



No. , Original

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

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## MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION

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## **MOTION FOR LEAVE TO FILE COMPLAINT**

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The United States of America, by its Solicitor General, asks leave of the Court to file its complaint against the State of Alaska submitted herewith.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

# **In the Supreme Court of the United States**

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## **COMPLAINT**

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The United States of America, by its Solicitor General, brings this suit against the defendant, the State of Alaska, and for its cause of action states:

### **I**

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

### **II**

This dispute involves submerged lands in Norton Sound, Alaska, off the coast of Nome, Alaska. By Sections 2 and 3 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1332, and by Section 9 of the Submerged Lands Act, 43 U.S.C. 1302, the United States has at all times relevant herein retained exclusive possession and control of all submerged lands, and all resources lying under those lands, seaward of three geographical miles from the State of Alaska's coast line as defined in the

Submerged Lands Act, 43 U.S.C. 1301(c): "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea."

### III

By Section 3 of the Submerged Lands Act, 43 U.S.C. 1311, and Section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343, the United States granted to the State of Alaska title to and ownership of submerged lands, and resources lying under those lands, coastward of the three-mile limit.

### IV

Under the decisions of this Court in *United States v. Louisiana*, 394 U.S. 11 (1969), and *United States v. California*, 381 U.S. 139 (1965), certain artificial additions to the natural shore, such as jetties, become part of the coast line and must be taken into account in determining the location of the three-mile limit and the extent of the territorial sea.

### V

Pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, the United States, through its Secretary of the Army and its Army Corps of Engineers, must examine and approve any artificial additions to the coastline, including the structures listed in Paragraph IV, that will occupy navigable waters, before such structures may be built. In making their determination, the Secretary of the Army and the Corps of Engineers consider, among other things, the effect on the offshore property interests of the United States of a proposed artificial addition.

## VI

In 1982, the City of Nome, Alaska, applied to the Army Corps of Engineers for a permit to construct a new port facility that would extend into Norton Sound, a navigable waterway containing submerged lands that are under the exclusive possession and control of the United States or owned by the State of Alaska as described in Paragraphs II and III.

## VII

The Army Corps of Engineers, in consultation with the United States Department of the Interior, see 33 C.F.R. 320.4(f), concluded that the proposed Nome facility would extend the coastline of the State of Alaska as described in Paragraph IV, adversely affecting the property interests of the United States in submerged lands in Norton Sound; the Corps therefore requested the State of Alaska to waive any property rights it might obtain over submerged lands, otherwise subject to exclusive federal possession and control, as a result of the City of Nome's construction of the facility.

## VIII

The State of Alaska agreed to and executed the waiver, which is valid and binding and forfeited any claim the State of Alaska may otherwise have had over any submerged lands beyond three miles from the natural coastline. The City of Nome then built the harborworks.

## IX

The United States now wishes to lease portions of the outer continental shelf in Norton Sound for the purpose of mineral recovery. The State of Alaska has asserted that



it owns more than 1000 acres of the proposed lease site as a result of the extension of its coastline caused by the Nome facility, notwithstanding its execution of the waiver described in Paragraphs VII and VIII, and it has requested the United States to delete the disputed area from the lease sale.

**X**

The existence of this claim by the State of Alaska casts a cloud on the rights of the United States and interferes with the effective development of the natural resources of the affected area, and thereby causes the United States great and irreparable injury for which it has no adequate remedy at law.

WHEREFORE, the United States prays:

1. That the State of Alaska be required to file an answer specifying the extent and nature of its claims in or to the submerged lands described in Paragraph IX.
2. That the Court enter a decree declaring that the submerged lands of the Outer Continental Shelf described in Paragraph IX appertain to the United States and are subject to its exclusive jurisdiction and control, and that the State of Alaska has no title thereto or interest therein.
3. For such other and further relief as the Court may deem proper.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*



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## **BRIEF IN SUPPORT OF MOTION**

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### **JURISDICTION**

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

### **STATEMENT**

This is an action to quiet title to submerged lands in Norton Sound, Alaska, and to establish, as against the State of Alaska, the exclusive rights of the United States in those lands beginning at a line three geographical miles seaward of the ordinary low-water mark of the natural coast of Alaska.

In *United States v. California*, 332 U.S. 19 (1947), this Court held that the federal government, and not the States, had paramount rights in all lands, including underlying mineral resources, beneath the marginal sea.<sup>1</sup>

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<sup>1</sup> At that time, the term "marginal sea" referred to the belt of waters three miles seaward of the coastline. See *United States v. California*, 332 U.S. at 29-34 (1947). Submerged lands beyond three miles are called the "outer Continental Shelf." See 43 U.S.C. 1331(a).

Thereafter, in the Submerged Lands Act, ch. 65, 67 Stat. 29, 43 U.S.C. 1301-1315, Congress granted to the States ownership of those submerged lands from the coastline to a point, in most cases, three geographical miles seaward thereof. Beyond that point, the United States retained full possession and control of all submerged lands. See 43 U.S.C. 1332.<sup>2</sup>

Although the Submerged Lands Act defines a State's coast line as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," 43 U.S.C. 1301(c), artificial additions to the coast, such as jetties and other structures, may become part of the coast line when they have a low water mark.<sup>3</sup> Such structures therefore have the effect of extending the three-mile limit seaward, by the distance that the structure protrudes beyond the natural low water line. See *United States v. Louisiana*, 394 U.S. 11 (1969); *United States v. California*, 381 U.S. 139 (1965). What was once federal submerged land may become state land by virtue of the addition.

This Court has stated that the United States may "protect itself" from such artificial changes in the coastline and consequent encroachment upon its submerged lands "through its power over navigable waters." *United States v. California*, 381 U.S. at 177; see *United States v. Louisiana*, 394 U.S. at 41 n.48 ("If the United States is con-

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<sup>2</sup> The Submerged Lands Act was made applicable to Alaska upon its admission to the Union in the Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343.

<sup>3</sup> Thus, a "spoil bank," which is attached to the natural coast line and has a continuous low-water line, is an extension of the mainland, see *United States v. Louisiana*, 394 U.S. 11, 40-41 n.48 (1969), while an open work pier, which does not have a low water mark, is not, see *United States v. California*, 447 U.S. 1, 6 (1980).

cerned about \* \* \* extensions of the shore, it has the means to prevent or remove them.”). The United States requires that plans for artificial additions to the coastline be submitted to the Secretary of the Army, who through the Army Corps of Engineers must examine and approve them. See Rivers and Harbors Appropriation Act of 1899, ch. 425 § 10, 30 Stat. 1151, 33 U.S.C. 403. In making his determination, the Secretary considers “the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 C.F.R. 320.4(a). Among the factors that the Secretary and the Corps of Engineers take into account is the effect an addition to a State’s coastline will have on the offshore property interests of the United States. 33 C.F.R. 320.4(f).

In 1982, the City of Nome, Alaska, applied to the Army Corps of Engineers for a permit to construct a new port facility that would extend into Norton Sound, a navigable waterway containing submerged lands that are controlled by the United States and lands that are owned by the State of Alaska as described above. The Corps, in consultation with the United States Department of the Interior, concluded that the proposed Nome facility would extend the coastline of the State of Alaska, to the detriment of the offshore property interests of the United States. The Corps therefore requested the State of Alaska to waive any property rights it might obtain over submerged lands, otherwise controlled by the United States, by the City of Nome’s construction of the facility. The State executed the waiver and forfeited any claim the State of Alaska might otherwise have acquired. See App., *infra*, 1a-4a.

The waiver, entitled a “disclaimer,” includes a provision expressing the State’s disagreement with the United States “as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing \* \* \* a [construction] permit” (App., *infra*,

2a), and reserving the State's "right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." (App., *infra*, 4a).

The United States now wishes to lease portions of the submerged lands in Norton Sound for the purpose of mineral recovery and has proposed a February 1991 lease sale. See 55 Fed. Reg. 24,330 (1990). The State of Alaska has claimed that more than 1000 acres of the proposed lease site belong to it, by virtue of the extension of the coastline caused by the Nome facility, despite the State's disclaimer of those rights, and it has requested the United States to delete that area from the proposed lease sale. The United States therefore brings this action to remove the cloud on its title to the lands in question and seeks a declaration that the State of Alaska's waiver was valid and binding upon it, and that the United States retains full dominion over all lands more than three miles seaward of the natural coastline off Nome, Alaska.

## ARGUMENT

### A. THE COMPLAINT STATES FACTS ENTITLING THE UNITED STATES TO RELIEF

This Court has recognized that the United States, not the individual States, exercises dominion over all lands beneath the marginal sea. See *United States v. California*, 381 U.S. 139 (1965). By the Submerged Lands Act, ch. 65, 67 Stat. 29, 43 U.S.C. 1301-1315, the United States has given the States ownership of a three-mile wide strip of land along the coast. But, at the same time, the United States reserved to itself its "plenary power to exclude structures from navigable waters." *United States v. Appalachian Power Co.*, 311 U.S. 377, 424 (1940). See Sub-

merged Lands Act § 3(d), 43 U.S.C. 1311(d) (the grant of submerged land to the States does not impair the United States' control over navigable waters).

This Court has ruled that artificial additions to a State's coastline may extend that State's ownership of submerged lands more than three miles from the natural coast. See *United States v. Louisiana*, 394 U.S. 11 (1969); *United States v. California*, 381 U.S. 139 (1965). However, in those very cases the Court stated that the United States may use its plenary power to control navigable waterways to protect itself from losing dominion over submerged lands beyond three miles from the coast through artificial additions, and it has suggested that changes in the boundary "could thus be the subject of agreement between the parties." *United States v. California*, 381 U.S. at 176, 177; see *United States v. Louisiana*, 394 U.S. at 41 n.48. The United States so used that power in this case by conditionally approving the Nome harborworks. By challenging the exercise of this power, the State of Alaska has created a dispute that requires adjudication by this Court.

The United States seeks to secure a declaration quieting title to disputed lands lying more than three miles seaward from the natural coastline of Alaska. Such a decree can be entered with a minimum of delay. The only question presented is whether the United States may request a State to waive its rights under the Submerged Lands Act as part of its general public interest review process for proposed structures in navigable waters. We believe that the parties can stipulate to the facts; thus, the taking of evidence will not be required and resolution of the controversy will present only questions of law. As in *United States v. California*, 332 U.S. 19, 24 (1947), and in *United States v. California*, 436 U.S. 32 (1978), there is no need for the appointment of a special master; this Court may proceed on a stipulated record and briefs.

**B. THIS IS AN APPROPRIATE CASE FOR EXERCISE OF THE ORIGINAL JURISDICTION OF THIS COURT**

This case eminently warrants invoking the original jurisdiction of this Court. The dispute is of vital importance and is not of merely local or transitory significance. Its outcome will affect not only the State of Alaska but all 23 States that border the open sea, several of which have signed disclaimers similar to the one here at issue. The ongoing controversy interferes with the congressionally declared national policy of "expeditious and orderly development" of the outer Continental Shelf, a "vital national resource reserve."<sup>4</sup> See 43 U.S.C. 1332(3). The present uncertainty casts a cloud on coastal boundaries, affects coastal leasing revenues, and impairs the ability of federal and state governments to put resources lying beneath submerged lands to their best uses. In short, the issue has recurring impact on federal-state boundaries in an area where there is a manifest need for certainty.

Because the issue is purely one of law, and no facts need to be developed, no useful purpose would be served by going first to district court. Indeed, trial court proceedings, followed by appellate review, would needlessly cause uncertainty and delay in resolving the issue. Since the issue has recurring importance to the Nation and almost half its States, this Court will almost certainly need to decide the matter at some point. There is no reason to wait.

The issues presented in this case are akin to those presented in other submerged lands disputes, such as *United States v. Louisiana, supra*, and the currently

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<sup>4</sup> While the suit is pending, the resource recovery lease could proceed as planned, with proceeds from the disputed lands being placed in an escrow account payable to the prevailing party. See Section 7 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1336.



pending original action in *United States v. Alaska*, No. 84 Orig. (1979 Term). Indeed, to our knowledge, with only one exception, all disputes between the United States and the States concerning ownership of submerged lands have been resolved by original actions in this Court,<sup>5</sup> which has considerable expertise in the area. The issues here are similar in urgency and importance to those in all the other cases. The considerations that led this Court to take jurisdiction of those cases as original suits are fully applicable here.

### CONCLUSION

The motion for leave to file the complaint should be granted.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

RICHARD B. STEWART  
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LAWRENCE G. WALLACE  
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JANUARY 1991

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<sup>5</sup> The one exception was *United States v. Alaska*, 422 U.S. 184 (1975), in which this Court expressed its desire to know "why the United States chose not to bring an original action in this Court." *Id.* at 186 n.2.



## **APPENDIX**

### **DISCLAIMER**

WHEREAS, the City of Nome ("Nome") has applied to the United States Army Corps of Engineers for a permit to construct a port facility at Nome;

WHEREAS, the project for which Nome is seeking the Corps of Engineers permit is fundamental to economic development in Northwestern Alaska;

WHEREAS, both statewide and nationwide benefits will be derived from the proposed Nome port facility through increased employment, increased revenues generated, and enhanced economic opportunities in Northwestern Alaska and the adjacent outer continental shelf;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., construction of such facility might affect the location of the coast line and boundary of the State of Alaska, including the offshore boundary between the outer continental shelf and state-owned lands beneath navigable water;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of the Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and the Solicitor pursuant to 33 C.F.R. § 320.4(f);

WHEREAS, the Corps of Engineers has been requested by the Attorney General and the Solicitor to withhold approval of Nome's permit application because of the potential effect on Alaska's coast line;

WHEREAS, the Corps of Engineers has determined that it will not issue such a permit over the Attorney General's and the Solicitor's objections on this ground;

WHEREAS, the Attorney General's and the Solicitor's objections to the permit application on this ground would be removed if a binding disclaimer is entered by the State of Alaska to the effect that Alaska does not, and will not, treat the facility as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objection if the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not issue the permit unless such a disclaimer is entered, thereby removing the Attorney General's and the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States's interest nor in Alaska's interest to delay construction of the Nome port facility while the question of the Corps of Engineers' legal authority to require such a disclaimer is resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engi-

neers does not have the legal authority to require such a disclaimer prior to issuing such a permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer remove the Attorney General's and the Solicitor's objections to issuance of the permit for construction of the Nome port facility, thereby allowing the construction to proceed, while at the same time preserving both the United States' legitimate interest i[n] not having Alaska's coast line extended if the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit and Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by art. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), AS 38.05.035(a)(14), and AS 38.05.0315(a), declares and agrees as follows:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is

not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

DATED:

May 9, 1984

STATE OF ALASKA

/s/ ESTHER C. WUNNICKE  
Esther Wunnicke, Commissioner  
Department of Natural Resources



