IN THE

Supreme Court of the United States

October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

CALIFORNIA'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR ENTRY OF A THIRD SUPPLEMENTAL DECREE

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SUBJECT INDEX

TABLE OF AUTHORITIES

Executive Orders

Congressional Materials

Books

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PRELIMINARY STATEMENT

The purpose of this reply brief is to point out that the United States has not answered the great majority of points raised by California in its opening brief. In large measure, the United States has ignored critical points which favor California's position.

At the outset, it must be noted that the United States has abandoned its claim to ownership of the tidelands

surrounding the islands and islets located within the Channel Islands National Monument. The United States claimed these tidelands in its initial pleading with respect to its proposed third supplemental decree. (U.S. Motion 4.) [1] Although the United States has not forthrightly conceded California's ownership of these tidelands, the United States simply omits to mention tidelands at all in its formulation of the "Questions Presented" in its brief. (U.S. Br. 2.)[2] Since the brief for the United States does not respond in any way to California's discussion of the tidelands issue (Cal. Op. Br. 38-42), the federal claim to these tidelands must be deemed to have been abandoned. *See New Haven Inclusion Cases,* 399 U.S. 392, 481 n. 78 (1970). Despite the fact that there was an active controversy respecting ownership of the tidelands when California filed its petition in the instant proceeding, the United States nevertheless proposes a third supplemental decree which would not recognize in any way that California is, in fact and in law, the owner of the tidelands located within the Channel Islands National Monument. Since the United States could not support its claim to the tidelands, it apparently wants this Court to overlook the fact that it ever claimed California's tidelands in the monument. To the contrary, California submits that it is entitled to a decree recognizing that it owns the tidelands

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[1] The abbreviated reference "U.S. Motion" refers hereinafter to the "Motion for Entry of a Supplemental Decree (No. 2) [now No. 3] and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of California," filed in December of 1976.

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[2] The abbreviated reference "U.S. Br." refers hereinafter to the "Brief for the United States in Response to California's Opening Brief and in Support of the United States' Motion for a Third Supplemental Decree," dated November 1977.

within the Channel Islands National Monument and adjudging that the United States has no legal interest in these lands whatsoever.

California strongly takes issue with the suggestion in the brief for the United States that a decision in favor of California would somehow diminish the protection of " . . . sea otters and other marine mammals which the United States is dedicated to preserving." (U.S. Br. 5.) It should again be noted that the Channel Islands National Monument was created to preserve certain fossils and geologic features, and not marine life. (*See* Cal. Op. Br. 21-23.) This point is clearly made in the first "Whereas" clause of the preamble to the 1938 Proclamation creating the monument. (Jt. App. 7.) That purpose was not altered in the 1949 Proclamation which enlarged the monument. (Jt. App. 67-68.) Indeed, the memorandum prepared by Assistant Solicitor General George T. Washington states that the proposed proclamation submitted to President Truman was revised specifically to eliminate any purpose regarding the protection of marine life. The memorandum makes this point in very strong terms:

> "The proposed proclamation originally stated, in addition to the justifiable grounds for enlarging the monument under the above Act [the Antiquities Act of 1906, 16 U.S.C. § 431], a purpose to protect marine life. It has been the opinion of this office that it is doubtful whether the Antiquities Act permits the establishment or enlargement of a national monument to protect plant and animal life [see Department of Justice Files 90-1-04-317 and 90-1-04-367]. Hence the language relating to this purpose has been eliminated from the proclamation." (Jt. App. 63.)

Since the Channel Islands National Monument was not enlarged for the purpose of protecting marine life, the United States is disingenuous insofar as it suggests that the outcome of this title dispute may have some effect on the protection of marine life. The State of California is no less dedicated than the United States to protecting sea otters and other marine mammals in the one-mile belt around Anacapa and Santa Barbara Islands. Under California law, the northern elephant seal, the Guadalupe fur seal, and the southern sea otter are "fully protected mammals," which may not be taken or possessed at any time except pursuant to permits for necessary scientific research. Cal. Fish & Game Code § 4700. Similarly it is unlawful in California to take any marine mammal except in accordance with the provisions of the federal Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. Cal. Fish & Game Code § 4500. For purposes of this California statute incorporating federal law by reference, "marine mammals" include sea otters, whales, dolphins, porpoises, seals, and sea lions. Cal. Fish & Game Code § 4500(c). Thus, the United States cannot successfully maintain that a decree in favor of California would reduce in any way the level of protection accorded to marine mammals within the one-mile belt surrounding Anacapa and Santa Barbara Islands.

This case does not find its genesis in the fact that "the disputed area is rich in kelp."[3] It arises because both California and the United States claim jurisdiction over

[3] There may be a veiled suggestion in the Brief for the United States that kelp harvesting would be injurious to marine life in the one-mile belt around Anacapa and Santa Barbara Islands. (*See* U.S. Br. 5.) California denies any such suggestion. Studies by the University of California's Institute of Marine Resources do not disclose any detrimental effects on marine life from kelp harvesting. W. North & C. Hubbs, eds., *Utilization of Kelp-Bed Resources in Southern*

the one-mile belt around Anacapa and Santa Barbara Islands, and these conflicting claims inhibit effective resource management in the area. The agreed record in this case shows that it was not until 1952, three years after the creation of the monument, that funds were budgeted for a ranger and other minimal protection for the Channel Islands National Monument. The monument still depends on the California Department of Fish and Game to patrol the waters around Anacapa and Santa Barbara Islands, and it is for this reason that California seeks a decree that the one-mile belt is under its jurisdiction rather than that of the federal government.

ADDITIONAL STATUTES INVOLVED

California Fish & Game Code § 4500:

> "(a) It is unlawful to take any marine mammal except in accordance with the provisions of the Marine Mammal Protection Act of 1972 (Chapter 31 (commencing with Section 1361) of Title 16 of the United States Code) or provisions of Title 50 of the Code of Federal Regulations, or pursuant to subdivision (b) of this section.
>
> "(b) At such time as federal laws or regulations permit the state to assume jurisdiction over marine mammals, the commission may adopt regulations governing marine mammals and the taking thereof.

California 1968. Since the parties have stipulated that there are no factual issues requiring appointment of a special master in connection with the petitions for entry of a fourth supplemental decree, it would be inappropriate to pursue this extraneous issue any further. Apparently, the United States does not seriously advance this point in view of the fact that it presents no authority whatsoever in support of its suggestion in the brief.

"(c) For purposes of this chapter, 'marine mammals' means sea otters, whales, dolphins, porpoises, seals, and sea lions."

California Fish & Game Code § 4700:

"Fully protected mammals or parts thereof may not be taken or possessed at any time and no provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected mammal and no such permits or licenses heretofore issued shall have any force or effect for any such purpose; except that the commission may authorize the collecting of such species for necessary scientific research. Legally imported fully protected mammals or parts thereof may be possessed under a permit issued by the department.

"The following are fully protected mammals:

(a) Morro Bay Kangaroo rat (Dipodomys heermanni morroensis)
(b) Bighorn sheep (Ovis canadensis)
(c) Northern elephant seal (Mirounga angustirostris)
(d) Guadalupe fur seal (Arctocephalus townsendi)
(e) Ring-tailed cat (Genus bassariscus)
(f) Pacific right whale (Eubalaena sieboldi)
(g) Salt-marsh harvest mouse (Reithrodontomys raviventris)
(h) Southern sea otter (Enhydra lutris nereis)
(i) Wolverine (Gulo luscus)"

ARGUMENT

I

AS A MATTER OF LAW, THE 1949 PROCLAMATION DID NOT ADD THE SUBMERGED LANDS OR WATERS OF THE ONE-MILE BELT TO THE CHANNEL ISLANDS NATIONAL MONUMENT

The essence of California's first argument in its opening brief was that the 1949 proclamation enlarging the Channel Islands National Monument did not add any submerged lands or waters of the one-mile belt to the pre-existing monument. The use of the ambiguous word "areas" in the final draft of the 1949 proclamation made it unclear whether it was the President's intent to add just the "certain rocks and islets" mentioned in the preamble to the monument or whether he intended to add something else in addition. California's review of the executive history of the 1949 proclamation showed that there was no reference whatsoever to submerged lands being added to the monument, although there is some evidence of an intent to add at least the surface areas of the waters in the one-mile belt.

The crux of California's first argument was that, as a matter of law, the 1949 proclamation could not have added the submerged lands of the one-mile belt to the monument because these lands had already been reserved for another purpose in a 1945 executive order. The 1949 proclamation did not effect an implied repeal of the 1945 executive order, and thus the submerged lands of the one-mile belt were not available for addition to the Channel Islands National Monument in 1949. Insofar as the 1949 proclamation may have intended to add the "waters" of the one-mile belt, separate and apart from the underlying submerged lands, these "waters" could not lawfully have

been added to the monument by themselves. The Antiquities Act of 1906 only permits the reservation of "lands" owned by the United States for national monument purposes. 16 U.S.C. § 431. In some circumstances, the reservation of land carries with it an implied reservation of waters or water rights. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918); *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976). But neither the Antiquities Act nor any case authority permits the reservation of Pacific Ocean waters for national monument purposes when the submerged lands beneath them have not been reserved as well. (Cal. Op. Br. 52-57.)

A. The United States Has Not Answered California's Point Regarding the Failure of the 1949 Proclamation To Revoke the 1945 Executive Order Which Has Already Reserved the Submerged Lands of the One-Mile Belt.

It is important to focus on the most critical portion of California's argument. If the submerged lands of the one-mile belt had already been reserved pursuant to Executive Order 9633 in 1945, then those lands could not be added to the Channel Islands National Monument in 1949 without a disfavored repeal by implication of the 1945 executive order. (*See* Cal. Op. Br. 42-48.) Lacking an answer to this compelling argument, the United States has responded in a footnote in its brief, perhaps with the vain hope that the significance of California's point will be overlooked. (U.S. Br. 25 n. 14.)

1. The 1945 Executive Order Reserved All the Submerged Lands of the Continental Shelf Seaward of the Ordinary Low Water Mark.

The United States apparently concedes that the 1945 executive order did not reserve the submerged lands of the

Continental Shelf even though the language of the order refers to the "natural resources of the subsoil and sea bed of the Continental Shelf." (*See* Cal. Op. Br. 46-47.) The United States argues, however, that the 1945 executive order only reserved submerged lands beyond the three-mile limit. (U.S. Br. 11-12, 25 n. 14.) In support of this argument, the United States relies on the definition of "high seas" contained in the Convention on the High Seas concluded in 1958 and utilized in the post-1958 materials collected in Whiteman's *Digest of International Law.* (*Id.*) The fallacy of this argument is that there is nothing to support an inference that President Truman used the term "high seas" in 1945 in the sense that was ultimately accepted by the draftsmen of the 1958 Convention on the High Seas. California's opening brief pointed out that the term "high seas" has been used as a term of art in admiralty and other contexts to include all of the ocean seaward of the ordinary low water mark. (Cal. Op. Br. 43.) The United States makes no comment on that point in its brief.

In the context of the 1945 executive order, California also pointed out in its brief that the "high seas" referred to in that order could not be both "contiguous to the coast of the United States" and include only that portion of the ocean beyond the three-mile limit. (Cal. Op. Br. 34.) Either before or after 1945, the "coast" of the United States has never been defined as being as far seaward as the three-mile limit. Since the "high seas" must actually touch the "coast" to be "contiguous" to it, California submitted in its opening brief that the term "high seas" was used in the 1945 executive order as a term of art including that portion of the seas which lies within the three-mile limit. (*Id.*) In response to this compelling textual evidence, the brief for the United States is completely silent.

Moreover, contemporaneous construction of the 1945 executive order by the Department of Interior agrees with California's position that the submerged lands reserved in the order included the lands within the three-mile limit as well as those beyond it. Our opening brief cited the 1945 annual report of Secretary of the Interior Ickes in which he refers to the whole Continental Shelf as being placed under the jurisdiction of his department in that year. (Cal. Op. Br. 43-44.) He does not qualify his report in any way that would indicate that only the lands of the Continental Shelf beyond three miles had been placed under the administrative jurisdiction of his department by the 1945 executive order. To the contrary, he refers in the cited passage to *"all of the ocean floor* around the United States and its Territories that is covered by no more than 600 feet of water." (Cal. Op. Br. 44.) (Emphasis added.) In the same passage, he also refers to portions of the Continental Shelf on the Pacific Coast no wider than one mile as being part of the new land placed under Department of Interior jurisdiction (*Id.*)

In the 1952 annual report of the Secretary of the Interior, there was further evidence that Interior treated the submerged lands within the three-mile limit as part of the lands on the Continental Shelf reserved by Executive Order 9633 in 1945. In a clear reference to the fact that Executive Order 9633 had placed the submerged lands of the Continental Shelf under the jurisdiction and control of the Secretary of Interior for administrative purposes "pending the enactment of legislation in regard thereto," the 1952 annual report explains that the failure of Congress to enact legislation with respect to the oil and gas deposits on the Continental Shelf has inhibited action with respect to the lands won by the United States in the first *California, Louisiana,* and *Texas* cases. (Cal Op. Br. 45.) If Executive Order 9633 did not reserve those

lands as well as the lands beyond the three-mile limit "pending the enactment of legislation in regard thereto," the quotation from the 1952 annual report cited in California's opening brief would be bereft of intelligible meaning.

What does the United States have to say about this evidence of how the Department of Interior construed the 1945 executive order? The answer is, Absolutely nothing! As it does elsewhere in its brief, it just ignores those arguments it cannot answer. Yet the United States utilizes the doctrine of contemporaneous construction in an effort to support its interpretation of the 1949 proclamation enlarging the Channel Islands National Monument. (U.S. Br. 21-27.) This suggests that the United States may view the doctrine as one to be applied only in favor of the United States, but not when the doctrine supports the position advanced by another party against the United States. While there is no support in the decisions of this Court for such an interpretation of the doctrine, such an implicit assumption may explain the silence of the United States in the face of such an unfavorable interpretation of the 1945 executive order by the department charged with its enforcement.

2. The 1949 Proclamation Is Not Sufficiently Clear To Support a Repeal by Implication.

While the United States does not discuss any of the authority cited by California with respect to the cardinal principal of statutory construction that repeals by implication are disfavored (*see* Cal. Op. Br. 48-51), it ends its footnote of argument with this bald assertion:

> "Second, California acknowledges (Br. 49-51) that any reservation of the disputed lands by the 1945 order could be implicitly revoked *pro tanto* by the 1949 proclamation. Assuming *arguendo*

> that it is necessary to reach this issue, we think the terms of the 1949 proclamation are certainly clear enough to constitute such revocation." (U.S. Br. 25-26 n. 14.)

In response to this assertion, California submits that it is by no means clear that the 1949 proclamation intended to add, or did in fact add, the submerged lands of the one-mile belt to the Channel Islands National Monument. The United States focuses on one of the numerous meanings of the word "area" cited in California's opening brief as "authoritatively" proving that the word may include submerged lands. (U.S. Br. 8.) This approach, of course, begs the question of whether the word "areas" in the 1949 proclamation was used in that special sense. The word "area" most usually refers to a surface rather than all the contents of a three-dimensional unit of space. (Cal. Op. Br. 14-17.)

The United States also asserts without support from the record that "areas" was " . . . the most commodious word that could have been used in this context to denote that everything within the boundaries, not merely 'certain rocks and islets,' was added to the monument." While "areas" could have been used to denote everything in the one-mile belt, neither the language of the proclamation nor its executive history will support the proposition that the word "areas" was used in that way.

The penultimate paragraph of Secretary Krug's draft of his letter transmitting the proposed proclamation to President Truman states that the purpose of the proclamation was to place under the control of the National Park Service "the islets, rocks, and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands." (Jt. App. 46, lines 19-23.) The final draft of the letter sent to the White House substituted the phrase "the

area within one nautical mile from the shoreline of Anacapa and Santa Barbara Islands" for the earlier reference to "islets, rocks, and waters." (Jt. App. 51, lines 20-22.) Thereafter the word "area" or "areas" was used in all the succeeding drafts of the 1949 proclamation. (Jt. App. 53-55, 67-68.) The reason for the substitution of terminology is wholly unexplained and left to inference. While the United States chooses to infer that "areas" was selected as the most "commodious" word to refer to everything in the one-mile belt, the stronger inference is that the word was used simply as a replacement for "islets, rocks, and waters" to the exclusion of the submerged lands beneath the waters.

This inference is reinforced by the fact that the documents comprising the executive history of the 1949 proclamation do not even once mention submerged lands as part of the proposed enlargement of the Channel Islands National Monument. (*See* Cal. Op. Br. 36-37.) The brief for the United States does not contain a single citation to the record where submerged lands were mentioned as part of the proposed enlargement. Even after the 1947 paramount rights decision, the only references in the executive history are to the islets, rocks and waters as distinct from the submerged lands lying beneath the waters. (Jt. App. 42, 46, 48, 49.) If, as the United States argues (U.S. Br. 25-26 n. 14), the 1949 proclamation so clearly added the submerged lands within the one-mile belt that 1945 executive order was partially revoked by implication, then one would expect at least one mention of the submerged lands somewhere in the executive history of the proclamation.

The absence of any reference of submerged lands in the documents comprising the executive history of the 1949 proclamation raises a compelling inference that the executive intent was to add a belt of waters without the

underlying submerged lands to the Channel Islands National Monument. Such an attempt would be impermissible under the Antiquities Act of 1906 (*see* Cal. Op. Br. 52-57), a point apparently conceded by the United States. (U.S. Br. 9 n. 3.) Yet it appears that this is precisely what the Executive Branch intended when it enlarged the monument in 1949. The United States totally misconstrues California's argument when it states on page 9 of its brief that " . . . California does not contend that the 1949 proclamation added merely surface waters to the Monument." Our opening brief states precisely the opposite in the second paragraph of page 52. Our point is that Congress has not authorized the reservation of waters alone as part of a national monument. The term "areas" must be narrowly construed to include only the islets and rocks within the one-mile belt if this Court is to avoid a construction of the 1949 proclamation which would invalidate it in its entirety. (*See* Cal. Op. Br. 52-57; *see also* 37-38.)

There can be little doubt that the National Park Service contemplated the enlargement of the monument with only the surface areas of the surrounding one-mile belt of ocean waters. The brief for the United States highlights this point very nicely. On page 15 of its brief, the United States quotes the head of the National Park Service's Section on National Park Wildlife as suggesting an extension of the monument's boundaries "to include *the surface of the adjacent ocean*" be considered. (Jt. App. 13.) (Emphasis added.) Therefore, the fact that the diagram attached to the 1949 proclamation contains acreage figures equal to the total surface area of the islands and surrounding waters is not "persuasive evidence" that the submerged lands beneath that part of that surface area were added to the monument in 1949. (*Cf.* U.S. Br. 9-10.)

The upshot of this argument is that, at the very least, there is an ambiguity as to whether submerged lands were part of the 1949 enlargement of the Channel Islands National Monument. In view of this ambiguity, it cannot be said that submerged lands were so clearly included in the 1949 proclamation as to effect a revocation of the 1949 executive order by implication. (Cal. Op. Br. 48-51.) Also under settled law, the ambiguity must be resolved against the United States since careful draftsmanship by its agents would have avoided this whole controversy. (*See* Cal. Op. Br. 37-38.) Since the submerged lands of the one-mile belt were not added to the monument in 1949 because of the failure to revoke Executive Order 9633, it necessarily follows that the waters of the one-mile belt could not have been added alone without violating the Antiquities Act. (Cal. Op. Br. 52-57.) The net result is that, as a matter of law, the 1949 proclamation is susceptible of only one possible remaining interpretation, that is, an enlargement which included the islets and rocks above high water and nothing else.

B. Contemporaneous Construction by the United States Does Not Support an Interpretation of the 1949 Proclamation To Include the Submerged Lands of the One-Mile Belt.

The force of the preceding argument is not undercut by any contemporaneous interpretation of the 1949 proclamation by either the United States or California. The United States cites the Court to a single memorandum by counsel for the National Park Service, written in 1949 and stating his opinion that "submerged areas" were "recently added to the Channel Islands National Monument." (U.S. Br. 21-22; Jt. App. 70.) Every other contemporaneous federal document cited in the brief for the United States adverts to the "waters" of the one-mile belt as part of the

1949 enlargement but pointedly omits any reference to submerged land as part of that same enlargement. (U.S. Br. 22, lines 16-18; 23, line 21; 26, line 10.) The United States also cites undated Park Service regulations which prohibit "digging in the bottom" and tampering with wrecks. (U.S. Br. 26.)

With only two post-enlargement documents which construe the 1949 proclamation to add submerged lands and three others which mention waters only, the United States is a bit disingenuous when it then concludes that "The federal government, acting through the Department of Interior, has not deviated from its position that since 1949 the Channel Islands National Monument includes all submerged lands and water areas within one mile of Santa Barbara and Anacapa Islands." (U.S. Br. 25; footnote omitted.)

A January 14, 1958 opinion rendered by the Field Solicitor of the Department of the Interior in San Francisco certainly deviated from this position when it stated that " . . . The Park Service no longer has authority to enforce its regulations in the water area within one nautical mile of the shore line of Anacapa and Santa Barbara Islands." (Jt. App. 88-89.) Moreover, the 1949 opinion of National Park Service Chief Counsel Jackson Price does not indicate that he had the benefit of the executive history compiled by the parties and now before this Court. (*See* Jt. App. 69-70.) The Price opinion also did not take Executive Order 9633 into account.

In any event, the sparse evidence of a "contemporaneous construction" is not controlling as to interpretation of the 1949 proclamation. This Court has never required deference to administrative constructions in all cases. On the contrary, it has consistently held that the courts, not administrative agencies or departments, have the ultimate

responsibility for interpretation of legislation (or, in this case, executive proclamations). In *Volkswagenwerk Aktiensellschaft v. FMC*, 390 U.S. 261, 272 (1968), the Court stated:

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' But the courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia." (Citations omitted.) *Accord, Zuber v. Allen*, 369 U.S. 168, 192-93 (1969).

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court enunciated a standard for evaluating contemporaneous administrative constructions by which courts could weigh such constructions against other interpretational aids. The Court there reasoned:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronounce-*

> *ments, and all those factors which give it power to persuade, if lacking power to control.*" (*Id.* at 140; emphasis added.)

Since an administrative construction is only valuable as an *interpretation* of a statute, it is axiomatic that an interpretation contrary to what the statute is held to mean as a matter of law cannot pass the "validity of reasoning" test. The Supreme Court has held that a contemporaneous construction without an adequate basis in law has no weight. *See, e.g., Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677-78 (1954); *Sanford v. Commissioner*, 308 U.S. 39, 52 (1939). A court cannot adopt an erroneous construction of a statute simply because the administrative agency ordinarily entitled to interpret the statute has interpreted that statute erroneously for a certain period of time. As the Supreme Court recognized in *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86 (1975), "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong." *Id.* at 95 (citations omitted). *Accord, Jewell Ridge Coal Corp. v. UMW*, 325 U.S. 161, 169 (1969). In a like manner, if the administrative construction is based on a long-continued oversight in construing the law, it is entitled to no weight. For example, in *Grand Trunk Western Ry. Co. v. United States*, 252 U.S. 112 (1920), the Supreme Court found that the Post Office's practice of paying the railroad the full rate for services did not overcome the statute's true intent that only 80% of the fees should be paid. The Court reasoned:

> "But here the practice long continued of paying the full rate instead of eighty percent thereof was not due to any construction of a statute which the department later sought to abandon, but to what is alleged to be a mistake of fact due perhaps to an

> oversight. To such a case the rule of long-continued construction has no application." *Id.* at 121.

Application of these rules to the instant case requires only a comparison of the reasoning behind California's interpretation of the 1949 proclamation with the interpretation proffered by the United States as "contemporaneous construction." California feels certain that its interpretation will withstand scrutiny under the "validity of reasoning" standard while the federal construction will not.

C. The Record Does Not Support the Federal Contention That California Agreed With Its Interpretation of the 1949 Proclamation in the Period Immediately Following Its Announcement.

The United States cites two documents as evidence that California recognized federal jurisdiction over the one-mile belt around Anacapa and Santa Barbara Islands in the months immediately following the issuance of the 1949 proclamation. (U.S. Br. 22-25.) A fair reading of the two documents should demonstrate that they are not evidence of that kind at all.

The first document in its entirety was as follows:

State of California
Department of Natural Resources
DIVISION OF FISH AND GAME
Ferry Building
San Francisco 11, California

July 15, 1949.

TO WHOM IT MAY CONCERN:

The National Park Service has just called to our attention the fact that Santa Barbara and Anacapa Islands, and the waters surrounding said islands to a distance of one nautical mile, comprise the Channel Islands National Monument.

The National Park Service also advises us that they will not permit any use of explosives for any purpose within the boundaries of this National Monument.

In the exercise of any permit previously issued by the California Fish and Game Commission to use explosives for seismic operations, or in the exercise of any permit which may be granted in the future, you will please be governed by this notice.

FISH AND GAME COMMISSION
BY
E.L. MACAULAY
Executive Officer

While this notice states the position of the National Park Service for the information of California seismic operation permittees, nothing in the document purports to endorse the federal position. A reasonable interpretation of the notice is that Mr. Macaulay was simply passing along information received from the National Park Service to California permittees so that they will not run the risk of trouble with federal authorities in the vicinity of the Channel Islands National Monument.

The second document is a letter requesting information about the National Park Service's postition with respect to commercial fishing and kelp harvesting in the waters around Anacapa Island. (U.S. Br. 24; Jt. App. 76.) This letter is scarcely an expression of California acquiescence to federal jurisdiction over the Anacapa Island kelp beds. It asks a question, but it expresses no position whatsoever on behalf of the State of California.

It would not have been surprising if some California official had recognized federal jurisdiction over the one-mile belt between 1949 and 1953. After all, it was during that period that the federal government had "paramount rights" and "full dominion" over the entire three-mile territorial sea. Recognition of federal jurisdiction over the submerged lands around Anacapa and Santa Barbara Islands would indicate respect for this Court's first decision in *United States v. California* rather than agreement with any federal interpretation of the 1949 proclamation. However, neither document cited by the United States mentioned submerged lands, and neither document is susceptible of the overreading given it in the brief for the United States.

II

THE UNITED STATES DOES NOT HAVE A RIGHT TO THE ONE-MILE BELT BY VIRTUE OF THE CLAIM OF RIGHT EXCEPTION TO THE SUBMERGED LANDS ACT

In its opening brief, California demonstrated that Congress intended to relinquish to California *all* federal jurisdiction and ownership rights within the three-mile territorial sea when it passed the Submerged Lands Act in 1953, subject only to the reservations and exceptions set forth in the Act. (Cal. Op. Br. 58-61, 82-84.) Nowhere in its brief does the United States dispute that such was the intent of Congress. Thus, the one-mile belt around the two principal islands of the Channel Islands National Monument was returned to California by virtue of the Submerged Lands Act unless the federal government can show that this one-mile belt was somehow excepted from the operation of the Act.

In an attempt to that end, the United States grounds its claim to jurisdiction over the one-mile belt around Anacapa and Santa Barbara Islands squarely on the claim of right exception set forth in Section 5 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. § 1313. (U.S. Br. 28.) In its opening brief, California cited authority for the proposition that the United States has the burden of proving that its claim falls within the Section 5 exception to the Submerged Lands Act. (Cal. Op. Br. 60-61.) The United States apparently agrees that it must shoulder the burden of proof since its brief nowhere challenges this proposition or the authority cited by California.

The United States makes a further telling concession when it states in its brief:

> "We further agree that the claim of right

> exception does not preserve to the United States any claim resting solely on the doctrine of paramount right [sic] announced by this Court in *California I* (Cal. Br. 76)." (U.S. Br. 29.)

The Senate Report on the bill which ultimately became the Submerged Lands Act virtually compels this concession. The report makes it clear that the claims of right excepted by Section 5 do 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).

California submits that this concession by the United States is fatal because its claim to the one-mile belt is a "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." But for the paramount rights doctrine announced in the 1947 *United States v. California* decision, the United States had no claim to ownership or control of the submerged lands of the one-mile belt, the natural resources beneath them, or the waters above them. Section 2 of the Antiquities Act of 1906 clearly specifies that only "lands owned or controlled by the Government of the United States" may be reserved for national monument purposes. 34 Stat. 225, 16 U.S.C. § 431. In 1949, the United States could be said to "own or control" the submerged lands of the one-mile belt around the two principal islands of the Channel Islands National Monument only because this Court had announced in 1947 that the United States was possessed of "paramount rights in, and full dominion and power over, the lands, minerals and other things" underlying the

Pacific Ocean seaward of the ordinary low-water mark on the coast of California to a distance of three nautical miles. *United States v. California*, 332 U.S. 804, 805 (1947). The Chief Counsel for the National Park Service expressly acknowledged in a May 31, 1949 memorandum that national monument jurisdiction over the belt was based upon the paramount rights doctrine enunciated in the first *United States v. California* decision. (Jt. App. 69-70, *esp.* 70, lines 9-11.) There could not be a clearer admission that the purported federal claim of right to the one-mile belt around Anacapa and Santa Barbara Islands is unmistakably a "claim resting solely on the doctrine of 'paramount rights'." In light of the Senate Report and the concession by the United States, it follows as a matter of law that the purported federal claim is not within the class of claims excepted from the operation of the Submerged Lands Act by the claim of right language in Section 5.

The United States argues that its claim to the one-mile belt is not a claim resting solely on the paramount rights doctrine. (U.S. Br. 29.) The gist of the argument is that the 1949 reservation of the one-mile belt as part of the Channel Islands National Monument is *ipso facto* a "claim of right" because it is "a statement by the President of the United States officially proclaiming that the areas are reserved 'under and by virtue of the authority vested in' him by a public law passed for just such a purpose by the Congress (Jt. App. 67)." (U.S. Br. 29.) This contention is utterly without substance.

The defect of this contention may be demonstrated by examining the nature of the federal claim to the submerged lands and waters of the one-mile belt before and after the 1949 Presidential Proclamation enlarging the Channel Islands National Monument. After the first *United States v. California* decision and prior to the 1949 proclamation,

there can be no question that the federal claim of right to the one-mile belt surrounding Anacapa and Santa Barbara Islands was a claim resting solely on the paramount rights doctrine enunciated in the 1947 decision. After the enlargement of the monument on February 9, 1949, nothing happened to alter the basis of the federal claim unless the proclamation somehow transmuted the claim resting solely on the paramount rights doctrine into a claim of a different type. The reservation did not have any such magical effect.

A reservation for national monument purposes is not a claim of right in and of itself. At most, it is an expression of a belief on the part of the President that the federal government owns or controls the lands being reserved for national monument purposes. The claim of right is the basis upon which the United States claims a right of ownership or to possession of the lands being reserved. The reservation operates only to change the category under which the Department of Interior holds the lands for administrative purposes. For example, if a national monument is created out of public domain lands, the lands reserved for national monument purposes are no longer subject to entry and sale and are set apart for the special purposes delineated in the Antiquities Act of 1906, 16 U.S.C. § 431. In *Wilcox v. Jackson*, 13 Pet. 498, 513 (1839), it was stated in regard to a military reservation that " . . . whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands . . . ." *United States v. Celestine*, 215 U.S. 278, 285 (1909), contains the following definition of a "reservation":

> " . . . The word is used in the land law to describe any body of land, large or small, which

> Congress has reserved for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."

While the President as well as Congress may now create a reservation under appropriate circumstances, the principle remains unchanged. The effect of a reservation is to shift the land from one administrative category to another. If the federal government does not own the lands placed in a reservation, the reservation does not improve the quality of federal title. The United States' claim of right remains the same as before the reservation.

The United States contends that a "claim of right" under Section 5 of the Submerged Lands Act does not have to be a claim of title or even a claim of a right to possession. (U.S. Br. 29-32.) It asserts that there is no support for California's position that a claim of right must be a claim of ownership or to possession. (*Id.* at 29-30.) Yet immediately after making this incorrect assertion, the United States quotes a portion of the legislative history of the Submerged Lands Act in which Senator Cordon explains to Senator Kuchel that a claim of right " . . . means that the United States is in actual occupancy and *claims that it has a right to occupancy.*" (U.S. Br. 30.) (Emphasis added.) A claim of a right to occupancy means nothing unless it means a claim of ownership (title) or to possession. Indeed, on page 31 of its brief, the United States quotes Senator Cordon again stating as follows:

> "The bill is a conveyance. Unless we except from the conveyance a tract of ground, *the title of which*

> *is in dispute,* and unless we except that we end the dispute, but we end it adversely to the United States." (Emphasis added by the United States.)

This language clearly demonstrates that a Section 5 claim of right must be a claim of title and not merely a reservation of federal lands standing apart from the underlying federal claim to ownership or control. But it also proves much more. The above quotation indicates that the claim of right exception was intended to preserve federal claims to tracts of land where *title was in dispute* as of the date of passage of the Submerged Lands Act. Title to the submerged lands underlying the one-mile belt around Anacapa and Santa Barbara Islands was not in dispute as of the date of the enactment of the Submerged Lands Act. Federal jurisdiction over these lands rested solely upon the paramount rights doctrine. As discussed above, Congress clearly manifested its intention that any claim resting solely on the paramount rights doctrine not be excepted from the operation of the Submerged Lands Act.

Finally, it should be observed that the United States did not respond at all in its brief to California's argument that the Submerged Lands Act revoked the 1949 proclamation reserving the one-mile belt for national monument purposes. (Cal. Op. Br. 82-84.) The failure to answer this argument should be treated as a concession of this point by the United States.

III

THE UNITED STATES' PROPOSED MODIFICATION OF ITS DECREE WOULD NOT RESOLVE THE THREE-MILE BOUNDARY ISSUE SATISFACTORILY, NOR WOULD IT RECOGNIZE CALIFORNIA'S OWNERSHIP OF THE TIDELANDS

In the third section of its opening brief, California pointed out that the decree proposed by the United States measured the three-mile boundary between federal and state submerged lands only from the coastlines of Anacapa and Santa Barbara Islands without taking into account other islands (rocks above mean high water) and low-tide elevations which should also be counted as basepoints for measurement of the boundary. (Cal. Op. Br. 85-87.) In footnote 17 of its brief, the United States admits that the low-tide elevations and other islands should be taken into account and that it overlooked them in its proposed decree. (U.S. Br. 32-33.) Despite that admission, however, the United States proposes that the Third Supplemental Decree omit specific reference to these other islands and low-tide elevations and merely state in general terms that the outer boundary of California's submerged lands is "three nautical miles from the coastline of California." (*Id.*)

The purpose of this exercise of continuing jurisdiction reserved in paragraph 13 of the 1966 supplemental decree, *United States v. California,* 382 U.S. 448, 453 (1966), is to give specific content to the general phraseology of the Submerged Lands Act and the first supplemental decree in areas where the parties have been unable to agree as to any portion of the boundary line. The phrase "three nautical miles from the coastline of California" proposed by the United States does not resolve the particular

problem posed here. Up until its latest brief, the United States did not count the other islands and the low-tide elevations in the vicinity of Anacapa and Santa Barbara Islands for purposes of locating the three-mile boundary. California believes that the other islands and low-tide elevations should be specifically mentioned in the decree with nothing left to inference. Otherwise the decree leaves California in the same position that it was in prior to seeking this decree — with general language that has to be further defined in order to establish that the other islands and low-tide elevations are to be taken into account.

California believes that the United States' objection to language referring to the territorial sea is well taken because the breadth of the territorial sea may change. Therefore California requests that the following language be substituted as paragraph 1 of its proposed supplemental decree:

> "1. As against the United States, the State of California has title to and is the owner of all tidelands (defined as the shore of all islands between the line of mean high water and the line of mean lower low water and the portions of all low-tide elevations above the line of mean lower low water) surrounding the islands within the Channel Islands National Monument, established by Presidential Proclamation No. 2281, 52 Stat. 1541 (April 26, 1938) and extended by Presidential Proclamation No. 2825, 63 Stat. 1258 (February 9, 1949), and all tidelands situated on low-tide elevations within three nautical miles of the line of mean lower low water on any of the foregoing islands. As against the United States, the State of California also has title to and is the owner of all submerged lands and natural

resources (as the latter term of defined in subsection (e) of 43 U.S.C. § 1301) between the line of mean lower low water on all islands within the Channel Islands National Momument and on all low-tide elevations located within three geographical miles of any of those islands, and a second line located three geographical miles seaward of the foregoing line of mean lower low water.

"With respect to the foregoing land and natural resources, California's rights include the right and power to manage, administer, lease, develop and use these lands and natural resources all in accordance with applicable State law."

It should again be noted that the decree proposed by the United States does not recognize California's ownership of the tidelands in the vicinity of the Channel Islands National Monument except by indirection. Any decree issued by this Court should affirmatively adjudge California to have title to and to be the owner of these tidelands as against the United States.

Lastly, these particular criticisms of the United States' proposed decree should not obscure California's basic objection that the United States' decree fails to recognize California's rights to the submerged lands and natural resources within the one-mile belt around Anacapa and Santa Barbara Islands.

CONCLUSION

Based on the foregoing argument, California urges this Court to enter a third supplemental decree in the form proposed in its petition with the slight modifications set forth in Section III of this brief.

Respectfully submitted,

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