bed of the marginal seas surrounding the country as a whole.

The Treaty of Guadalupe Hidalgo Does Not Support the Government's Title.

The Government attempts to differentiate the situation off the California Coast from that applying to the balance of the country on the ground that, for a valuable consideration, the United States, under the Treaty of Guadalupe Hidalgo, acquired all the proprietary interests of the Republic of Mexico to all lands in the State of California, not privately owned; that Mexico owned, in a proprietary capacity, the bed of the marginal seas; the United States never conveyed any of these lands to the State of California; hence the beds of the marginal seas still belong to the United States and the State of California does not have the same status as the other States of the Union.

There are several answers to this argument.

(1) In the process of demonstrating to the Court its title to the lands sought to be recovered, where the plaintiff traces its claim as the successor in interest of some third party, it is not sufficient to allege and prove the succession but the title of the predecessor must also be shown. There is no attempt to show that Mexico ever had any proprietary interest in the bed of the marginal seas. If, when and how the title to the marginal seas "emerged" in the Republic of Mexico is not stated. According to plaintiff's brief, Mexico itself did not claim title to the bed of the marginal seas until the year 1934. [See p. 53, Plaintiff's Brief.] This falls far short of proving that title existed in the Republic of Mexico at the time of the execution of the Treaty of Guadalupe Hidalgo.

(2) The Treaty of Guadalupe Hidalgo, in terms, conveyed nothing to the United States. It merely fixed the boundary line between the United States and Mexico. In so far as the State of California is concerned, the boundary line starts where the Gila River empties into the Rio Colorado "thence across the Rio Colorado following the division line between Upper and Lower California *to the Pacific Ocean.*" (Note: It does not say one league, or three miles, or any other distance from the shore.) Following the line of argument pursued in plaintiff's brief, p. 94, *et seq.*, the conveyance of title by Mexico did not extend beyond the shore line.

So, if the fixing of the boundary line is an implied conveyance, the conveyance stopped at the shore line of the Pacific Ocean and the bed of the marginal sea was not conveyed. If Mexico ever owned the bed of the marginal sea, the argument set forth in the plaintiff's brief, in so far as it is based on the Treaty of Guadalupe Hidalgo, lends considerable support to the argument that the Republic of Mexico still owns the bed of the marginal sea off the California Coast. As a matter of fact, it is reported that the Republic of Mexico does claim the islands off the California Coast.

(3) The argument that the bed of the marginal sea passed to the Plaintiff by virtue of the Treaty of Guadalupe Hidalgo is entirely inconsistent with the case of *U. S. v. Mission Rock,* 189 U. S. 391, and the other decisions of this Court relating to submerged lands in California.

Either plaintiff's argument or the Court's opinion in the *Mission Rock* case is unsound.

If plaintiff assumes that the Treaty of Guadalupe Hidalgo transferred to the United States all the lands in California underlying its navigable waters, it finds itself in a situation which is impossible to justify by logic or judicial authority.

It must be admitted that the title of Mexico to the bed of inland waters—such as San Francisco Bay—and between high and low tide on the open sea is much more easily sustainable under international and municipal law than is its title to lands below the low-water mark of the marginal sea.

It must also be admitted that the United States conveyed none of the submerged land, in any category, to California, yet in numerous cases this Court has held that the State, not the United States, owns the bed of San Francisco Bay and plaintiff concedes that the State owns the lands between the high and low-water mark on the open sea.

If title to submerged lands admittedly owned by Mexico belong to the State, by what logic or reason can it be argued that land, which may or may not have belonged to Mexico, passed to the United States and not the State by the terms of the same document.

From all these considerations we submit the Treaty of Guadalupe Hidalgo is not a factor in the controversy and California is in the same position as the other States in regard to the ownership of the bed of the marginal sea.

The Government's Argument is Not Consistent With the Decided Cases Which It Asks the Court to Reaffirm.

We gather that the long line of decisions of this Court, cited in the defendant's brief, involving the state ownership of tidelands, do not have the enthusiastic accord of the learned Attorney General of the United States, even as limited by him; but as he, nevertheless, asks that these cases be reaffirmed, we shall assume in this brief that they state the law.

This Court has consistently held that during the Colonial period all lands underlying navigable waters were the property of the King; that, in 1776, the King's title passed to the several states in which the lands were situated; that all new states were admitted on an "equal footing" with the original states and therefore owned the lands underlying the navigable waters within their territorial limits.

The Government urges that in affirming these cases, the Court limit their operation to the beds of inland waters and to the land above the low-water mark on the marginal sea. It is admitted that no opinion of this Court contains any such limitation and that there is no decision of this, or any other American Court, which has ever held that the United States owns the bed of any navigable water within the territorial limits of any state.

It might be pointed out that the decisions of this court upholding unlimited state ownership of submerged lands have been followed in at least 31 unappealed decisions of inferior federal courts and in no less than 248 decisions of the highest courts of 37 different states.

A. If the King Owned the Land the Government Cannot Recover.

We do not propose to argue whether or not the King owned the lands underlying the navigable waters within the realm on the open sea, as well as those under inland navigable waters. If the King did own these lands, then there is nothing in the *ratio decidendi* of the decided cases, or in reason or logic, which justifies placing title to the bed of inland waters and land above the low-water mark in one category and lands below the low-water mark of the marginal seas in another category.

Obviously, under the decisions, the title to both categories originated and devolved together.

If we assume the King owned the bed of the marginal sea then, in 1776, either the title passed to the individual states in which the lands were situated or the title lapsed and the lands became *res nullius*.

In either event there is a total lack of title in the plaintiff which is necessary for judgment.*

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*As to the nature and sovereignty of the Central Government before 1789 see:

Fisk's American Revolution, Vol. 1, 156, 184, 284, 290.

Garner & Lodge, History of the United States, Vol. 1, 392, II, 546.

Fisk, Critical Period of American History, p. 116.

No. XV of the Federalist.

See *Art. II, Art. III, and particularly Art. IX, Articles of Confederation.*

The Treaties with Great Britain November 30, 1782 and December 3, 1783 were made with the several states "as free sovereign and independent states."

B. If the King Did Not Own the Lands They Were Res Nullius and the Government Cannot Recover.

On the other hand, if we assume the King did not own the land under the marginal seas, it inevitably follows that the lands belonged to no one and they fall in the category of *res nullius*. We believe that a careful reading of plaintiff's argument must inevitably lead to the conclusion that plaintiff believes that no one had a proprietary interest in the bed of the marginal seas below the low-water mark until, at some undisclosed moment, long after 1789, title thereto "emerged" in the United States of America.

We respectfully submit that the proprietary title to lands which are *res nullius* does not "emerge" but, on the contrary, must be acquired by some positive action prescribed by municipal law.

The method of acquiring title to *res nullius* has long been recognized. The land, or object, must be claimed and reduced to possession. The first in time is the first in right.

Res nullius fit primi occupantis (*Bouviers Law Dictionary*).

See also—*The Queen v. Keyn,* L. R. 2 Exch. Div. 63 (1876), cited on p. 47, Plaintiff's Brief.

The United States has never taken possession of any of the lands referred to in the complaint. It has never even claimed title or right of possession until it filed a suit against the Pacific Western Oil Company in 1945. This suit has been recently dismissed.

On the other hand, the State of California has taken positive action.

In the first Constitution of the State, the boundary line was fixed at three English miles off shore. (Art. 12, Sec. 1, Constitution of 1849.) By the Enabling Act, admitting the State to the Union, Congress recognized this boundary. (9 Stats. at L. 452.)

As early as 1872 the State of California asserted title to the lands described in the complaint. (See Sec. 670 of the Civil Code.)

> "*Property of the State.* The State is the owner of all land below tidewater and below ordinary high water mark bordering upon tidewater within the state, of all land below the waters of a navigable lake or stream * * * ."

In 1944 the State of California, by joint resolution of both Houses of the Legislature, reasserted title to the three mile belt. (1945 Stat. of Cal., p. 2969.)

The United States did not claim any of these lands other than in the action indicated in 1945 and by proclamation of the President in 1945. (Sec. p. 42, Plaintiff's Brief.) If, therefore, proclamations and legislative fiats have any effect in the acquisition of title, California being first in time is first in right.

But, California did not stop with the mere assertion of claims. More than 15 years ago, the State leased the lands specifically described in the complaint and many of the other lands therein referred to. Through its lessees, it took the actual possession thereof, built piers thereon and drilled numerous wells to great depth therein. For many years the State has, under claim of right, openly

and notoriously, continuously and adversely, maintained the actual possession of many of these lands against the world.

If, therefore, the lands below the low-water mark on the marginal sea were *res nullius,* then, by the rules of international and municipal law, the State, and not the United States, acquired title thereto.

C. The Obligation to Defend Against Foreign Enemies Does Not Give Rise to Proprietary Rights.

The suggestion that the obligations arising out of National Defense are the generating force of proprietary rights to the bed of the marginal sea proves too much. National defense is related to the sovereign powers of the Government, not to its proprietary rights. The duty to defend New York City against foreign enemies does not carry with it a proprietary interest in New York City lots. The Government concedes that the Government does not own the bed of Puget Sound, the Great Lakes, the St. Lawrence River, the Niagara River, or the Rio Grande, all of which border on foreign countries. We believe it will also concede that it is just as much the duty of the Government to defend these bodies of water against foreign enemies as it is to defend our open coasts.

The Decisions of This Court Do Not Warrant the Limitation of State Title to the Bed of Inland Waters and Land Above the Low-Water Mark.

It is not our purpose to burden the Court with a repetition of authorities cited in the briefs on file herein but merely to point to those whose judgment necessarily makes untenable the argument that the incidence of title to submerged lands is in any wise affected by the fact that land underlies inland waters or that it is in a harbor or that the low-water mark is a demarcation of ownership.

In *Illinois Central Railroad v. Illinois,* 146 U. S. 387, there was involved the title to the lands underlying Lake Michigan and it was held that the title to all of said lands to the boundary line of the State belonged to the State of Illinois.

Lake Michigan contains harbors but it is not a harbor.

Illinois borders the lakeshore for a relatively short distance as compared with the States of Michigan and Wisconsin.

When the Government refers to "inland waters" as determinative of state ownership it must be inland in respect to that state. There is no logic in restricting a state's title to lands under waters which are inland if the lake is inland only as respects the United States, that is, partly in one state and partly in another.

If, however, the Government insists that every body of water is inland where its waters do not wash a foreign shore, we have this very curious and unacceptable result. Following the *Illinois Central* case, *Michigan,* like Illinois, must own the bed of Lake Michigan to the Illinois boundary, while it only owns to the low-water line of Lake Huron and Lake Superior because they are taken out of

the category of inland waters by the fact that the international boundary line runs through them.

As the court recently said in *New York v. United States,* 326 U. S. 572:

> "This Court is under no duty to make laws less than sound logic and good sense."

The same conditions existing in the Great Lakes are applicable to American Rivers. Some of them are wholly within the State; some contain the boundary line between states; and some, at least three, to-wit, the Rio Grande, the Niagara River, and the St. Lawrence River, contain the boundary line between the United States and a foreign country. Those which contain the boundary lines between states cannot be fairly called inland waters of either state. Those containing international boundary lines are certainly not inland waters of any state or of the United States. Yet, in all cases, the rule is the same that the state owns the river bottom to its boundary line.

These same cases involving lakes and rivers which are not inland renders the differentiation of ownership of beds above and below the low-water mark untenable. Lakes and rivers have no measurable tides but they have a low-water stage and a high-water stage. The only difference is that the tides are daily and flood stages on rivers and lakes are seasonal. But if there is anything critical in the line of low water that fact must be the critical thing, not how it was caused or how often it recurs. Nevertheless, the Court has never limited the state's ownership to the low-water stage of lakes and rivers which touch foreign shores.

There are at least three cases in which the state has been adjudged the owner of lands below the line of mean low tide on tidal waters. In the first of these cases the United States was the plaintiff.

United States v. Mission Rock Co., 189 U. S. 391.

The land involved originally consisted of two small islets in San Francisco Bay with very precipitous sides. No beach was uncovered by the reflux of the tide. The portion above the high-water mark was only .14 of an acre on one islet and .01 of an acre on the other. At low water from four to six feet of the face of the cliffs were exposed.

The State of California granted these islets and much of the surrounding submerged lands to the defendant Mission Rock Co. The defendant filled in the area and built it up to one considerable island. The Government sued to recover the title.

Judgment was rendered for the Government for .14 and .01 of an acre, being the land originally above high water, as a part of the public lands. Defendant was given all the rest.

If Plaintiff's contention in the instant case were correct, the Government should have recovered not only the .14 and .01 of an acre but all of the land below the low-water mark as well, leaving to the Mission Rock Company, as grantee of the State, a belt four to six feet wide, which originally lay between the high and low-water

mark. As has been previously pointed out, this case is absolutely destructive of the argument that the bed of navigable waters passed from Mexico to the United States under the Treaty of Guadalupe Hidalgo and that, if not conveyed by the United States to the State of California, such lands still belong to the United States.

The right of Mexico to the bed of San Francisco Bay before the Treaty of Guadalupe Hidalgo is far clearer than its right to the bed of the marginal sea. The bed of the San Francisco Bay has never been conveyed by the United States to the State of California, still this court has held in the *Mission Rock* case, in which the United States was itself plaintiff, that California owned the land.

We submit that this decision is *res adjudicata* in so far as acquisition of title under the Treaty of Guadalupe Hidalgo is concerned.

In *Smith v. Maryland,* 18 Howard 71, involving oyster beds in Chesapeake Bay, the Court said:

> "Whatever land below the *low*-water mark is the subject of exclusive property and ownership belongs to the state on whose maritime border and within whose territory it lies."

The same result was reached in *Lowndes v. The Town of Huntington,* 153 U. S. 1.

This case also involved oyster beds in Long Island Sound which must have been below the low-water mark, though not especially so stated in the opinion.

Confusion in Titles Will Arise From Defining Ownership by Such Terms as "Open Seas," "Marginal Seas" and "Three Mile Belt."

It is perhaps axiomatic that the safety and peace of the community depend in no small degree on the sanctity and certainty of titles to real property. To adopt into law of real property such indefinite and ill-defined descriptive language as "open seas," "marginal seas," or "three-mile belt" is to be sincerely deplored as it can only add to the confusion created by the filing of this suit. The difficulty arises from the uncertainty as to where the open sea begins. Does it follow the sinuosities of the coast line or does it run from headland to headland? Is it affected by chains of islands along the main coastline and, if so, how far off may these islands be?

A decision for plaintiff herein will foment a thousand law suits to determine what is inland water and what is marginal sea.

No one can forecast with certainty until final judgment in each particular case where the ownership of the state ends and that of the United States begins.

We need go no farther than the lands specifically described in the complaint, and alleged to be claimed by Pacific Western Oil Company, to appreciate the confusion the Government's claim leads to. These lands are a part of the Elwood Oil Field. They are situated in Santa Barbara County, along the shore of a body of water called the Santa Barbara Channel. This channel runs approximately east and west and is bounded on the north by the mainland coast. It is separated on the south from the Pacific Ocean by a chain of partially overlapping islands known as Anacapa, Santa Cruz, Santa Rosa, and

San Miguel, all in the County of Santa Barbara. Two of these islands are of substantial size, one sixteen miles long and the other twenty-five. The waters of the channel are very smooth and in marked contrast to the waters of the open sea beyond the islands. Is Santa Barbara Channel marginal sea or inland water?

In addition to this, at the beginning of Santa Barbara Channel, at Point Concepcion, the North, or mainland, shoreline sweeps inland in a substantial arc and swings out again into the channel at Point Hueneme. The Elwood Oil Field lies well within a line drawn from one of these headlands to the other. (See map of Santa Barbara Channel appended hereto.)

These physiographic features of the area in suit seem to show conclusively that this land is not "within the three-mile belt of the open sea," yet the filing of the suit indicates that there is room to claim otherwise.

If there is the slightest possible doubt under the facts in the case at bar, the extent of uncertainty engendered over titles is readily apparent.

To name but a few among the many places where serious question will arise as to the location of the dividing line between state and federal ownership we cite New York Harbor, Delaware Bay, Chesapeake Bay, Puget Sound, Mobile Bay, Pamlico Sound, Albemarle Sound and Long Island Sound.

That learned counsel for the Government is already cognizant of a few of the confusing problems which will arise if his contentions are sustained appears in Note 8 on p. 18 of his brief.

Conceding the Correctness of the Government's Argument, Judgment as to Lands Held by the Pacific Western Oil Company Must Be for the State.

If every argument made by the Government in this case were correct, the judgment must, nevertheless, be rendered for the state respecting the lands occupied by the Pacific Western Oil Company.

In the Government's application for leave to file the complaint, the only reason it gives why the existing authorities are not controlling is that "this case involves the three-mile belt on the *"open sea."* (The emphasis is supplied by the Government.)

In view of the location of the Pacific Western lease on Santa Barbara Channel and inside a line from headland to headland of the mainland boundary of the channel, it does not fall within the definition of submerged lands of the open sea.

Therefore, we respectfully submit that judgment must be for the defendant on the Government's own statement of its claim.

Respectfully submitted,

A. L. WEIL,
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Amici Curiae.

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COAST AND GEODETIC SURVEY MAP NO. 5202
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