No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE COMPLAINT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—(Continued):

Constitution, statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 89, Original

STATE OF CALIFORNIA, ET REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE COMPLAINT

MEMORANDUM FOR THE UNITED STATES

1. As we understand California's statement of the case, the underlying facts are alleged to be the following:

(a) At the time of California's admission to the Union in 1850, and for half a century thereafter, most of the lands now claimed were permanently submerged below the Pacific Ocean and some small part of them were tidelands—uncovered at low tide and submerged at high tide—adjacent to ocean-fronting uplands owned by the United States;

(b) Some years after California statehood, the United States withdrew the adjacent uplands from the public domain to create a Coast Guard Reservation, whose boundary on the Pacific Ocean was the line of mean high water;

(c) As a result of the construction by the United States of jetties at the turn of the Century, fairly rapid accretion occurred on the ocean side of the Coast Guard Reservation, so that the former submerged lands and tidelands in suit became uplands, the process being complete well before 1953;

(d) But for the construction, improvement and maintenance of the jetties, the lands in suit would have remained submerged or tidelands, approximately as they were in 1850 and for the next half century.

For present purposes, we accept that statement as accurate. We likewise agree that, as a matter of federal law, accretion so caused inures to the upland owner, while under the law of California, such accreted lands would remain sovereign State lands if they were such before the artificial accretion.

2. In the special circumstances, we join California in its suggestion that the claim is properly presented directly to this Court. Although the controversy might be remitted to a district court, it is within the non-exclusive original jurisdiction of this Court. 28 U.S.C. 1251(b)(2); *California* v. *Arizona*, 440 U.S. 59, 63-68 (1979). For good reason, the Court is reluctant to entertain original actions when another forum is available. But, in this instance, the exercise of the Court's special jurisdiction seems appropriate because only questions of law are involved and because the resolution of those questions uniquely turns on prior decisions of this Court.

California suggests that this Court alone can answer whether *Hughes* v. *Washington*, 389 U.S. 290 (1967), has been effectively overruled by *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). We agree. But we do not rest our submission that the case is properly here on that ground. As we read it, the later decision in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), settles that federal law governs a controversy in which the United States is claiming land adjacent to navigable waters as the original and present owner (*id.* at 669-671), and *Hughes* is relevant only in determining whether it is appropriate to borrow State law as the federal rule when the dispute involves the

boundary of land on the open sea. Still more fundamental, however, is the issue whether the formerly submerged lands claimed by California were ever owned by the State. The answer depends most immediately upon the Submerged Lands Act of 1953, 43 U.S.C. 1311 *et seq.*, and the controversy thus presents a question traditionally considered by this Court in the exercise of its original jurisdiction. See *United States* v. *Alaska*, 422 U.S. 184, 186 n.2 (1975). Ultimately, the present case is ruled by prior constitutional decisions of this Court. Those are, we submit, sufficient reasons to call into play the Court's original jurisdiction.

3. California repeatedly invokes *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), as supporting its claim to the acreage in dispute, primarily submerged lands of the continental shelf before 1953 which at no time underlay inland waters. Yet, that assertion was expressly rejected in *United States* v. *California*, 332 U.S. 19 (1947), where it was held that the State had no interest in the submerged lands of the territorial sea off its coast. See, also, *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). To be sure, in 1953, Congress relinquished to the States a three-mile belt of submerged lands along their coasts. 43 U.S.C. 1311-1312. But that grant cannot aid California's present claim, for, long before the Submerged Lands Act became effective, the area now in dispute had ceased to be submerged lands or tidelands.

Presumably, California argues that the Submerged Lands Act did not make a new grant, but constituted a retrospective overruling of this Court's first *California* decision and "confirmed" to the coastal States a belt of seabed that the Constitution itself had vested in each new State upon its admission to the Union. Thus, title to the lands now in dispute, while submerged or tidelands, would have been vested, *nunc pro tunc*, in the State, subject to divestment only in accordance with such rules as California chose

to adopt—not including the process of "artificial" accretion. There are, however, insuperable obstacles in the way of that conclusion.

a. First, the Court has explicitly held that the 1953 statute "did not impair the validity of the [pre-Submerged Lands Act] *California, Louisiana,* and *Texas* cases," but was "a constitutional exercise of Congress' power to dispose of federal property." *United States* v. *Louisiana*, 363 U.S. 1, 7, 20 (1960). See, also, *id.* at 86 (Black, J., dissenting); *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954); *id.* at 275-277 (Reed, J., concurring); *United States* v. *California*, 381 U.S. 139, 145-148 (1965); *United States* v. *Louisiana* (Texas boundaries), 389 U.S. 155, 156-157 (1967); *Texas Boundary Case*, 394 U.S. 1, 2 (1969); *United States* v. *Maine*, 420 U.S. 515, 524-526 (1975); *United States* v. *Louisiana*, 446 U.S. 253, 256, 268 (1980). Indeed, it could hardly be otherwise. The Court's first "tidelands" decisions construed the Constitution and Congress could not overrule them if it chose. Nor has the Court itself changed its view. See *United States* v. *Maine, supra.*

b. What is more, attributing any different objective to the Submerged Lands Act would raise additional constitutional problems. The statute was sustained as a disposition of *federal* property, a matter over which Congress has plenary power under Article IV. But if this Court's holding that the territorial seabed did not inure to the States were deemed reversed retrospectively, it would be most difficult to defend critical provisions of the Act, and its corrollary, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* Presumably, Congress cannot withhold any part of what the Constitution itself granted to the States. Yet, the Submerged Lands Act purports to limit the States' share of the seabed to three miles from present coastlines along the Atlantic and Pacific Oceans, regardless of historic boundaries (*United States* v. *California, supra*, 381 U.S. at 159-160,

163-167, 174, 176-177; *United States* v. *Maine, supra*, 420 U.S. at 519-527), and to a maximum of three leagues from modern coastlines in the Gulf of Mexico, even when, due to erosion, the historic boundary was more seaward (*Texas Boundary Case, supra*, 394 U.S. at 4-6). In every case, moreover, the statute exempts from the grant—without compensation—any area otherwise within the State's territorial seabed effectively appropriated by the United States at any time before 1953. 43 U.S.C. 1313; see *United States* v. *California*, 436 U.S. 32, 38-41 (1978).

So, also, if the Submerged Lands Act were viewed as merely implementing a grant already made by the Constitution itself, it seems doubtful that the Equal Footing principle would condone a scheme under which Gulf States alone were free to establish "historic" claims up to nine miles while the same privilege was denied to the States bordering the Atlantic or the Pacific. See *United States* v. *Texas, supra*, 339 U.S. at 717-720.

c. Finally, California's submission would produce wholly anomalous consequences. Thus, California itself has successfully argued that the Submerged Lands Act grant is measured from its present coastline, as artifically extended by landfill and the construction of jetties and other coast protective works. *United States* v. *California, supra*, 381 U.S. at 176-177; (Supplemental Decree) 382 U.S. 448, 449 (1966); (Second Supplemental Decree) 432 U.S. 40, 41-42 (1977). See, also, *Louisiana Boundary Case*, 394 U.S. 11, 40-41 n.48, 48-49 n.64 (1969); *United States* v. *California*, 447 U.S. 1, 5-8 (1980). Yet, consistently with its present assertions, the State must claim ownership of those artificial extensions, or at least the underlying previously submerged lands—as well as the "bulges" of additional territorial sea belt thereby produced. That would, indeed, be having one's cake and eating it too.

The argument strains common sense too far. It requires attributing to Congress an intent to "restore" sovereign rights in the seabed by resorting to contradictory formulae. A uniform federal rule would be applied in fixing the low water line, which follows the shifting actuality regardless of cause, and, at the same time, varying State law rules must be adopted in setting the high water line along the same coast, including a rule that departs from current reality when geographical changes result from man-made construction. The incongruity is most obvious when, as is true along much of the California coast, the lines of low and high water, at any given period, almost coincide on the geographer's chart. Indeed, under California submission, where there has been erosion of the land due to artificial causes, the high water line, in law, may be seaward of the legally governing low water line—and that for the purposes of construing the same statute.

Constitutional objections aside, it is hardly conceivable that Congress should have ordained such illogical, inequitable, and impractical results. This Court has determined that the "coastline" relevant for purposes of the Submerged Lands Act is the baseline recognized in international law, which is ambulatory, following geographical realities regardless of cause, and which, along the open coast, is marked on current nautical charts. *United States* v. *California, supra*, 381 U.S. at 163-166, 175-177; *Louisiana Boundary Case, supra*, 394 U.S. at 19-35. That is, of course, a practical standard. But the virtue of that relatively simple rule would be defeated if it were necessary also, in every case, to plot the historic line of mean high water or the fictional high water line that unaided nature might have created. In the present instance, such a reconstruction may be possible. In others, however, the task simply would not be feasible, or would burden the courts—including this Court—with endless litigation. One need only contemplate the varying contentions that would confront us if we had to

redraw the Louisiana coast discounting the effect of coast protective works, jetties, landfill, channel dredging and all other human activities that have changed the shoreline.

d. Our own submission, we stress, works no injustice to the coastal States. Whenever the United States, in the exercise of the federal navigational servitude, builds jetties or other works along the coast, it is presumptively directly *benefiting* the State affected, as well as the Nation as a whole. Sometimes, to be sure, an incidental consequence (after 1953) is to deprive the State of some submerged acreage. But that is normally compensated under the Submerged Lands Act by pushing outward the boundary of the three-mile belt, usually creating a "bulge" of new State seabed larger than the acreage lost adjacent to the shore.[1] In some cases, moreover, the consequence is to create a new pocket of inland waters, which gives the State both a fuller title near shore and a more seaward baseline from which to measure its three-mile belt of territorial sea. Plainly, there is no inequity involved.

5. In sum, insofar as we are concerned with formerly submerged land, the present case does not require resolution of the continuing viability of *Hughes* v. *Washington, supra*, or even the question suggested by *Wilson* v. *Omaha Indian Tribe, supra*, whether to adopt State law as the federal rule when the United States is the upland landowner. At the time the acreage in dispute was submerged, it was federal property and its status as such did not change by its becoming upland. The Submerged Lands Act came too late to convey title to California and there is no other basis for a State claim. Thus, it remains federal land, whether as a distinct parcel of the public domain or as

---

[1]Thus, for instance, a mile-long jetty, fifty feet wide, jutting out at right angles from a straight coast "appropriates" less than six acres of submerged land but produces a "bulge" of additional State territorial seabed comprising some 2,600 acres.

accretion inuring to the Coast Guard Reservation. It is of no interest to the State whether a formal "withdrawal" of the area is necessary to subject it to Coast Guard jurisdiction. In no event does the State itself have any proprietary claim there.

Much of what has been said applies equally to so much of the disputed acreage as once had the character of tidelands—the "foreshore," uncovered at low tide but submerged at high tide. Analytically, however, there is a difference in that tidelands along the coast, unlike permanently submerged lands, are deemed to have inured to the State upon admission to the Union under the *Pollard* rule, a principle left unimpaired by this Court's more recent decisions denying State propriety claims in the marginal sea beyond the low water line.[2] Although we suspect the tidelands question in the present case is, as a practical matter, *de minimis*, we address it briefly.

The short answer to any complaint about the "appropriation" of State tidelands in the present context is that it results from the constitutional exercise by the United States of its overriding navigational servitude. It is well established that federal power over navigable waters extends to the line of ordinary high water and permits authorized agencies of the United States to alter the character of the foreshore, whether by permanently submerging it or permanently exposing it. So also, the United States may, without liability for compensation to the owner or permission of the State, dredge, fill in, or build upon the tidelands in the interest of

---

[2]So far as we are aware, the decisions of this Court expressly confirming State title to tidelands have all involved what would today be viewed as *inland* waters, whether in bays (*Pollard Lessee* v. *Hagan, supra*), river mouths (*Shively* v. *Bowlby*, 152 U.S. 1 (1894)), or harbors (*Borax Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935)). But the Court has assumed that the same rule applies to tidelands directly fronting the open sea. See *United States* v. *California, supra*, 332 U.S. at 30-31; *Hughes* v. *Washington, supra*, 389 U.S. at 294.

navigation. See, *e.g., United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 390-393 (1945), and cases cited. In these circumstances, one may doubt the practical importance of adjudicating naked legal title to the soil.

If such a determination is necessary, however, we cannot doubt the answer. At least on the ocean itself, where the national interest is at its greatest, it can make no sense to defer to a State law rule which freezes the status of former tidelands because the geographical change resulted from man-made construction, even though the land on both sides remains in the United States. To concede a narrow strip of State lands dividing a federal reservation in these circumstances is a result to be eschewed if at all possible. Since, under *Wilson* v. *Omaha Indian Tribe, supra*, the matter is governed by federal law and the only question is whether to borrow State law, there is no difficulty in avoiding the anomaly. In our view, this is plainly one of those situations in which there is a "need for a uniform national rule" to protect "federal trust responsibilities," and no countervailing substantial State interest on behalf of other affected landowners. 442 U.S. at 673-674. On the contrary, here there is every reason to subject the former submerged lands and the adjoining former tidelands to the same legal regime. Both must be governed by the federal rule if the tail is not to be permitted to wag the dog.

6. There remains only the question how the Court should deal with the case. As we have said, we believe the matter is properly submitted directly to this Court. Accordingly, we do not suggest denial of the motion for leave to file *simpliciter*. But it does not follow that the Court should refer the controversy to a Special Master or even itself give the case plenary consideration.

Traditionally, the Court has followed a very flexible practice in original cases. See Rules 9.2 and 9.5 of the Rules of this Court. One course has been to review the issue

presented on the merits, but summarily, and then to deny leave to file. *E.g., Alabama* v. *Texas, supra*; see *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973), and cases cited. Occasionally, such an order is entered on the face of the jurisdictional papers, without oral argument. *E.g., Alabama* v. *United States*, 373 U.S. 545 (1963). More usually, the Court hears the parties orally, as in *Alabama* v. *Texas, supra*, a case not unlike the present one. That procedure, it seems to us, is appropriate here.

At all events, we would urge the Court not to appoint a Special Master, at least until it has itself determined that a cause of action of sufficient substance is presented. Much wasteful effort would be saved if the Court were to resolve—as no one else can—whether (as we suggest) the issue is foreclosed by prior decisions of this Court and, if so, whether the Court is disposed to reconsider its precedents. It would be unfortunate to repeat the experience of all parties in *United States* v. *Maine, supra*, in which five years were consumed in elaborate proceedings before a Special Master, after which the Court concluded that the claims were without merit in light of prior cases which it was inappropriate to disturb. 420 U.S. at 516-519, 528.

There is, of course, nothing unusual in dispensing with the services of a Special Master when wholly legal questions are presented in original cases. Indeed, that has been the prevailing pattern in these offshore controversies since the first *California* case in 1947. Most recently, at the joint suggestion of the parties, the Court itself heard and resolved

without a reference another dispute between the United States and the State of California. See 436 U.S. 32 (1978). We suggest the same practice be followed here.

Respectfully submitted.

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

AUGUST 1981

DOJ-1981-08