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MICHAEL BODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

No. 5, Original

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF CALIFORNIA, *Defendant.*

**RESPONSE TO THE MOTION OF THE UNITED
STATES FOR ENTRY OF A SUPPLEMENTAL DE-
CREE (NO. 2) and MEMORANDUM IN OPPOSI-
TION TO THE MOTION OF THE UNITED STATES**

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Number of children in the household	Probability of a child being in the household
0	0.00
1	0.25
2	0.45
3	0.60
4	0.70
5	0.78
6	0.82
7	0.84
8	0.85
9	0.85
10	0.85

IN THE
Supreme Court of the United States

October Term, 1976

No. 5, Original

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF CALIFORNIA, *Defendant*.

**RESPONSE TO THE MOTION OF THE UNITED
STATES FOR ENTRY OF A SUPPLEMENTAL
DECREE (NO. 2)**

In response to the motion of the United States for entry of a supplemental decree (No. 2), the State of California alleges as follows by way of answer:

1. California admits that the United States owns all land areas located above the level of mean high water on all the islands, islets and rocks located within the Channel Islands National Monument. The State of California admits that it has no legal interest in any land areas above the level of mean high water on any of these islands, islets and rocks.

2. California denies that the United States owns any tidelands (defined as the lands between the line of mean high water and the line of mean lower low water) surrounding the islands, islets and rocks located within the Channel Islands National Monument. California alleges that it is the owner of all tidelands located within the boundaries of the Channel Islands National Monument.

3. California denies that the United States owns the submerged lands and natural resources located within one geographical mile of the coastline of Anacapa and Santa Barbara Islands. California, and not the United States, is the owner of these lands and natural resources.

4. California is the owner of all submerged lands underlying the waters of the Pacific Ocean seaward from the coastline of each island, islet, rock and low-tide elevation within the Channel Islands National Monument to a distance of three geographical miles from that coastline. California is also the owner of all natural resources in and underlying the waters of the Pacific Ocean within the three-mile belt of water described in the preceding sentence.

5. California denies that its ownership rights are limited to "the submerged lands and natural resources underlying the waters of the Pacific Ocean more than one nautical mile from the coastline of Anacapa and Santa Barbara Islands seaward, to a distance of three nautical miles from the coastline of those Islands," as suggested by paragraph 3 of the supplemental decree proposed by the United States.

6. California also denies that there are factual issues which necessitate the appointment of a special master in connection with the cross-motions for a second supplemental decree. California believes that the United States and California should be able to agree to a procedure which obviates the need for a special master. Negotiations to that end are in progress, and California urges the Court to postpone appointment of a special master until the parties inform the Court of the results of their discussions. The United States through its attorneys has indicated that it has no objection to such a postponement.

Respectfully submitted,

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December 30, 1976.

IN THE
Supreme Court of the United States

October Term, 1976

No. 5, Original

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF CALIFORNIA, *Defendant*.

**MEMORANDUM IN OPPOSITION TO THE
MOTION OF THE UNITED STATES**

I

SUMMARY OF CALIFORNIA'S POSITION

The position of the State of California is set out in the memorandum which accompanied its separate petition for entry of a supplemental decree. That memorandum is incorporated here by this reference.

Briefly summarized, California's position is that the 1949 enlargement of the Channel Islands National Monument in Presidential Proclamation 2825, 63 Stat. 1258, did not add to the monument any tidelands, any submerged lands, or any natural resources in or underlying the adjacent waters of the Pacific Ocean. The 1949 proclamation added "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." California contends that this language added to the monument only the surface areas of all islands, islets, and rocks above the line of mean high water and within one nautical mile of the two named islands. The preamble of the 1949

proclamation recites that "certain islets and rocks situated near Anacapa and Santa Barbara Islands are required for the proper care, management, and protection of the objects of geological and scientific interest" located on lands which were already part of the monument. This limited statement of purpose appears to negate any intention to add to the monument any submerged lands, waters, or natural resources in or underlying the waters of the Pacific Ocean. Also since the Antiquities Act of 1906, 16 U.S.C. § 431, only authorized the creation of national monuments on "lands owned or controlled by the Government of the United States," the President would have proceeded without statutory authority if indeed he had added a belt of Pacific Ocean waters to the Channel Islands National Monument. Such waters and the natural resources in them are obviously not "lands" and could never have been thought to be "lands owned or controlled by the Government of the United States."

Furthermore, if the 1949 proclamation had added submerged lands to the Channel Islands National Monument, these lands were susceptible of inclusion within a national monument only by virtue of the "paramount rights doctrine" enunciated in the 1947 decision in this case. *United States v. California*, 332 U.S. 804, 805 (1947). When the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315, was passed in 1953, all rights of ownership in these lands again vested in the State of California except for those few cases where the United States establishes that it actually occupied these lands under "claim of right" so as to come within the exception set forth in Section 5 of the Submerged Lands Act, 43 U.S.C. § 1313. While the memorandum in support of the United States' motion focuses heavily on "actual occupancy," nowhere does the memorandum identify a "claim of right" other than ownership predicated on the "paramount rights doctrine" of the 1947 decision. The

legislative history of the Submerged Lands Act makes it clear that a "claim of right" under that Act does not include "any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess., 20 (1953).

II

WHY THERE IS NO NEED FOR APPOINTMENT OF A SPECIAL MASTER

California believes that there are at most five issues which must be decided to resolve the discrete controversy raised by the two competing petitions for entry of a supplemental decree:

(1) What is the proper interpretation of the 1949 Presidential Proclamation enlarging the Channel Islands National Monument — did it add only the surface areas of the islets and rocks above high water and within one nautical mile of Anacapa and Santa Barbara Islands?

(2) If the 1949 proclamation did add a belt of waters to the monument, was that action beyond the scope of statutory authority which permitted the creation of a national monument only upon "lands owned or controlled by the Government of the United States"?

(3) Does California or the United States own the tidelands located within the Channel Islands National Monument?

(4) If submerged lands were included within the 1949 enlargement of the monument, were those lands "actually occupied under claim of right" by the federal

government and thus excepted from the operation of the Submerged Lands Act?

(5) What is the proper location of the three-mile boundary between state and federal submerged lands in the vicinity of the Channel Islands National Monument?

A. Interpretation of the 1949 Proclamation and the Antiquities Act

The first two issues clearly present only questions of law involving interpretation of the 1949 proclamation and the Antiquities Act of 1906. Since there are only legal issues presented by these two questions, California submits that these issues can be resolved on the basis of briefs filed by the parties. Hence, there is no need for a special master because there are no disputed issues of fact to be tried.

The parties are currently in the process of identifying the relevant documents which they believe constitute the executive history of the 1949 proclamation. This process simply involves identification of all documents shedding some light on the intent of the President in issuing the 1949 proclamation. It does not involve any factual dispute between the parties. Nor is there a need for a special master to sift through voluminous documents and to make findings on executive history as an aid to the Court. At most, there will probably be no more than fifty pages of documents to consider. California has proposed to the United States that these documents be printed in a joint appendix to accompany the briefs. A record of this size should constitute no greater burden on the Court than the record in a typical case on the summary calendar, and the Court will be aided by the summaries of these documents contained in the briefs of the parties.

B. Ownership of Tidelands

In its memorandum accompanying its proposed supplemental decree, the United States asserts that "There is evidence to suggest that the Channel Islands, possibly including those reserved in the Channel Islands National Monument, were the subject of Mexican land grants." The United States suggests that it may be able to establish its title to the tidelands surrounding the islands of the monument "through these and other routes." (U.S. Motion, pp. 10-11.)

California was frankly surprised by this claim since it had thought that its ownership of the tidelands surrounding the islands within its political boundaries had already been settled. In the 1966 supplemental decree, this Court adjudged California to have "the title to and ownership of the tidelands along its coast (*defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water*)" *United States v. California*, 382 U.S. 448, 452 (1966) (emphasis added). The only exceptions to the decree on this point were those specified in Section 5 of the Submerged Lands Act, 43 U.S.C. § 1313.

There is no real possibility that the United States will be able to establish ownership of the tidelands around the islands of the Channel Islands National Monument through Mexican land grants. All of the ungranted tidelands in California were ceded by Mexico to the United States pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). These tidelands were held in trust by the United States for the creation of future states and passed to California when it was admitted to the Union in 1850. *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935). The only tidelands whose ownership did not vest in California upon statehood were those tidelands granted by the Mexican government to private parties

prior to the Treaty of Guadalupe Hidalgo. When these grants including tidelands were subsequently confirmed by federal Board of Land Commissioners, the tidelands remained in private ownership. For the United States to base a claim on such Mexican land grants, it would have to show either that the Mexican grantee (or a successor-in-interest) transferred his lands, including the tidelands, to the United States, or that the United States condemned a parcel including the tidelands. Neither of these possibilities is susceptible of proof.

While there were some Mexican land grants on the Channel Islands (a broad term describing all of the California islands south of Point Conception), there were never any Mexican grants with respect to the islands within the Channel Islands National Monument. The only federal patents confirming Mexican land grants on California islands were for the islands of San Diego (at San Diego Bay), Santa Catalina, Santa Cruz, Santa Rosa, and Mare Island (in San Francisco Bay). J. N. Bowman, *The Question of Sovereignty over California's Off-Shore Islands*, Pacific Historical Review, Aug. 1962, at 298. Since there were never any Mexican land grants on the islands within the Channel Islands National Monument, the United States will find it impossible to prove title to the tidelands by transfer from a Mexican grantee or by condemnation of the lands within his grant. Indeed, the 1938 proclamation creating the Channel Islands National Monument appears to have recognized the absence of title to the tidelands — the calls for the exceptions on Santa Barbara Island begin and end at the high water line. Proclamation No. 2281, 52 Stat. 1541 (1938) (reprinted as Appendix A to California's Petition).

Since the memorandum of the United States states only that the United States *may* be able to establish title to the tidelands (U.S. Motion, pp. 10-11), this choice of words

suggests that this issue has been joined only out of an abundance of caution and only because the United States has not yet fully investigated the state of its title. Under these circumstances, California submits that it would be premature to appoint a special master to make findings on the ownership of tidelands. The better course, in California's view, would be to delay the appointment until the parties advise the court of an inability to arrive at an agreement that would permit resolution of this issue without reference to a special master. It is also wholly possible that the United States may decide to abandon its claim when it discovers no tenable basis for asserting title.

C. Actual Occupancy Under Claim of Right

California likewise submits that the fourth issue should present no questions of fact for a special master. In its moving papers, the United States appears to contend that the sub-issue of "actual occupancy" can be resolved as a matter of law. (U.S. Motion, pp. 13-14.) It is the apparent position of the United States that the drawing of the new boundaries of the monument in the 1949 proclamation was sufficient without any physical presence to constitute "actual occupancy." If the United States is correct, there is no factual issue for trial by a special master.

As a legal matter, California disputes the proposition that there can be "actual occupancy" without some act of occupation other than the mere drawing of a line on a map. There are two reasons why the lack of agreement on this sub-issue should not compel the appointment of a special master. First, California believes that it can arrive at a factual stipulation with the United States as to any acts of occupation beyond the mere drawing of the boundary on the map. With such a stipulated set of facts, it would be possible for the Court to decide the sub-issue of

“actual occupancy” as a matter of law and without a special master having to take evidence on that question.

The second reason why there is no need for a special master on this point is that “actual occupancy” is irrelevant if the United States did not occupy the areas in question under a “claim of right” sufficient to qualify under Section 5 of the Submerged Lands Act. As a matter of law, California contends that no legally cognizable claim of right can be made out with respect to any submerged lands added to the Channel Islands National Monument in 1949. Those lands were federal lands only by virtue of the paramount rights doctrine of the 1947 decision in this case. As pointed out earlier, the legislative history of the Submerged Lands Act indicates that the phrase “claim of right” was not intended to include claims based upon the paramount rights doctrine alone.

D. The Three-Mile Boundary

Finally, the resolution of the three-mile boundary between state and federal submerged lands does not present a factual issue. While controversies involving location of the coastline may sometimes involve factual issues (*see* U.S. Motion, p. 8), no factual issues are presented in this discrete phase of the *United States v. California* litigation. The 1966 supplemental decree of this Court defines “coastline” in part as the “line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or on an island” *United States v. California*, 382 U.S. 448, 449 (1966) (para. 2). The supplemental decree proposed by the United States would measure the three-mile boundary from the coastlines of Anacapa and Santa Barbara Islands only. (U.S. Motion, pp. 4-5, para. 3.) On the other hand, California seeks a decree which specifies that the relevant coastline includes the coastline not

only of these two islands but also of every other island and low-tide elevation within three geographical miles of the coastline of Anacapa and Santa Barbara Islands. Such a decree would use the coastline of these additional features and is required by the 1966 supplemental decree, which defined an island as any “naturally-formed area of land surrounded by water, which is above the level of mean high water.” (382 U.S. at 449, para. 3.) The further particularized decree sought by California merely entails an application of the legal principles delineated in the 1966 decree. As such, there appears to be no need for a special master on this last point either.

E. Proposed Method of Proceeding Without a Special Master

When California filed this petition for entry of a second supplemental decree, it did so in the hope of an expedited resolution of the limited controversy with respect to its ownership rights in the vicinity of the Channel Islands National Monument. Reference of the issues involved to a special master would only result in additional cost and delay. The purpose of this memorandum has been to demonstrate that this cost and delay can be avoided if the parties can agree on a joint appendix and present the case to the Court on briefs in support of their respective proposed decrees. This procedure was used by the parties when this case was first presented to the Court for decision in 1947.

Therefore, California urges the Court to postpone appointment of a special master in this case until February 1, 1977, by which date the parties are to advise the Court as to whether they can agree on a procedure, such as that outlined above, which would obviate the need for a special master. California has been authorized by the United States to represent to the Court that the

United States has no objection to a postponement of the appointment of a special master while the parties attempt to reach such an agreement. California has proposed to the United States that the joint appendix and the briefs of the parties in support of their respective supplemental decrees be filed on or about February 15, 1977, so that this aspect of the *United States v. California* litigation may be placed on calendar for argument this term.

Respectfully submitted,

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December 30, 1976.

Service of the within and receipt of a copy
thereof is hereby admitted this day
of January, A.D. 1977.
