

JUL 5 1980

No. 5, Original

MICHAEL RODAK, JR., CLERK

In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,  
*Plaintiff,*

VS.

STATE OF CALIFORNIA,  
*Defendant.*

On the Report of the Special Master

PETITION FOR REHEARING

GEORGE DEUKMEJIAN  
Attorney General of the  
State of California

N. GREGORY TAYLOR  
Assistant Attorney General

JOHN BRISCOE  
Counsel of Record

NANCY A. SAGGESE  
Deputy Attorneys General  
6000 State Building  
San Francisco, CA 94102  
Telephone: (415) 557-2210  
*Attorneys for Defendant*







## SUBJECT INDEX

	<u>Page</u>
Introduction .....	1
 <b>I</b>	
Determining the status of a coastal facility by reference to its function, instead of its physical characteristics, will create uncertainties when that function is changed or abandoned .....	2
 <b>II</b>	
The opinion misreads the special master's report. He found in fact that five of the piers constitute port facilities .....	5
 <b>III</b>	
The mean lower-low water line, not the mean low water line constitutes the "line of ordinary low water" on the Pacific Coast .....	6
Conclusion .....	7

## TABLE OF AUTHORITIES CITED

### Cases

	<u>Page</u>
United States v. Alaska, No. 84, Original, ..... U.S. ....., 100 S.Ct. 1005 (1980) .....	2
United States v. California, 381 U.S. 139 (1965) .....	2, 6
United States v. California, 432 U.S. 40 (1977) .....	3
United States v. Maine, No. 35, Original, 433 U.S. 917 (1977) .....	2

### Treaties

Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958) .....	1
Article 8 .....	3, 4, 5

### Statute

Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 et seq. ....	1, 2, 6
--	---------

### United Nations Documents

Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/ Add. 1 .....	4
Summary Records of the 7th Session [1955] 1 Y.B. Int'l L. Comm'n 74, U.N. Doc A/CN.4/SER.A/1955....	4

No. 5, Original

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,  
*Plaintiff,*

vs.

STATE OF CALIFORNIA,  
*Defendant.*

On the Report of the Special Master

PETITION FOR REHEARING

## INTRODUCTION

California files this Petition for the purpose of noting several elements of this Court's opinion of June 9, 1980, which if not clarified may well create troubling uncertainties in future proceedings in the cases construing the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.* As this Court notes in its opinion, it has adopted the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958), for the purpose of defining the expression "coast line" as used in the Act. And application of the Convention's provisions "tend[s] to be highly fact bound." Slip Opinion, pp. 3-4. California's 1000-mile coast line has been the subject of this litigation

for 35 years. Alaska's 6000-mile coast line is now the subject of litigation which will surely last many years. *United States v. Alaska*, No. 84, Original, ..... U.S. ...., 100 S. Ct. 1005 (1980) (appointment of special master). And substantial portions of the Atlantic Seaboard are before a special master to determine the location of their coast line. *United States v. Maine*, No. 35, Original, 433 U.S. 917 (1977).

In 1965 this Court stressed the certainty which should attend the determination of the coast line in these cases. *United States v. California*, 381 U.S. 139, 164-167. We suggest that for the guidance of the parties and the special masters, the questions raised by this Court's opinion of June 9 would be best resolved now.

## I

### **DETERMINING THE STATUS OF A COASTAL FACILITY BY REFERENCE TO ITS FUNCTION, INSTEAD OF ITS PHYSICAL CHARACTERISTICS, WILL CREATE UNCERTAINTIES WHEN THAT FUNCTION IS CHANGED OR ABANDONED.**

This Court's opinion implicitly recognizes that if the sixteen California piers constituted ports, they would be treated as parts of the coast line for purposes of the Submerged Lands Act. Slip Opinion, p. 3, fn. 5. Thus, had this controversy arisen seventy years ago when these piers served as the principal ports of Southern California, California's position would certainly have been upheld. See Exception of the State of California and Supporting Brief, pp. 6-12. Instead, this Court writes that the piers are not ports at present, and finds that they do not function as



“harborworks,” nor as coast-protective works; thus, it concludes, they do not qualify as parts of the coast for purposes of the act. Slip Opinion, pp. 6-7.

The Court’s focus upon the present function of a coastal structure, rather than upon its permanence and connection with the coast, engenders an uncertainty which may dog the parties and special masters for years in these cases: When a coastal facility loses that characteristic which had caused it to be treated as part of the coast, is it thereafter to be disregarded, or does it maintain its status? The Santa Monica Breakwater off the coast of California, for example, has been decreed to constitute part of the coast, presumably because it served as a coast protective work. *United States v. California*, 432 U.S. 40, 42 (1977). Because of faulty design and lack of maintenance, however, it may soon cease to be a coast protective work, if it has not already. Tr. Denver Hearings, pp. 215-216. Too, piers on the Alaskan coast which constitutes ports at present may be used for different purposes in another decade as the centers of commerce, particularly oil production, move. See Amicus Curiae Brief of the State of Alaska in Support of the Exceptions of the State of California to the Report of Special Master, filed herein on or about November 14, 1979, p. 1. Will these structures then be disregarded as “base points” on the coast line?

It was precisely this kind of uncertainty which the drafters of the Convention sought to avoid. In 1955 the International Law Commission was considering Article 8 of the Convention, and specifically what became paragraph 2 of its Commentary to the Article, which paragraph reads:

“(2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works.”<sup>1</sup>

Addressing this paragraph, the United Kingdom representative remarked:

*“... The Commission’s rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline; it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. But huge piers of the type being constructed in the Persian Gulf [i.e., the seven-mile pier, ought to be treated differently].”*<sup>2</sup> (Emphasis added.)

(It should be noted that even the Government concedes that the seven-mile-long pier under discussion was apparently unconnected with a harbor. United States’ Brief in Opposition to Exception of the State of California, p. 23. Clearly then, the ILC contemplated no requirement that an open-pile pier be part of a harbor before it is “assimilated” to harborworks. Compare Slip Opinion, page 6.)

---

<sup>1</sup>Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int’l L. Comm’n 270, U.N. Doc. A/CN.4/SER.A/1956/Add. 1. The paragraph quoted on page 6 of the Court’s Slip Opinion is incorrectly cited. That paragraph was not part of the Commentary to the final, 1956 draft of Article 8, but rather a portion of the Commission’s “comment” to its 1954 draft. The wording was changed in the final draft.

<sup>2</sup>Summary Records of the 7th Session, [1955] 1 Y.B. Int’l L. Comm’n 74, U.N. Doc. A/CN.4/SER.A/1955.

By making clear that the physical characteristics of a structure, and not its function, are the factors determining its status as part of the coast, the uncertainties we identify will be avoided.

## II

### **THE OPINION MISREADS THE SPECIAL MASTER'S REPORT. HE FOUND IN FACT THAT FIVE OF THE PIERS CONSTITUTE PORT FACILITIES.**

At all events, California respectfully submits that, as it understands the rationale of the Court's opinion, the opinion cannot be applied without distinction to all sixteen of the piers. As we note above, the opinion correctly recognizes that port facilities are to be treated as parts of the coast by virtue of Article 8. Slip Opinion, p. 3, fn. 5. But it mistakenly states that the Special Master found the volume of shipping handled by some of the piers insufficient to consider them ports. *Id.* The Master's comment did not pertain to whether the structures constituted "ports." See Report of the Special Master, p. 29. He does, however, define "port" as a "place where passengers or cargo may be transferred between ship and shore," and which "may or may not be part of a harbor. . . ." Report, p. 7, fn. 7. He then states that the Port Orford Pier is used "*as a port facility*," (emphasis added) and finds that the Ellwood, Carpinteria, Morro Strand and Rincon-Punta Gorda piers are likewise used for the transfer of passengers and cargo between ship and shore. Report, pp. 20-21.

For certainty in examining these questions, not only on the California coast but also as the issue may arise in liti-

gation between the Federal Government and other coastal states, we submit that the Court should direct the Special Master to prepare a proposed decree that specifies these five piers as parts of California's coast line.

### III

#### **THE MEAN LOWER-LOW WATER LINE, NOT THE MEAN LOW WATER LINE CONSTITUTES THE "LINE OF ORDINARY LOW WATER" ON THE PACIFIC COAST.**

An apparent oversight is contained on page two of the Court's opinion, where it is said that the "issue is whether the coast line follows the *mean low water line* along the natural shore, or whether it follows the seaward edge of 15 piers and the Rincon Island complex. . . ." (Emphasis supplied.) In 1965, this Court held that on the Pacific Coast, the mean lower-low water line and not the mean low water line is to be taken as the "line of ordinary low water" referred to in the Submerged Lands Act. *United States v. California*, 381 U.S. 139, 175-76 (1965). If in fact this remark was an oversight, we suggest it be corrected. The United States has not contended for a change in the rule.

**CONCLUSION**

For the foregoing reasons, we respectfully request that the Court grant this Petition for Rehearing.

July 3, 1980

Respectfully submitted,

GEORGE DEUKMEJIAN

Attorney General of the  
State of California

N. GREGORY TAYLOR

Assistant Attorney General

JOHN BRISCOE

NANCY A. SAGGESE

Deputy Attorneys General

*Attorneys for Defendant*

**Certificate of Counsel**

I, John Briscoe, am a member of the Bar of the United States Supreme Court, and am counsel for California in this action. I certify that this Petition for Rehearing is presented in good faith and not for delay.

Dated: July 3, 1980





