IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 5 Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF CALIFORNIA TO THE REPORT OF THE SPECIAL MASTER DATED AUGUST 20, 1979

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AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF CALIFORNIA TO THE REPORT OF THE SPECIAL MASTER DATED AUGUST 20, 1979

The United States of America recently brought suit under this Court's original jurisdiction to determine the boundary between submerged lands quitclaimed by the United States to the State of Alaska as an incident of Statehood under the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., and the lands of the outer continental shelf which remain under the control of the United States. *United States* v. *Alaska*, No. 84 Original. While that case, as presently pleaded, is confined to a determination of the common boundary in a portion of the Beaufort Sea, it is anticipated that, as with other submerged lands litigation, it eventually will be the forum for resolution of all remaining disputes involving Alaska's seaward boundary.[1]

While most of Alaska's coastline remains in its undeveloped natural state, there has been some development of piers, jetties and other coastal installations. In his Report of August 20, 1979 in this case, Special Master Alfred J. Arraj made recommendations to this Court regarding the legal effect this Court should give to such

[1] One dispute concerning the seaward boundaries of Alaska's submerged lands has been before this Court. United States v. Alaska, 422 U.S. 184 (1975). That case was not brought under this Court's original jurisdiction; it was filed in the United States District Court for the District of Alaska and came to this Court on a writ of certiorari. For cases representative of other original jurisdiction submerged lands litigation, *see* United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960); United States v. California, 381 U.S. 139 (1965); and United States v. Louisiana, 394 U.S. 11 (1969).

structures in ascertaining California's seaward boundary. His recommendation that the 16 piers and wharves on the California coast should not be treated as "artificial extentions" of California's coastline is the product of a serious misapprehension of the law and departs from principles already established by this Court. If adopted by this Court, the Special Master's recommendation might establish principles that would incidentally deprive Alaska of submerged lands as to which Alaska's ownership heretofore has not been questioned. Those submerged lands lie within a boundary generated by treating permanent installations (in the nature of the California piers) as part of Alaska's coastline. Accordingly, the Court's decision in this case is of vital concern to Alaska.

The Special Master departed from principles already established by this Court when he adopted, Report, pp. 28-29, a "balancing test" under which the effect of artificial structures on delimitation of the coastline is determined by ascertaining "'whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of the territorial sea be increased. . . .'" Report, pp. 26-27, quoting from McDougal and Burke, *The Public Order of the Oceans* at 387-388 (1962). As applied by the Special Master, *see* Report, pp. 28-29, it would appear that only harbor works connected with a conventional harbor or artificial structures serving a coastal maintenance function would create a sufficient interest in the surrounding waters to justify treating the structures as modifications of the coast.

However, such determinations are to be made in accord with the principles established by the Geneva Convention on the Territorial Sea and Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606 (1964). *See United States* v. *California*, 381 U.S. 139, (1965): *United States* v. *Louisiana*, 394 U.S. 11, 16, 34 (1969). In the 1965 *California* decision, 381 U.S. at 175, the Court adopted the

language of Article 8 of the Convention that "the outermost permanent harbor works which form an integral part of the harbor system shall be regarded as forming part of the coast" as determinative under the Submerged Lands Act. In the *Louisiana* decision, 394 U.S. at 50 n. 64, the Court called attention to the second paragraph of the official Commentary to the final International Law Commission draft of Article 8 (identical to its present form) which provides:

> (2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbor works.

[1956] 2.Y.B. Int'l. L. Comm'n. 270. The Court noted that the Commentary "expressly covers artificial structures which are not closely linked to ports" in rejecting the United States' restrictive position that Article 8 is limited to structures which are "integral parts of [a] harbor system". The Court held that beach erosion jetties, sometimes called "groins," which are not directly connected with a port are part of the coast within Article 8 of the Convention.

Moreover, this Court has held a number of other structures having various purposes to be "artificial extensions" of the coastline. *United States* v. *California*, 432 U.S. 40, 41-42 (1977). Only a few of the structures addressed in the 1977 *California* decree have any connection with a port or harbor. Several others are examples of "coast protective works," but still others are neither works associated with a port or harbor nor coast protective works. The Agua Hedionda Lagoon Jetties, for example, are simply designed to provide an intake for a lagoon which supplies cooling waters for an electrical power plant at the site. Transcript of Denver hearings before the Special Master, *United States* v. *California*, pp. 220-234.

From the foregoing, it is clear that installations which this Court has decreed to be artificial extensions of the coastline may have various purposes and need not be structures which either are connected with a conventional harbor or serve a coastal maintenance function. The determinative factor is whether they are "permanent structures erected on the coast and jutting out to sea. . . ." The 16 California piers all meet these criteria, and therefore are artificial extensions of the coastline.

The most notable error in the Special Master's recommendation was his treatment of those piers on the California coast which are used by oil companies for the loading and unloading of passengers and cargo (the Port Orford, Ellwood, Carpinteria, Morro Strand and the Rincon Island-Punta Gorda Piers). These installations are not only "permanent structures erected on the coast and jutting out to sea. . .;" they also constitute port facilities[2], and the history of and commentary to Article 8 have made it clear for some time that it encompasses port facilities such as the five California piers referred to above.

When the text of the Convention was referred to the General Assembly by the International Law Commission in 1956, Article 8 was entitled "Ports." Paragraph 1 of the Commentary to Article 8 provides in part:

> (1) The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State.

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[2] Alaska is in basic agreement with these definitions employed by the Special Master:

> A port is any place where passengers or cargo may be tranferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe anchorage and sheltering for boats from weather conditions prevailing on the open sea.

Report, p. 7 n. 7.

[1956] II Y.B. Int. L. Comm'n. p. 270. When the Court adopted the language of Article 8 as determinative under the Submerged Lands Act in the 1965 *California* decision, 381 U.S. at 175, it was established that port facilities such as the five California piers referred to above are parts of the coastline for purposes of the Act. There was no reason for the Special Master to go beyond that decision and the provisions of the Geneva Convention, apply a "balancing test" that has not received the sanction of this Court and conclude that these five piers—i.e., port facilities—should not be considered part of the California coast.

Particular attention should be given to the Rincon Island-Punta Gorda facility. This installation should not be confused with an artificial island, the use of which for measuring the territorial sea is prohibited by Article 10 of the Convention. The facility is a port installation which is connected to the mainland by a pier. Report, p. 29. Unlike artificial islands, the Rincon Island-Punta Gorda facility meets the requirement that it be "connected with the coast." *United States* v. *Louisiana, supra* at 37. It is significant that, in that decision, this Court noted that raised structures, such as lighthouses, would be considered "harbor works" if they were connected with the coast, and therefore would be used as base points pursuant to Article 8, while such structures would constitute artificial islands which would not be used as base points by virtue of Article 10 in the absence of such a connection.

The Special Master referred to the McDougal and Burke approach as a "reasonableness test." Report, p. 28. However, there is nothing reasonable about a test under which a rubble groin supporting no human activity but merely serving to minimize beach erosion creates a greater "interest in the surrounding waters" than a pier which may serve as a port or as a place where people may stroll,

fish, and dine in ocean-view restaurants. In any event, if the McDougal and Burke test produces a result different from the results obtained by applying this Court's decisions and the provisions of the Geneva Convention, its use is impermissible; that is precisely the result here.

The writings of one commentator, however, are noteworthy. Dr. G. Etzel Pearcy, the former Geographer of the Department of State, held the view that "[p]iers and breakwaters are the most common examples" of permanent installations which form parts of the coast. Pearcy, "Measurement of the U.S. Territorial Sea," XL *Bulletin*, Department of State, No. 1044, June 29, 1959, pp. 963, 966-968, quoted in 4 Whiteman, *Digest of International Law* (1965) p. 263. In Dr. Pearcy's 1965 "Sovereignty of the Sea" article, Department of State Geographic Bulletin No. 3, there is a diagram showing a "pier," unconnected with any port or harbor, used as a base point for measuring the territorial sea. *Id.* at 29. (That article was cited by this Court in *United States* v. *Louisiana*, *supra* at 51 n. 66.) The identical diagram was included as part of Dr. Pearcy's 1969 article published in the Department of State Bulletin at p. 31. While these writings contained disclaimers that they do not necessarily reflect the policies of the Department of State, it is significant that the 1965 diagram was unchanged when it was republished in 1969.

For the foregoing reasons, the recommendation of the Special Master with respect to the 16 piers along the California coast should not be adopted by this Court. Rather, this Court should enter a decree declaring that those 16 piers constitute artificial extensions of the California coastline and are to be employed in determining the boundary between submerged lands quitclaimed to the

State of California under the Submerged Lands Act and submerged lands of the outer continental shelf under the control of the United States.

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Respectfully submitted,

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