No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT OR ORIGINAL COMPLAINT

MEMORANDUM FOR THE UNITED STATES (1) IN REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT OR ORIGINAL COMPLAINT, AND (2) IN OPPOSITION TO MOTION TO DISMISS

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v.

STATE OF CALIFORNIA

ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT OR ORIGINAL COMPLAINT

MEMORANDUM FOR THE UNITED STATES (1) IN REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT OR ORIGINAL COMPLAINT, AND (2) IN OPPOSITION TO MOTION TO DISMISS

STATEMENT

At pages 3–7 of the Government's Motion for Leave To File Supplemental Complaint or Original Complaint are set out the facts material to that motion. California has now moved to dismiss the original suit, which is still pending before this Court, on two grounds: (1) that the controversy has been rendered moot by the Submerged Lands Act; and (2) that the United States has failed to prosecute the case. In connection with California's motion, our statement of facts should be supplemented by pointing out that since 1954 the United States and the State have been

conducting negotiations, by conferences and by correspondence, in an attempt to work out some means of reaching a permanent or interim settlement of their boundary dispute before resorting to further prosecution of this case.

California also, of course, opposes our motion for leave to file, contending that the case is not an appropriate one either for a supplemental complaint or for an original complaint in this Court. If our motion to file a supplemental complaint is denied, or if the original action is dismissed, the result will be to require the United States to initiate a new suit to relitigate every element of the boundary controversy. Since the opposing motions involve largely the same issues, we shall not try to deal with them separately, but shall show with respect to both that the case is not moot, that it is an appropriate case for a supplemental complaint and for exercise of the Court's original jurisdiction, and that it should not be dismissed for lack of prosecution.

ARGUMENT

I

THE CASE IS NOT MOOT

In terms, the original complaint in this case presented only the issue of ownership of the marginal belt, but implicit in that was also the issue of its location. This was recognized by the Court when it overruled California's objections to the generality of the terms in which the marginal belt was described, saying that the Court could, if necessary, "have more detailed hearings in order to determine with greater defi-

niteness particular segments of the boundary." 332 U.S. 19, 26. Also implicit in the case was the understanding that landward of the marginal belt lay the tidelands and beds of inland waters which belonged to the State under *Pollard* v. *Hagan,* 3 How. 212, while seaward of the marginal belt lay the continental shelf where all rights belonged to the Federal Government under Presidential Proclamation No. 2667, 59 Stat. 884.[1] Thus, the proceedings before the Special Master to establish criteria for identifying the marginal belt, and to identify specific parts of it, were in effect proceedings to establish the dividing line between all the submerged lands of the United States and those of the State of California.

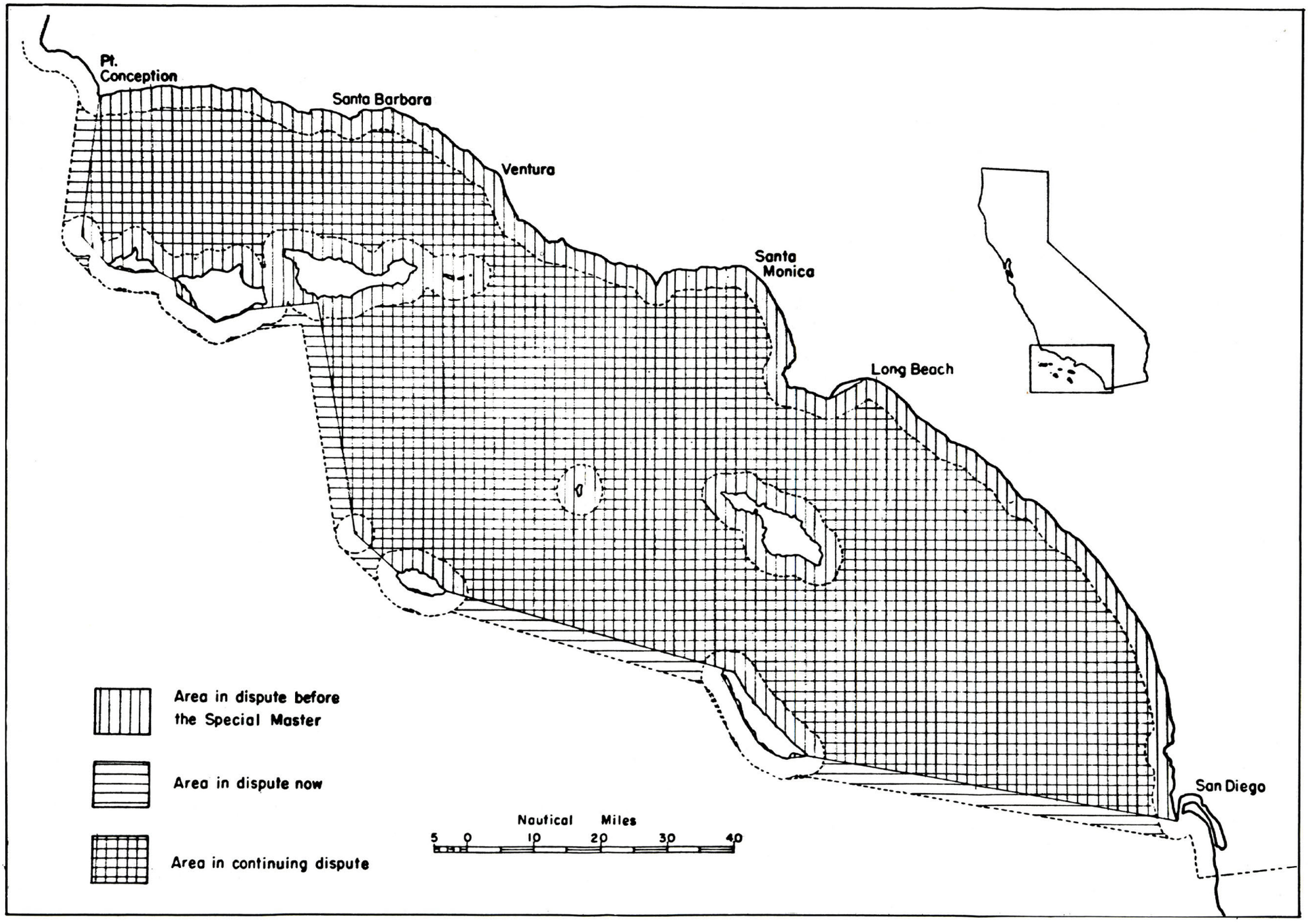
At that time, in accordance with the decree of October 27, 1947, 332 U.S. 804, the dividing line was the line of ordinary low water where the shore fronted the open sea, and the line marking the outer limit of inland waters. That combined line, technically known as the "coast line,"[2] constitutes the baseline or landward limit of the marginal sea. By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301–1315, the United States gave to the State the

[1] The complaint sought to quiet title to only the first three miles seaward of the coastline because three miles was all that California claimed. Calif. Const., Art. XXI, sec. 1. When the United States later brought similar suits against Louisiana and Texas, it put in issue a 27-mile belt in one case and the entire bed of the continental shelf in the other because those were the respective claims of those States. See *United States* v. *Louisiana*, 339 U.S. 699, 701, 705; *United States* v. *Texas*, 339 U.S. 707, 709, 720.

[2] *United States* v. *Louisiana*, 363 U.S. 1, 66, fn. 108; Submerged Lands Act, sec. 2(c), 43 U.S.C. 1301(c).

bed of the marginal sea, extending three miles seaward from the coast line, so that now the dividing line between state and federal submerged lands is the seaward, rather than the landward, boundary of the marginal sea. However, the seaward boundary is by definition that line which lies three miles seaward of the coast line, so that the location of the coast line is still, as it was before, the determinative factor in establishing the boundary. The parties continue to adhere to their former views as to the location of the coast line. Thus, the same legal issues are actually in dispute between them now as were before the Special Master.

Nor is it merely in the legal issues that the controversy between the parties continues as it was. The actual physical subject matter of the present dispute is largely identical with that before the Special Master. The principal coastal segment litigated before the Special Master was that between Point Conception and San Diego, shown on the accompanying map. The United States contended that the coast line closely followed the shore, except for a stipulated harbor area near Long Beach, whereas California contended that the coast line ran seaward of all the offshore islands. Thus the area marked on the map with vertical lines or with squares, amounting to about 7,100,000 acres, was claimed by the State as land under inland water and by the United States as the bed of the marginal sea or the continental shelf. Now that the Submerged Lands Act has given the State the bed of the marginal sea, the parties are in agreement that



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the dividing line between their respective submerged lands has been moved three miles seaward; but their disagreement as to where it formerly was produces a corresponding disagreement as to where it now is. In short, the area of dispute has been shifted three miles seaward, taking out of dispute a three-mile fringe on the landward side, along the mainland and around islands, comprising about 1,210,000 acres (marked on the map with vertical lines only), bringing into dispute a corresponding three-mile fringe on the seaward side, south and west of California's claimed outer limit of inland waters, comprising about 370,000 acres (marked on the map with horizontal lines only), and leaving continuously in dispute the great central area of about 5,890,000 acres (marked on the map with both vertical and horizontal lines to form squares).

When all of the legal issues and nearly 83 percent of the area in dispute before the Special Master remain in dispute still, we submit that the case cannot realistically be said to have become moot. All that has happened is that the Submerged Lands Act has rendered the wording of the original complaint unsuitable to presentation of the continuing controversy. What we seek leave to do is to substitute wording that will adequately describe the controversy in the light of the present circumstances. In our view, this is a far more reasonable way of dealing with the situation than to dismiss the case and begin again, repeating all that has been accomplished so far toward its solution, as California asks.

II

THE CASE IS A PROPER ONE FOR A SUPPLEMENTAL COMPLAINT

1. *Intervening circumstances do not make a supplemental complaint improper.*—California argues (Opposition,[3] 13–19) that it would not be proper to proceed by way of supplemental complaint because the situation has been affected by events that have occurred since the Special Master made his report. The argument is specious. It is precisely because the situation has been affected by intervening events that a supplemental complaint is proper. "The office of a supplemental complaint is * * * 'to bring into the record new facts which will enlarge or change the kind of relief to which the plaintiff is entitled.'" *Southern Pacific Co.* v. *Conway,* 115 F. 2d 746, 750 (C.A. 9). The United States is not asking that the intervening events be ignored, as California seems to imply. On the contrary, we are asking that they be considered and that a decree be entered which takes them into account. A supplemental complaint is the appropriate means of accomplishing this.

2. *Intervening circumstances have not reduced the importance of the Special Master's report.*—If the intervening events had so radically altered the situation that the old issues were wholly supplanted by new ones, it might well be that it would be more

[3] "State of California's Opposition to United States Motion for Leave to File Supplemental Complaint or Original Complaint and Motion of the State of California to Dismiss United States v. California, No. 5, Original," filed July 15, 1963.

appropriate to begin a new case than to carry on the existing one. See *United States* v. *Southern Pacific Co.,* 75 F. Supp. 336, 339–340 (D. Ore.), cited by California (Opposition, 20). But that is not the situation.

The questions before the Special Master were as follows (Report of Special Master (Under Order of December 3, 1951), pp. 1–2):

> *Question 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?
>
> *Question 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?
>
> *Question 3.* By what criteria is the ordinary low water mark on the coast of California to be ascertained?

An examination of the intervening events enumerated by California (Opposition, 14–19) will show that they have neither obviated any of these questions nor invalidated the steps taken toward their solution before and by the Special Master.

(a) The first intervening event cited is the passage of the Submerged Lands Act (Opposition, 7, 14–15). So far as this case is concerned, the effect of the Act was simply to give to California the submerged land extending seaward from the low-water line and from

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the outer limit of inland waters for a distance of three geographical miles. Since the Act used the same baseline that this Court used in its decree of October 27, 1947 and that the Special Master used, that is, the ordinary low-water line and the outer limit of inland waters, the questions that remain to be answered now to establish the location of that baseline are exactly the questions that were before the Special Master. The Submerged Lands Act has simply added one more step to the ascertainment of the boundary between federal and state submerged lands, that is, measuring three miles seaward from the baseline.[4] Strictly speaking, even that procedure was in the case from

[4] So far as we know, there is no difference between the parties as to how the three-mile width of the marginal sea is to be measured, once the baseline is established. Suggesting that there are "new and complex issues" relating to this question, California says (Opposition, 15), "It should be noted, for example, that the seaward limit of the marginal belt is not necessarily a mere transposition of the baseline three miles seaward." This raises a wholly false issue, as we have never contended that the seaward limit should be drawn in that way. The United States and other nations have long followed the rule that the marginal sea is all the area lying within three miles of any part of the baseline; and this principle is now codified in Article 6 of the Convention on the Territorial Sea and the Contiguous Zone (see fn. 7, p. 11, *infra*): "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea." 106 Cong. Rec. 11174; cf. Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April–4 July 1956, United Nations General Assembly Official Records, Eleventh Session, Supplement No. 9 (A/3159), p. 15; Report of the Committee of Experts on Technical Questions Concerning the Territorial Sea, Annex to Addendum to the Second Report of the International Law Commission on the Regime of the Territorial Sea, May 18, 1953

the outset, for the three-mile line was the seaward limit of the area to which the United States originally sought to quiet its title. It has now become the landward limit, but it is the same line. The Submerged Lands Act affords no reason for discarding what has been done so far toward the establishment of the location of the line.

(b) Next, California refers (Opposition, 15–16) to various judicial decisions construing the Submerged Lands Act. We find nothing in them relevant to the determination made by the Special Master.

Alabama v. *Texas,* 347 U.S. 272, merely sustained the validity of the Act, in accordance with the position taken by the United States. The validity of the Act is not questioned by either party to the present controversy, and *Alabama* v. *Texas* has nothing to do with the boundary question considered by the Special Master.

Superior Oil Co. v. *Fontenot,* 213 F. 2d 565 (C.A. 5) merely held that a state lessee whose rights were confirmed by the Submerged Lands Act was liable to the State for severence tax on oil removed from the leasehold between June 5, 1950, and May 22, 1953. It had not the remotest connection with the boundary question that now concerns us.

(A/CN.4/61/Add.1), p. 5. The application of this rule is purely mechanical, once the baseline is established.

California's argument that the decree has been rendered moot by the Submerged Lands Act necessarily assumes that the marginal belt covered by the Act is the same one covered by the decree. But this of course involves a recognition of the fact that the Act has not introduced any new or different method of delimiting the marginal belt.

United States v. *Louisiana,* 363 U.S. 1, and *United States* v. *Florida,* 363 U.S. 121 involved the claim of the gulf States that they had received marginal belts wider than three miles, under the special provision of the Submerged Lands Act permitting wider grants to States on the Gulf of Mexico in certain circumstances. No such issue can arise on the Atlantic or Pacific coast, where a maximum limit of three miles was fixed by section 2(b) of the Act. 67 Stat. 29, 43 U.S.C. 1301(b). The location of the coastline was not in issue, as the Court specifically noted (363 U.S. at 67, fn. 108): "We do not intend, however, in passing on these motions, to settle the location of the coastline of Louisiana or that of any other State." If there is anything in the opinions in those cases that casts doubt on the correctness of any principle applied by the Special Master, that of course presents a question of law that can be argued to the Court by the parties in support of their exceptions to his report.

(c) Equally irrelevant is the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331–1343, next cited by California (Opposition, 16–17). That Act reasserted exclusive federal jurisdiction over the continental shelf seaward of the area granted to the States by the Submerged Lands Act,[5] and provided how that area should be administered and leased. It dealt with the "outer Continental Shelf," defined by

[5] This jurisdiction was previously asserted by Presidential Proclamation No. 2667, September 28, 1945, 59 Stat. 884, and by section 9 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. 1302.

section 2 of the Act, 67 Stat. 462, 43 U.S.C. 1331, as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 2 of the Submerged Lands Act." It merely adopted the boundary established by the Submerged Lands Act, adding nothing new in that respect.[6]

(d) Next, California refers (Opposition, 17–18) to developments in international law, particularly the Convention on the Territorial Sea and the Contiguous Zone, ratified by the President on March 24, 1961.[7] Two provisions of the Convention are mentioned by California as having an important bearing on the coastline question. The first is the provision of Article 4 of the Convention, recognizing that in certain circumstances a coastal nation may define its coast line along a highly irregular coast by promulgating "straight baselines" between salient points or to and between offlying islands. 106 Cong. Rec. 11174. That provision is a codification of the rule of the *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports 1951, p. 116. See *Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April–*

[6] The fact, emphasized by California (Opposition, 17), that the Outer Continental Shelf Lands Act recognizes the possibility of settling disputes by agreement, and authorizes interim operating agreements, has no tendency to invalidate the Special Master's work on the location of the coast line.

[7] This convention is not yet operative, because not ratified by the requisite number of nations, but since its ratification by the President it has represented the policy of the United States. See letter of January 15, 1963, from the Secretary of State to the Attorney General, 2 *International Legal Materials* 527, 528.

4 July 1956, U.N. General Assembly Official Records: Eleventh Session, Supplement No. 9 (A/3159), pp. 14–15. The *Fisheries Case* was decided on December 18, 1951, five weeks before the Special Master began his hearings to answer the questions posed by the Court's order of December 3, 1951, set out at page 7, *supra.* The Special Master was fully advised of the doctrine of international law announced by that case; the subject was briefed before him; and he was given a letter from the Secretary of State specifically dealing with its effect (or, rather, lack of effect) on the coast line claimed by the United States. Report of Special Master (Under Order of December 3, 1951), pp. 9–13. The United States recognized then, as it does now, that international law permits a nation to adopt straight baselines in the circumstances specified in the *Fisheries Case* and in the Convention. It does not require a nation to do so, and the United States has never adopted such baselines. The fact that the judicial rule has now been embodied in a convention has not the slightest tendency to impair the continuing validity of the proceedings before the Special Master or the conclusions reached by him.

The second provision of the Convention which California cites as having significantly changed the situation is paragraph 4 of Article 7 (106 Cong. Rec. 11174), which recognizes as inland waters bays up to 24 miles wide at the entrance, whereas the United States formerly put the limit at 10 miles. While we fully agree that this represents a change in the international policy of the United States,

we find in it no reason to discard the work done by the Special Master. It is our position that this change in the nation's international policy does not affect the State's submerged land title. Whether it does so is a question of law, which can be argued separately, either before the Court or on reference to a Special Master. It can affect, in any event, only one bay in California: Monterey Bay. There is no other California bay more than 10 miles wide that meets the other requirement of the Convention, that the area of a bay equal the area of a semicircle having the entrance closing line as its diameter. In its "Brief in Relation to Report of Special Master of May 22, 1951," p. 26, California claimed as inland waters of Monterey Bay the area inside a line from Pt. Pinos to Pt. Santa Cruz. We agree that if the 24-mile rule is to be applied at Monterey Bay, the closing line should then be drawn between those points. Thus the Convention has merely brought into the controversy the additional question of whether such a change in the international position of the United States enlarges the proprietary rights of the State at this one place. The presence of this additional question does not detract from the work of the Special Master in answering the other questions, which still remain in the case, as to the rest of the coast. This question can be considered separately, and the conclusion added to the other conclusions of the Special Master, as they may be modified by the Court upon consideration of the parties' exceptions.

(e) Finally, California refers (Opposition, 18–19) to the admitted fact that it is now desirable to adjudicate the entire coast, not merely the segments considered by the Special Master. This certainly is no reason for doing over again his work on the parts of the coast that he considered, particularly in view of the fact that it comprised about a third of the entire coast line of the State, and included segments chosen to include representative areas "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." Report of Special Master (ordered filed June 27, 1949), p. 3. The very purpose of the selection of such areas was to establish principles that would answer all, or most, of the questions that might arise in fixing the line along the rest of the coast whenever that should become necessary.

3. *The problematical availability of alternative procedures is not a valid argument against allowance of a supplemental complaint.*—California argues (Opposition, 19–20) that a supplemental complaint is not necessary because "The only advantage of supplemental proceedings would be the possibility of referring to the documentary and testimonial evidence introduced before the Special Master," and suggests that this same advantage could be secured in a new suit by stipulation, or even without a stipulation in the case of evidence that is no longer otherwise available.

These are wholly inadequate reasons for rejecting a supplemental complaint under which the whole of the present record would remain accessible to the Court.

So far as we are advised, most of the former evidence is still available; and while California says (Opposition, 20) that in such case the parties "will be free to explore the practicability of stipulating to the introduction of former evidence," it offers no assurance that such a stipulation would in fact be forthcoming. In effect, California is saying that the Court should be willing to incur the duplicative burdens of a separate suit because California could, if it chose, agree to obviate some of them. We see no reason why the matter should thus be left to California's complaisance.

Moreover, we cannot accept the premise that the only advantage of a supplemental complaint would be the possibility of referring to the evidence introduced before the Special Master. The Special Master not only received evidence, but also entertained and considered extensive oral and written arguments on the case and submitted a careful report thereon. His fees and expenses came to $37,303.66. Orders of Nov. 26, 1951, and Jan. 12, 1953. One of the very great advantages of proceeding in the same case will be to avoid duplication of his work in evaluating the evidence and arguments and formulating his conclusions thereon; another advantage will of course be to avoid duplication of his fees and expenses. Mere reference to evidence already taken would fall considerably short of these desiderata.

III

THIS IS AN APPROPRIATE CASE FOR EXERCISE OF THE ORIGINAL JURISDICTION OF THIS COURT

California argues (Opposition, 20–23) that the pleading tendered by the United States should not be accepted by this Court either as a supplemental complaint or as an original complaint, because one of the district courts in California would be a more appropriate forum. We disagree. This is not a small or local matter, involving simply title to a few parcels of land. Primarily, this case involves the basic legal principles to be applied in establishing the line between the submerged lands given to the States by the Submerged Lands Act and those retained by the United States. This issue is of as great and general importance as the other issues involving ownership of offshore submerged lands, of which this Court has taken original jurisdiction in *United States* v. *California,* 332 U.S. 19; *United States* v. *Louisiana,* 339 U.S. 699; *United States* v. *Texas,* 339 U.S. 707; *United States* v. *Louisiana,* 363 U.S. 1; and *United States* v. *Florida,* 363 U.S. 121.

Once the legal principles are established, their application to particular localities should present relatively little difficulty. If, as California suggests (Opposition, 22), it will involve the "presentation of massive testimonial, documentary, and physical evidence, most of which will be readily available only in the vicinity of the area in question," a Special Master appointed by the Court could go to California to receive such evidence, as was done before. In our

view, however, such evidence is largely irrelevant. The case involves determination of the physical configuration of the coast, determination of the applicable legal principles, and application of the latter to the former. The configuration is a matter of scientific measurement (as to which the surveys of the United States Coast and Geodetic Survey are commonly accepted as reliable, though California of course is free to dispute them); the principles are a matter of legal rule. Local testimony is not material to either. To the extent that local testimony may be relevant to establishing the status of "historic" inland waters or customary harbors, we believe that most of the important areas have already been dealt with before the Special Master.

We suggest that after permitting the supplemental complaint to be filed, the Court should call for briefs and argument on the pending exceptions to the report of the Special Master, and proceed to rule thereon. We believe that such a ruling would clarify the future course of proceedings on the suppplemental complaint and probably would obviate the need for taking most of the testimony to which California refers. If the Court should conclude that the supplemental complaint presents further legal or factual questions requiring reference to a Special Master, we see no reason to expect that he would be handicapped by ambiguities as to his authority, as California apprehends (Opposition, 22). The procedure of an original suit should be as satisfactory here as in numerous other cases where it has been used.

IV

THE CASE SHOULD NOT BE DISMISSED FOR LACK OF PROSECUTION

California suggests (Opposition, 25–27) that the case should be dismissed for lack of prosecution.

The status of the case does not justify invocation of that principle. On November 10, 1952, the Court ordered the Special Master's report to be filed and allowed the parties until January 9, 1953, to file exceptions thereto. 344 U.S. 872. Exceptions were filed by the United States on January 2, 1953, and by California on January 9, 1953. Those exceptions are now pending before the Court awaiting its ruling.

As the court held in *Taylor* v. *Southern Ry. Co.*, 6 F. Supp. 259, 261 (E.D. Ill.), dismissal for failure to prosecute "is justified only where the court can say as a matter of law, from the undisputed facts, that the plaintiff has clearly evidenced an intention to abandon his cause of action." Here, where the parties have been engaged ever since 1954 in continuing efforts to work out a permanent or interim settlement that would obviate or simplify further prosecution of this case, it is evident that there has been no intention by the United States to abandon its position, or to discontinue this litigation if the negotiations should prove fruitless.

The language of the Court in its opinion in this case, rejecting California's defense of laches, is relevant still (332 U.S. 19, 40):

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

We submit that in a matter of this sort, involving grave public interests and relationships between the United States and a State, it is appropriate to explore fully the possibility of resolving differences by agreement rather than by litigation; that a longer delay for this purpose may be appropriate in dealings between governments than might be allowable in the case of private disputes between private parties; and that the public interest should not be penalized even if public officials, in the exercise of their judgment, have continued settlement efforts longer than the Court might have considered altogether justified.

To dismiss this case for delay in prosecution would serve no useful purpose. On the contrary, it would merely subject the Court and parties to the wholly needless burden of repeating, in a new case, extensive proceedings already had before the Special Master in this one. Every consideration of policy and convenience requires the Court to conserve those proceedings by permitting the case to proceed to its conclusion on a supplemental complaint, rather than

to waste them by requiring duplicate proceedings to be begun.

CONCLUSION

For the foregoing reasons, the motion of the State of California to dismiss this case should be denied, and the motion of the United States for leave to file a supplemental complaint should be granted.

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SEPTEMBER 1963.

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