IN THE

Supreme Court of the United States

October Term, 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

Reply Brief of the State of California to Brief of the United States in Support of Amended Exceptions to Report of the Special Master

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Statutes

Textbooks

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Introductory Statement

The United States Brief in Support of Amended Exceptions (April 1964) (hereinafter referred to as U. S. Supporting Brief) discusses only two points contained in plaintiff's amended exceptions to the Report of the Special Master dated October 14, 1952 and filed November 10, 1952. Consequently, this Reply Brief of the State of California will be directed solely to the two arguments advanced by the United States. To the extent that the remaining exceptions of the United States have not been fully covered in California's Brief in Support of Exceptions (April 1964) and are germane to the questions to be raised by the United States' Reply Brief, the State will further discuss such points in its Closing Brief.

Significantly, the amended exceptions of the United States are predicated in large part upon the determinative effect on the present controversy both of the Submerged Lands Act and international law developments occurring after the filing of the Special Master's Report in 1952. This approach is in sharp contrast with the basic premise of plaintiff's Motion for Leave to File Supplementary Complaint (March 1963), and its Memorandum in Reply to Opposition to Motion for Leave to File and in Opposition to Motion to Dismiss (September 1963), wherein the United States represented to this Court that the present dispute between the parties was fundamentally unchanged during the period of more than ten years following the filing of the Special Master's Report.[1] Conversely, California con-

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[1]For example, the aforesaid documents filed by the United States contain the following statements:

a. "An event subsequent to the decree [332 U.S. 804, 805]—namely, enactment of the Submerged Lands Act—has terminated the effectiveness of the 1947 decree as an appropriate instrument for settlement of the dispute between the parties, yet has left alive between the parties a major portion of that dispute, *involving all the same legal principles and operative facts,* and affecting largely the same area of submerged land." (U. S. Motion for Leave to File Supplement Complaint (March, 1963), p. 10.) (Emphasis added.)

b. "Our proposed supplemental complaint will avoid this useless duplication by providing the necessary pleading to sustain, as an independent issue in the new situation created by the Submerged Lands Act, the question of location of the three-mile belt—a question which has heretofore appeared only as an implicit aspect of the title question but which has in fact survived the resolution of the title question by the Submerged Lands Act." (*Id.* at p. 11.)

c. "Strictly speaking, even that procedure [of measuring three miles seaward from a baseline] was in the case from 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

tended that these subsequent events were of such fundamental significance that the Special Master's Report of October 14, 1952 would not materially assist this Court. (California's Opposition to United States Motion for Leave to File (July, 1963), pp. 13-19). The United States now recognizes that the Submerged Lands Act (67 Stat. 462; 43 U.S.C. §§ 1331-43) has changed in important respects the method of ascertaining the baseline off the California coast seaward from which three geographical miles are to be measured. (U. S. Amended Exceptions, p. 2, n. 1; U. S. Supporting Brief pp. 17, 22.) Specifically, the Government's Supporting Brief, on page 17 thereof, contains the following concession:

> ". . . we concede that the Submerged Lands Act of May 22, 1953, gave to the State all areas reclaimed or enclosed by artificial fill or structures on the effective date of the Act, together with the submerged lands extending three miles seaward therefrom; . . ."

Furthermore, the United States now invokes and relies heavily upon international law developments subsequent to the Special Master's Report (U. S. Supporting Brief, pp. 11-15, 23, nn. 16, 17), and concedes that these later developments represent the present foreign policy of this nation. (U. S. Supporting Brief, p. 14.)

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location of the line." (U. S. Memorandum (1) in Reply to Opposition for Leave to File Supplemental Complaint or Original Complaint, and (2) in Opposition to Motion to Dismiss (September, 1963), pp. 8-9.)

d. "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." (*Id.* at p. 13.)

The practical significance of the issues raised by the United States Supporting Brief is limited by the following considerations:

a. As to open roadsteads, California does not claim that anchorages in front of harbors and outside water areas substantially enclosed or sheltered from wind and storm by natural or artificial structures, in and of themselves, constitute inland waters. Coupled with this is the concession by the United States that all waters within such areas (except for areas protected by artificial structures erected after May 22, 1953) are inland waters. (U. S. Amended Exception 1.)

b. The United States concedes that the California coastline is located at the seaward limit of artificial structures and fill existing prior to May 22, 1953. (U. S. Amended Exceptions 1, 9, 10; U. S. Supporting Brief p. 17.)

Thus, the principal controversy between the United States and California as to the issues covered by the United States' brief in support of its amended exceptions relates to the effect upon the location of the federal-state offshore boundary of artificial changes in the shoreline made after May 22, 1953, which effect, as pointed out by the Special Master (Report of Special Master dated October 14, 1952, p. 46, hereinafter referred to as "Rep. p. ...."), is subject to practical control by the parties pursuant to agreements between them.

It is to be noted that in portions of its Supporting Brief, the United States assumes that international law

principles and United States foreign policy are determinative of the matters at issue. We emphasize California's continued assertion that the fundamental Congressional intention embodied in the Submerged Lands Act was to restore to the states all lands within their historic boundaries, irrespective of any question of external sovereignty. (See California's Brief in Support of Exceptions, vol. 1, pp. 9-35, 68.) In this connection, California strongly controverts assertions by the United States (1) that the three geographical miles confirmed by the Submerged Lands Act are in all cases identical to the three-mile belt of territorial waters of the United States as against foreign nations (U. S. Supporting Brief, p. 16), and (2) that Congress intended its definition of inland waters "to embrace the same shore line and outer limit of inland waters as were then [as of May 22, 1953] recognized for purposes of international law." (U. S. Supporting Brief, pp. 22-23.)

ARGUMENT

I

There Is No Controversy Before This Court as to the Status of "Open Roadsteads," Properly Defined, Since California Does Not Claim That Such Areas Are Per Se Inland Waters.

The United States has excepted to the recommendation of the Special Master that "In front of harbors the outer limit of inland waters is to embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port, and, absent contrary evidence, may be assumed to be the line of the outermost permanent harbor works" (Rep. p. 4), insofar as it would embrace as inland waters areas not substantially enclosed or sheltered from wind and storm by natural land formations or by artificial structures erected before May 22, 1953[2] (U. S. Amended Exception No.1). Specifically, plaintiff has excepted to the asserted ruling of the Special Master that anchorages used in connection with ports and harbors are *per se* inland waters (U. S. Amended Exception No. 11; U. S. Supporting Brief pp. 5-16). In its Supporting Brief, plaintiff has argued the general proposition that inland waters do not include "open roadsteads," thus raising a question not specifically considered by the Special Master.

There does not appear to be any controversy between the parties concerning the question raised by the United States as to the status of "open roadsteads." Califor-

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[2]The problem of the status of waters behind artificial harbor-works erected after May 22, 1953 (the effective date of the Submerged Lands Act) will be dealt with in Point II of this Argument.

nia does not claim that "open roadsteads," as hereinbelow defined, are *per se* inland waters. However, California deems it essential to delineate with precision the scope of any concession made by it, particularly where, as here, the Special Master never specifically defined "roadsteads," "ports" or "harbors," and the United States Supporting Brief contains no definition of the last two terms.[3]

For the purpose of resolving the status of "open roadsteads" in this case, California regards the following definitions to be proper and predicates its position thereon:

> 1. Roadstead. A water area commonly used for the anchoring, loading and unloading of ships off shore and other than directly onto or from wharfs, piers, jetties and similar structures. (See definition given by the Chairman of the International Law Commission, Yearbook of the International Law Commission, 1954, I, p. 89.) It is obvious that a roadstead may be located either within or without a harbor (2 Gidel, *Le droit international public de la mer* 22 (1932)), and in the

[3]Definition of all these terms is necessary because they are often used interchangeably and without precise distinction. (See 39 C.J.S. Harbor; 72 C.J.S. Port; Black, Law Dictionary 847 (4th ed. 1951).) Plaintiff has defined "open roadsteads" as "unsheltered areas used in anchorages in front of coastal ports," (U.S. Supporting Brief, p. 6.) yet the term "roadstead" has been used without the modifying adjective "open" to describe an unsheltered anchorage. (*Hamburg-American Steam Packet Co. v. United States,* 250 Fed. 747, 763 (2d Cir. 1918).) Frequently, the term "port" is used to designate a place for loading and unloading vessels. (72 C.J.S. Port; *Devato v. 823 Barrels of Plumbago,* 20 Fed. 510, 515 (S.D.N.Y., 1884).) This same factor, namely a location for loading and unloading ships, is also an integral part of a definition of roadsteads. (Convention on the Territorial Sea and the Contiguous Zone, Art. 9, U. N. Doc. A/Conf. 13/L. 52.)

latter case may properly be referred to as an "open roadstead."

2. Harbor. A water area providing shelter for ships either by natural land formation or by artificial structures. (Black, Law Dictionary, 847 (4th ed. 1951); Webster's New International Dictionary, 1136 (2d ed. 1951).)[4] A harbor may contain within it a roadstead or a port. Under international law, piers, jetties and other structures jutting out into the water are assimilated to harborworks. (See Report of International Law Commission to the General Assembly (8th Session), Yearbook, 1956, II, p. 269.)

3. Port. A water area commonly used for the docking, loading or unloading of ships (*Devato v. 823 Barrels of Plumbago,* 20 Fed. 510, 515 (S.D. N.Y., 1884); *The Möwe,* [1914] P. 1, 15; 2 Gidel, *supra,* 12).[5] To distinguish "ports" from "road-

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[4]While there is authority that a harbor is a water area providing shelter for ships by natural land formation (See *e.g.,* Baratoux, *De la délimitation du domaine public maritime et fluvial,* p. 22 (Paris. 1902); Münch, *Die technischen Fragen des Küstenmeers,* p. 126 (Kiel, 1934), it is clear that the Special Master was discussing harbors in connection with areas sheltered by both natural land formations and artificial structures. (Rep. pp. 46-48.) Also the recommendations of the Second Sub-Committee at the 1930 Hague Conference for the Codification of International Law (See 3 Acts of the Conference for the Codification of International Law, p. 219 (1930) and Article 8 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U. N. Doc. A/Conf. 13/L. 52) by referring to "outermost permanent harbor works" make it clear that a harbor embraces an area sheltered by artificial as well as natural formations.

[5]The term "port" is sometimes used in a broader sense to designate a fiscal or customs area. (See *The Möwe, supra,* [1914] P. at 15; 72 C.J.S. Port, p. 229.) For purposes of this case, the narrower definition given above is more appropriate in light of its greater precision as denoting a particular place, rather

steads," this term should be limited to areas in which ships are unloaded directly onto and from wharfs, piers, jetties and similar structures. A port, so defined, may, or may not be within a harbor.

The parties in this case have always agreed that "ports" and "harbors" constitute inland waters,[6] although it was necessary for the Special Master to evolve criteria for determining which areas would qualify as ports and harbors.

The United States apparently now concedes that waters within the natural headlands of a harbor (U. S. Amended Exception 1) and waters landward of artificial harborworks erected before May 22, 1953 (U. S. Amended Exceptions 1, 10)[7] are inland waters within the meaning of the Submerged Lands Act. As to road-

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than a district of many places classed together for the purpose of revenue. *Cf. Dock Co. v. Browne,* 2 Barn. & Adol. 43, 58, 109 Eng. Rep. 1059, 1065 (K.B. 1831).

[6]In the initial stages of this proceeding, the United States included ports and harbors as being within the term inland waters. (*United States v. California,* 332 U.S. 19, 25-26 (1947); U. S. Brief in Support of Motion for Judgment, p. 2 (January 1947). The United States has long claimed that ports and harbors constitute inland waters and that the marginal belt is to be measured from the seaward limits thereof. See *Cunard S.S. Co. v. Mellon,* 262 U.S. 100, 122-24 (1923). Moreover, it is well settled in international law that ports and harbors are considered to be inland waters. (See Report of the Second Committee, Conference for the Codification of International Law, The Hague, 1930, Annex II, Report of Sub-Committee No. II (L. of N. Doc. V, Legal Questions 1930, V. 9); 24 Am. J. Int'l. L. Supp. 250 (1930); 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Art. 8 (U. N. Doc. A/Conf. 13/L. 52).)

[7]Although in paragraph X(c) of its Supplemental Complaint the United States attempts to limit the inland waters of a harbor to an area within the *natural* headlands of a harbor, California assumes that the concession concerning artificial harborworks contained in the United States Brief in Support of its Amended Exceptions supersedes the Supplemental Complaint.

steads located within a harbor, they must of necessity be considered as inland waters.[8]

To the extent that any ship anchorages are located outside California's historically recognized inland waters and outside of natural or artificial harborworks, this State does not claim that such anchorages, in and of themselves, constitute inland waters. Thus, although both parties have excepted to the aforesaid recommendation of the Special Master (California's Exception VI-A (April 1964)), it appears that there exists no substantial controversy between the parties as to open roadsteads as above defined. However, as heretofore stated, California does not agree that this controversy involves any question of external sovereignty, nor do we necessarily agree with the United States' conclusions as to the international law principles relating to open roadsteads.[9] Rather, California's position is based upon the fact that neither its constitutional boundary (Calif. Const. of 1849, Art. XII) nor the 1949 legislative clarification of that boundary (Calif. Gov. Code §§ 170-72) make mention of open roadsteads. Thus, California's position is consistent with our view that the State's coastline, as recognized by the Submerged Lands Act,

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[8]See Yearbook of the International Law Commission, 1954, I, p. 89.

[9]See 2 Gidel, *supra*, 12, 22-25, 28-34; 3 Gidel, *supra*, 525 (1934), and the claims of Denmark, United Nations Conference on the Law of the Sea, Official Records, vol. I, p. 82 (U.N. Doc. A/Conf. 13/37), both indicating that open roadsteads have been claimed as inland waters. See also League of Nations, Second General Conference on Communications and Transit: Records and Texts Relating to the Convention and Statute on the International Regime of Maritime Ports, p. 14 (L. of N. Doc. C.29.M.15.1924.VIII; and see Laun, *Le régime international des ports*, 15 Académie de Droit International, Recueil des Cours, 1 at 16 (1926-V).

is a line changing in actual location but defined in accordance with historic criteria.

California's concession as to the status of open roadstead must not, of course, be construed so as to include roadsteads that are within other inland waters such as harbors, bays or channels, nor as affecting in any way California's position that the historic use of natural bays and other waterways as anchorages, is indicative of their historic recognition as bays or other inland waters.

Since there is no dispute between the parties as to the status of California's open roadsteads, as such, this Court need not resolve their status in this proceeding.[10]

II

Artificial Changes Occurring Since May 22, 1953 Move California's Seaward Boundary Under the Submerged Lands Act

A. Introductory Statement

The second argument in the brief of the United States relates to the effect of artificial changes upon the California coastline. The Special Master recommended that harbors and ports be delimited by the line of the outermost permanent harborworks (Rep. p. 4)

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[10]We do not wish to imply, however, that open roadsteads may not constitute inland waters within the meaning of the Submerged Lands Act under an historic context applicable to any other state. The United States contends that the Submerged Lands Act has the necessary effect of excluding open roadsteads from inland waters (U. S. Supporting Brief, pp. 15-16). As California pointed out in its opening brief (Calif. Brief in Support of Exceptions, vol. I, pp. 20-24), Congress, in enacting the Submerged Lands Act deliberately refused to define inland waters. We believe that it cannot be fairly said that Congress either did or did not intend open roadsteads to be included as inland waters within the meaning of the Act.

and that the ordinary low-water mark on the California Coast be measured as it exists at the time of survey, thereby including artificial fill and structures. (Rep. pp. 4-5, 44-46.) The United States concedes that the coastline, as defined by the Submerged Lands Act, is seaward of the outermost permanent harborworks and artificial fill existing as of May 22, 1953 (the effective date of the Act), but contends (1) that the Special Master's recommendation was wrong when made, and (2) that, despite the enactment of the Submerged Lands Act, the Special Master's recommendations are still erroneous insofar as they relate to artificial changes occurring subsequent to May 22, 1953. (U. S. Supporting Brief, p. 17.)

Concerning the effect of artificial changes to the coast, California urges that the Special Master's recommendations were correct when made, and that his recommendations are still correct, as to both past and future changes, when applying the Submerged Lands Act to California.

For purposes of clarity, we shall state our understanding as to the precise scope of the United States' concessions:

1. The boundary between the United States and California in the subsoil and submerged lands of the continental shelf as established by the Submerged Lands Act will move in the future due to natural accretion and erosion of the shoreline. (U. S. Supporting Brief, p. 20.)

2. Natural accretion and erosion are to be defined in accordance with the federal common law rule (*County of St. Clair v. Lovingston,* 23 Wall. (90 U.S.) 46, 67 (1874), so as to include gradual

shoreline movements induced by artificial structures, and not in accordance with California law, under which such changes are treated as artificial for purposes of determining ownership as between the adjacent upland owner and the owner of the submerged lands. *People v. Hecker,* 179 Cal. App. 2d 823, 834 (1960; *Carpenter v. City of Santa Monica,* 63 Cal. App. 2d 772, 787-94 (1944).) (U.S. Supporting Brief, p. 20.)

3. For purposes of establishing the "coast line" of California under the Submerged Lands Act, any artificial changes or structures made or erected prior to May 22, 1953 are to be considered. (U.S. Supporting Brief, p. 17.) Thus, artificial harborworks, erected prior to that date, such as the "outer breakwater" in the San Pedro area, encompass inland waters for purposes of the Act, and any artificial fill constitutes part of the coast (if in direct contact with the open sea) from which the three geographical miles seaward are to be measured.

The only dispute thus remaining between the parties in this limited area relates to the effect, if any, of artificial fill and structures made or erected after May 22, 1953.

B. The Special Master's Recommendations Concerning Artificial Changes in the Shoreline Were Correct When Made

As California noted in its opening brief (Calif. Brief in Support of Exceptions, vol. I, p. 10), the Special Master and the parties sought to resolve the matters then at issue on the premise that the doctrine of "para-

mount rights" as enunciated by this Court was controlling. Thus, it was assumed by all parties that the inland waters of California were to be delineated by reference to international law and United States foreign policy, and the case remained in this posture until passage of the Submerged Lands Act in 1953. California contends that under principles of international law and United States foreign policy, the Special Master's recommendations as to artificial changes in the shoreline were correct as of 1947, the date of the entry of the decree herein, as of 1952, the date of the Special Master's Report, and remain correct today.

In applying international law and United States foreign policy to the question of artificial changes to the coastline, the Special Master referred to the work of the 1930 Hague Conference for the Codification of International Law. (Rep. pp. 42, 46.) Although California has pointed out that mere proposals by an uninstructed United States delegation at this Conference cannot be regarded as definitive statements of international law principles officially adopted by the United States (*e.g.*, Calif. Brief in Support of Exceptions, vol. I, p. 78), the hereinafter quoted proposals are not inconsistent with prior or subsequent positions of the United States and, as shown below, were officially adopted when the United States ratified the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. At the 1930 Hague Conference, the Second Sub-Committee made two pertinent recommendations. The first of them was proposed by the United States:

> "In determining the breadth of the territorial sea, in front of ports the outermost permanent harbour

> works shall be regarded as forming part of the coast."
>
> (3 Acts of the Conference for the Codification of International Law, 200, 219 (1930).)

The observation of the Second Sub-Committee on this recommendation stated:

> "The waters of the port as far as a line drawn between the outermost fixed works thus constitute the inland waters of the Coastal State."
>
> (3 Acts of the Conference, 219; 24 Am. J. Int'l L., Supp. 250 (1930).)

Thus, as of the time of the Special Master's Report, both international law and the position of the United States in its international relations recognized that waters landward of artificial harborworks constituted inland waters.

The second pertinent recommendation of the Second Sub-Committee of the Hague Conference provided:

> "For the purpose of this Convention, the line of low-water mark is that indicated on the charts officially used by the Coastal State, provided the latter line does not appreciably depart from the line of mean-low water."
>
> (3 Acts of Conference, 217; 24 Am. J. Int'l. L., Supp. 247 (1930).)

As the United States has observed: "Obviously, charts will show the coast as it exists, regardless of whether it has resulted from natural or artificial processes." (U. S. Supporting Brief, p. 23 n. 16.)

Consequently, the Special Master in applying then existent international law and United States foreign pol-

icy was absolutely correct in recommending that the coast of California was to be determined on the basis of artificial changes in existence at the time of survey and that waters landward of the outermost permanent harborworks constituted inland waters. Irrespective of the Submerged Lands Act and the present concession of the United States as to artificial changes prior to May 22, 1953, the State of California has always owned artificially filled lands and lands underlying waters behind artificial harborworks.

The authoritative character of these particular recommendations made by the Second Sub-Committee is confirmed by their codification in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L. 52), Article 8 of which provides:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

Article 3 provides:

> "Except when otherwise provided in this article, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked in large-scale charts officially recognized by the coastal State."[11]

The aforesaid principles of international law proposed at the 1930 Hague Conference and embodied in the 1958 Geneva Convention were not, of course, limited

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[11]As conceded by the United States (U.S. Supporting Brief, p. 14), articles 3 and 8 of the 1958 Geneva Convention now represent the official position of the United States. (2 International Legal Materials, 527, 528 (1963).)

to then existing structures and artificial fill. Of necessity they contemplate a continually moving line including artificial changes, since any new artificial harborworks will, for purposes of international law, create new areas of inland waters, and any artificial fill along the shore will be reflected on the charts officially recognized and used by the coastal State. As heretofore noted (p. 8, *supra*), under international law, piers, jetties and other structures jutting out into the water are assimilated to harborworks. (Report of the International Law Commission to the General Assembly (8th Session), Yearbook, 1956, II, p. 269.) Any new structures of this nature create new areas of inland waters. (See International Law Commission, Yearbook, 1955, II, p. 58.)

California contends that under the Submerged Lands Act, international law and United States foreign policy are not determinative of the issues in this case. However, even under the principles deemed applicable by the parties before the Special Master and prior to the passage of that Act, the conclusions of the Special Master concerning artificial fill and structures were and are correct, either as of 1947, 1952, or today, and any future artificial changes, favorable or unfavorable to California, will result in a moving federal-state boundary.

C. Congress Intended the State's Coastline to Move in the Future as a Result of Both Natural and Artificial Changes

As California maintained in its opening brief, whatever may have been the approach of the Special Master and the parties under the prior decision and decree of this Court in this case, the respective rights of

the parties to the seabed and subsoil of the continental shelf are entirely subject to the terms of the Submerged Lands Act. (Calif. Brief in Support of Exceptions, vol. I, pp. 9-11.) It is California's position that Congress intended, in enacting the Submerged Lands Act, that the federal-state boundary on the continental shelf should be measured from the state's coastline, and that such coastline was to be a moving one, as a result of both natural and artificial changes.

A review of the terms and legislative history of the Submerged Lands Act in California's opening brief (Calif. Brief in Support of Exceptions, vol. I, pp. 11-27) leads to the inescapable conclusion that Congress intended to restore to the states the tide and submerged lands within their historic boundaries, as approved by Congress, but that the term "coast line" used in section 2(c) of the Act (67 Stat. 29; 43 U. S. C. §1301-(c)) referred to a line constantly changing in actual location. Hence the coastline as of the time of a state's entry into the Union was not to be determinative. (See Hearings in Executive Session Before the Committee on Interior and Insular Affairs, United States Senate, 83d Congress, 1st Session on S. J. Res. 13, etc. Part 2, p. 1354-55 (1953).) As the United States recognizes in its opening brief (U. S. Supporting Brief, p. 24), Congress intended that this present coastline should include artificial changes occurring subsequent to a state's entry into the Union. (1953 Senate Hearings, *supra,* p. 1357.)

Furthermore, it was contemplated that the coastline might change in the future. As Senator Cordon, the Acting Chairman of the Senate Committee on Interior and Insular Affairs during consideration of the Sub-

merged Lands Act and the floor manager of the proposed resolution, stated:

> "The Senator from Oregon cannot say that as a result of the enactment of the pending measure the exterior boundary will always be as here established, since it may vary because of a change in coastline in 150 years. . . ." 99 Cong. Rec. p. 2697.

That Senator Cordon was talking about both natural and artificial changes is apparent from the amendment offered in Committee by Senator Long. Senator Long proposed a change in the second sentence of Section 4 to allow a state to extend its seaward boundaries to a line three geographical miles from its coastline,

> ". . . 'existing at the time such State became a member of the Union or where said coastline has been or *is hereafter* altered by natural accretions, then from such present or future coastline.' " (1953 Senate Hearings, *supra,* p. 1353.) (Emphasis added.)

Senator Long was informed that his amendment would cause a state to lose the advantage of adding artificial changes and that the term "coast line" was understood to include artificial as well as natural changes. (1953 Senate Hearings, *supra,* pp. 1344-45, 1353-58, 1374.) Before dropping his proposed amendment, Senator Long made it absolutely clear that the term coastline as used in the Act included both natural and artificial accretions by stating:

> ". . . The bill spells out two things: One, that where the States have reclaimed land, they are entitled to take that reclaimed land and they can

> measure their present coastline out 3 miles from where, by action of man, they have reclaimed land. . . . Where there have been accretions, both man-made and natural, it is agreed under the terms of this bill that the coastline would be measured from the outward limit of those accretions." (1953 Senate Hearings, *supra,* p. 1357.)

Coupled with the above legislative history is the basic objective of Congress in enacting the Submerged Lands Act, *i.e.,* to restore the states to the position in which they had always thought they were prior to the decision in *United States v. California.* (See statements of Senator Holland, author of the Act, 99 Cong. Rec. 4361.) Just as the states had always assumed that their coastlines had been modified by past changes in their shorelines, both natural and artificial, they anticipated that their coastline would be similarly modified by future changes. This being so, the Submerged Lands Act is by its nature limitless as to time, relating back to the entry of each state into the Union and incorporating all subsequent coastline changes, whether they occurred before or after May 22, 1953.

The United States relies on judicial interpretation of the Swamp Lands Act of September 28, 1850 (9 Stat. 519), which cases have uniformly held that said act was a grant *in praesenti* and therefore related only to lands which were swamp lands at the date of the grant. (See *Work v. Louisiana,* 269 U.S. 250, 255-59 (1925); *Michigan Land and Lumber Co. v. Rust,* 168 U.S. 589, 591 (1897).) The granting section of

the Swamp Lands Act compels this conclusion reached by the courts:

> ". . . the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State." (9 Stat. 519, §1.)

However, the Swamp Lands Act was not a recognition of rights of the states which had been historically honored, as is the Submerged Lands Act, but was a grant of lands indubitably belonging to the United States, and as to which the states had no prior claim. In contrast, the foregoing legislative history of the Submerged Lands Act clearly shows an intent to relate to lands the status of which may change in the future.

The United States erroneously argues that the extension of the Submerged Lands Act to Alaska (72 Stat. 339, 343) and Hawaii (73 Stat. 4, 6) upon the admission of those states into the Union is evidence of the *in praesenti* character of the Submerged Lands Act. (U. S. Supporting Brief, p. 25.) Actually, these later statutory extensions were made simply because the Submerged Lands Act, like the Swamp Lands Act of 1850, related to lands within "a state" but not within a "territory" so that subsequent enactments were required to make the Submerged Lands Act applicable to former territories which became states. (See *Rice v. Sioux City & St. Paul R.R. Co.*, 110 U.S. 695, 697 (1884).)

D. The Rules of Property Law Relating to Owners of Submerged Lands and Adjacent Uplands Are Not Relevant to This Dispute.

The United States has assumed that a judicial interpretation of the Submerged Lands Act is to be governed by ordinary rules of property law[12] and has cited State and federal authority for the proposition that artificial accretions to the shore do not inure to the benefit of the adjacent upland owners. California does not quarrel with this authority, but contends that Congress did not intend that the boundary of the State on the continental shelf was to be determined in accordance with common law principles governing the property rights of private individuals.

As California has shown in its opening brief (Calif. Brief in Support of Exceptions, vol. I, pp. 16-27), the primary purpose of Congress in enacting the Submerged Lands Act was to restore the respective states to the position in which they believed themselves to be prior to the 1947 decision in this case and to allow the states to realize their historic expectations as to tide and submerged lands. In defining the extent of this restoration, Congress used the criterion of a state's

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[12]The reliance on common law property rules by the United States to support its contention points up the fact that the Government will rely on principles of international law where such rules are helpful, but when such rules are inconvenient the Government will revert to principles governing private land ownership. As California noted in its opening brief (Calif. Brief in Support of Exceptions, vol. I, p. 78, n. 38; p. 114), the State Department letter of November 13, 1951, on which the United States relied before the Special Master (Rep. pp. 9 *et seq.*), is silent on the subject of the effect of artificial changes to the shoreline. Yet the rules of international law on this subject were well enunciated at the time and are now codified by the 1958 Geneva Convention, as shown in point II B *supra*, and under these rules there can be no question that artificial fill and artificial structures result in changes to the coastline.

historic boundaries, with certain modifications. Thus, when construing the Submerged Lands Act as it relates to coastline changes, it is the state's historic expectations that are to be applied rather than technical property law principles. It is clear that just as the littoral states regarded their coastlines as lying seaward of artificial fill and structures existing as of May 22, 1953, they similarly anticipated that their coastlines would be modified by future changes of this character. There is no basis, either in the Submerged Lands Act itself or in its legislative history, for assuming that Congress intended to define state boundaries by applying historically accepted criteria to past changes, and by applying to future changes private property concepts never before applicable.

The United States argues that artificial additions to the California shoreline occurring after May 22, 1953 should not result in a seaward shift of the federal-state boundary on the continental shelf. This, is based upon plaintiff's premise that "[a]rtificial changes that do not divest the title of California or of any private owner should not divest the title of the United States." (U. S. Supporting Brief, p. 21.) The inconsistency of plaintiff's position is demonstrated by the United States' concession that artificial changes prior to May 22, 1953 did extend the State's seaward boundaries, although these extensions did not result in a corresponding divesting of the title of California or in an increment to the title of the adjacent landowner. Moreover, the United States concedes that natural accretions to the shoreline will move the federal-state boundary seaward on the continental shelf (U. S. Supporting Brief, pp. 20, 21), and the parties have agreed that gradual accretions induced by artificial structures are to be treated

as natural accretions for purposes of this boundary controversy. (Rep. p. 44; U. S. Supporting Brief, p. 20.) Thus, when such gradual accretions induced by artificial structures occur off the California coast, there will be a resulting seaward extension of the State's boundaries. Under such circumstances, however, the State will not lose any land to the upland owner, since such accretions are treated under California law as artificial accretions and will remain in State ownership. (*People v. Hecker, supra* (179 Cal.App.2d at pp. 837-39); *Carpenter v. City of Santa Monica, supra* (63 Cal.App. 2d at pp. 789-94).) Obviously, the respective rights of the United States and California in a division of the continental shelf are in no way dependent upon a consideration extraneous to this case, namely, the status of title to accretions as between the owner of the tidelands and the adjoining upland owner.

Finally, California emphasizes that the Special Master recognized that constitutionally the United States has complete control over the making of artificial changes in the shoreline, and that the effect of any such future changes on the State's seaward boundaries on the continental shelf can be the subject of agreement between the parties. (Rep. pp. 45-46.)

In the last analysis, whether artificial accretions and changes to the coastline result in a moving of the states' seaward boundary on the continental shelf, under the Submerged Lands Act, depends on the intention of Congress, not on usual rules of property law. California has demonstrated that Congress intended the coastline to be a continually changing one, subject to future variance attributable to both natural and artificial causes, so that the seaward boundary of the State must likewise be changeable.

Conclusion

For the reasons and arguments appearing in all of its briefs, California respectfully urges that the exceptions of the United States to the Report of the Special Master be overruled.

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Dated: June 15, 1964.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A. D. 1964.
