In the

Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,	)	
v.	)	No. 5, Original
STATE OF CALIFORNIA, Respondent.	)	

Washington, D. C.
February 27, 1978

Pages 1 thru 47

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Official Reporters
Washington, D. C.
546-6666

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Monday, February 27, 1978

The above-entitled matter came on for argument at 1:34 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

ALLAN A. RYAN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

RUSSELL IUNGERICH, ESQ., Deputy Attorney General, State of California, 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 5 Original, United States against California.

Mr. Ryan.

ORAL ARGUMENT OF ALLAN A. RYAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. RYAN: Mr. Chief Justice, and may it please the Court:

This case is before the Court on cross motions for entry of a third supplemental decree. The areas in dispute are two one-mile belts of water and submerged lands, surrounding the two islands which together comprise the Channel Islands National Monument.

I invite the Court's attention to page 68 of the Appendix, the beige document, which contains a diagram or a map of the area in dispute and the surrounding area.

Anacapa Island is about 12 miles offshore and Santa Barbara Island about 35 miles offshore the Coast of California. The islands themselves are about 40 miles apart. These islands were established as the Channel Islands National Monument in 1938 by Presidential Proclamation of President Roosevelt. In 1949, both parties agree, President Truman in a Presidential Proclamation expanded the monument by adding to it -- and I quote from his proclamation which is on page 67 of the Appendix -- adding to it, quote, "the areas within one nautical mile of

the shoreline of Anacapa and Santa Barbara Island, as indicated on the diagram," end quote. The diagram being that on page 68.

The United States believes that by this language President Truman added to the monument everything within one mile of each of the islands.

QUESTION: At the time of President Truman's proclamation, referring to this diagram -- this is the identical diagram to which you referred, is it?

MR. RYAN: Yes, Mr. Justice Stewart.

QUESTION: And this was attached and made a part of the proclamation?

MR. RYAN: Specifically, it was, yes, sir.

We believe that that proclamation added to the monument everything within one mile of the shoreline, waters, submerged lands and natural resources. This conclusion is supported not only by the words and the diagram of the proclamation itself, but by the Executive history of the proclamation.

California contends that President Truman added only rocks and islets within one mile of the islands, although California candidly concedes that both the language and the Executive history of the proclamation do not unequivocally support its reading.

If this Court decides that President Truman did, indeed, include the waters and submerged lands within one mile in his proclamation, it must then decide the second issue

presented by this case, that is, did the Submerged Lands Act of 1953 cede these lands and waters to California, as California contends, or were they exempted by Section 5 of that Act, which provides that the United States will retain lands occupied by claim of right.

As to the first issue, the primary dispute between the parties centers on what President Truman meant by the word "areas" when he added, quote, "the areas within one nautical mile of the shorelines," end quote, of the two islands. The word "areas" if, of course, far more inclusive than the specific words "rocks and islets," and California has yet to suggest why, if President Truman had intended to include only rocks and islets, he would have used such an expansive and inaccurate word as "areas." Furthermore, the map or diagram on page 68, which was incorporated by reference into the proclamation, shows a boundary line running one mile around both islands, with acreage figures that describe the total surface area of the islands and of one mile of water surrounding the islands.

Finally, the diagram does not depict a single rock or islet within the boundary line, except for some rocks that lie a few hundred yards off the shore of Santa Barbara and, obviously, no one-mile boundary was necessary to include them.

California has yet to explain why a proclamation that was designed to include rocks and islets within the boundaries

of the monument omitted to describe or depict those objects.

In all, we believe it clear that the proclamation did exactly what it said it was doing, adding all areas within one mile of the islands, and that "areas" cannot be reasonably understood to mean merely some rocks and islets, but must mean the waters, lands, natural resources, in short, everything within one mile of the two islands.

The parties have collected the various letters, memos and other materials which led up to the signing of this proclamation, sort of legislative history, as it were, and if any doubt as to the scope of the proclamation exists this history certainly removes it. In a nutshell, this history reveals that after President Roosevelt established the Channel Islands National Monument in 1938 by reserving the islands themselves, it was almost immediately realized that those boundaries were inadequate to protect the wide variety of marine mammals and plant life that thrived in the waters around the islands. Federal officials and naturalists agreed that Federal jurisdiction should extend into the water. But at that time California and the United States were engaged in litigation before this Court to determined the three-mile belt around the -- beyond the Coast of California. And these islands, I might add, politically, are a part of the State of California, so that the three-mile question at issue involved these islands.

In view of the conflicting claims that were then

before the Court, the United States during this period of the mid-forties took no definitive action to expand the monument, because there was doubt that it had the legal power to do so, regardless of how advisable such action might have been from a naturalist standpoint.

That question, of course, was settled by this Court in 1947 in favor of the United States, when this Court held in the first California decision that the United States had paramount rights over the lands, minerals and other things in the Pacific Ocean lying seaward of the low water mark.

QUESTION: Does that mean that you concede that there was no claim at all before the '47 decision, that the U.S. had no claim at all before 1947?

MR. RYAN: No, I would not take that position, Mr. Justice Blackmun. Before 1947, I would say that the question was in dispute and there was no definitive resolution. I wouldn't go so far as to say we had no claim. I think our claim -- the United States' claim that was placed before the court in California won.

QUESTION: But I take it that if the '47 case had come out the other way, you would say you had no claim.

MR. RYAN: If the '47 case had come out the other way, we would have no claim, in 1949 --

QUESTION: And there couldn't have been any national monument set up there.

MR. RYAN: It could not have been expanded in the way that President Truman did so. And if President Eisenhower had tried to do this in 1959, after the Submerged Lands Act was passed, it would not be possible. It was only in that period of time prior to the Submerged Lands Act that the United States had claim to this territory. How far back it went, in response to Mr. Justice Blackmun --

QUESTION: Well, immediately before the Submerged Lands Act, while the '47 decision was still ruling the waves, what was the difference between the United States' claim with respect to the seabed underlying the national monument and the adjoining seabed?

MR. RYAN: There was really no difference, as a matter of law. The only difference for these purposes is that by making it a national monument that gives it certain protection.

QUESTION: I guess you were just going to tell me then why the Submerged Lands Act didn't treat both pieces of the seabed the same.

MR. RYAN: It did not because of the claim of right exception. Had it not been for the claim of right exception, --

QUESTION: But both areas would be under claim of right.

MR. RYAN: No. The area --

QUESTION: Well, United States can't do any more than claim to own what it owns.

MR. RYAN: That's true, but the claim of right exception did not include those lands which the United States owned, if you will, only by virtue of the California won decree, the paramount rights doctrine. The Congress specifically said claim of right does not include that vast area of sea --

QUESTION: Except for that decision -- you just said if the decision had come out the other way they wouldn't have owned the national monument either.

MR. RYAN: Well, they would have owned the island, but had the decision come out the other way, I don't think that President Truman in 1949 could have simply reserved this area and said, "I proclaim it a national monument." He may have been able to proceed by eminent domain or other fashion.

QUESTION: Is that how the Government acquired the islands in the first place, by eminent domain?

MR. RYAN: The islands were a Federal monument -- excuse me, Federal territory, lighthouse territory, at least as far back as 1854. They have been in Federal hands at least since that date when they were used as lighthouses.

QUESTION: That is ownership of the real estate?

MR. RYAN: Yes, sir.

QUESTION: The entire island?

MR. RYAN: The entire island, at least down to the

high water mark.

QUESTION: Now, that you have mentioned high-water mark, somewhere along here will you talk about tidelands?

MR. RYAN: I will talk about it right now, and say that the United States has no claim to the tidelands.

QUESTION: Why?

MR. RYAN: Because the tidelands, historically, have been considered inland waters of a state.

QUESTION: But if you are relying on the proclamation, proclamation didn't except the tidelands. President Roosevelt's initial --

MR. RYAN: President Roosevelt's proclamation did not include the tidelands.

QUESTION: But it didn't exclude them.

MR. RYAN: Well, in that case, I would have to say that it excluded it by implication, because tidelands, at least since the case of Pollars Lessee by this Court, tidelands have been considered inland waters of the State, and President Roosevelt just by proclaiming it a national monument could not have taken the tidelands back from the State.

QUESTION: Your reliance, in this case, as I understand it -- correctly me if I am wrong -- is exclusively upon President Roosevelt's proclamation and President Truman's later proclamation.

MR. RYAN: Well, as to the territory at issue here --

QUESTION: President Truman's --

MR. RYAN: President Truman.

QUESTION: Well, I don't see why you don't claim the tidelands, if your reliance is on those proclamations.

QUESTION: The result is that the State owns the tidelands and you claim the islands and the seabed beyond the tidelands.

MR. RYAN: Right.

QUESTION: So we have a little horseshoe ownership of the State.

QUESTION: I don't understand that because the tidelands may be inland waters of the State if the State happens to own the shore. But the State at the time of the proclamation didn't own the shore. Never has. Doesn't yet own these islands.

MR. RYAN: The islands, politically, are a part of the State of California, like Nantucket is a part of Massachusetts.

QUESTION: Well, that may be so, but the land is United States territory, isn't it?

MR. RYAN: Yes, it is.

QUESTION: But that holds true in Pollard's Lessee, too. All the land was in the possession of the United States, and yet this Court held that United States when it alienated the land could not alienate the tidal waters.

MR. RYAN: That the tidal waters remained subject to state jurisdiction.

QUESTION: That may be so, but as Brother Stewart says, the proclamation didn't say a word about tidelands.

QUESTION: And you are relying on the proclamation.

MR. RYAN: That's correct.

QUESTION: So why do you concede away the tidelands, unless you are relying on something else.

MR. RYAN: We concede them away, if that's what we are doing, simply --

QUESTION: That's your proposed decree, excluding the tidelands.

MR. RYAN: We are not before this Court asking for the tidelands.

QUESTION: Why not?

MR. RYAN: And the reason we are not is because, as we read President Roosevelt's proclamation in 1938 he had power, if you will, only to reserve the areas that the United States controlled, and the United States did not control the tidelands.

QUESTION: So you say the proclamation could not purport to take --

MR. RYAN: Could not have.

QUESTION: -- legally and constitutionally could not take the tidelands.

MR. RYAN: Could not take the tidelands. It does result in an odd situation, where the United States owns the land and one mile beyond the land and California retains the tidelands. I won't argue that that is the most rational result in the world, but under current state of affairs I think that is what is the result.

QUESTION: Well, did President Truman have more power than President Roosevelt, or is it just that his proclamation is more express. .

MR. RYAN: Well, they were looking at two different things. He did not have more power. We are not contending that he did. President Roosevelt reserved only the islands. That is specific. He said, "These two islands are reserved." President Truman, responding to the claims and the entreaties of naturalists and Park Service officials and others, said, "President Roosevelt didn't go far enough. The lands themselves are not adequate to protect the marine life. We will have to include the waters, and so forth, the submerged lands around there." And he used the word "areas" to achieve that result.

QUESTION: So, President Truman used broader language than President Roosevelt did.

MR. RYAN: Well, he did, yes.

QUESTION: If he had said, "the areas including the tidelands," you would have said that he didn't have power to

include the tidelands.

MR. RYAN: I would say that right now, yes.

QUESTION: Mr. Ryan, is there a map here that shows the width of the tidelands, that is the area between --

MR. RYAN: There is nothing in the record that shows that.

QUESTION: Any idea? What's left of this mile? That's what I am interested in.

MR. RYAN: I would say it's a matter of feet. I don't know how much the tide rises and falls --

QUESTION: What's left of this mile is a matter of feet. You don't mean to imply that, do you?

MR. RYAN: I am sorry. That the tidelands which separate the Federal islands from the Federal water are probably -- It can be measured in feet, I am sure.

QUESTION: Where do you begin the measure? From what?

MR. RYAN: From the line of mean lower low water, which is the California coastline up to --

QUESTION: What relation does that have to the tidelands?

MR. RYAN: That is the seaward end of the tidelands.

QUESTION: The administration of this conglomeration of four different areas, United States-California, United States-California, would present all sorts of difficulties, I

would think. Has anybody given any attention to that?

MR. RYAN: California raises that point in their brief. I don't think that is anything more than an administrative problem that can be certainly worked out between the United States and California as to who will administer what.

QUESTION: It is not our problem, but it does bear, I would think, on the reasonableness of the Government's interpretation of these proclamations.

MR. RYAN: Well, I think, Mr. Justice, that it bears not so much on the reasonableness of our interpretation as on the realities of the law, that is, that the United States could not have simply appropriated those tidelands in 1949 or at any other time, as it appropriated what was around it. I am sure that had those tidelands been available, President Truman would have included them, and that would have been the only sensible way to do it. But as a matter of the law, at least since Pollard's-Lessee, those lands were not available to the United States. And I would say that whatever problems are presented at administration by this 6-foot, or whatever it is, section of tidelands, are something that can be worked out between California and the United States. And I would agree it is not a reason to find in California's favor in the case.

I think it is important to note that when the question came up, especially in the post-proclamation administration period of this area, as to whether the Federal

Government had jurisdiction over submerged lands, the National Park Service, which was charged with the administration of the area, specifically referred to the submerged lands as being under its jurisdiction and the parties have been able to find no evidence that California ever contested that interpretation. California, I am sure, has looked harder for it than the United States did, but the joint Appendix is here and there is no question raised in these materials as to any dispute by California at the time that Federal jurisdiction --

QUESTION: Mr. Ryan, may I ask, getting back to this measuring point, whatever may be the width of the tideland -- you suggest that the width was only in feet -- whatever it may be seaward of the islands, wherever its boundary is, of the tideland, isn't it from that point that you measure the mile seaward?

MR. RYAN: Yes, Mr. Justice, yes, that's our interpretation.

QUESTION: It's a simple thing to measure from the low-water mark of the shore of the island.

MR. RYAN: That's correct.

QUESTION: May that not -- banking on tides and everything else -- may that not be just -- a few feet? Whatever it is California has.

MR. RYAN: What California has is determined by the line of mean lower low water, which is a statistical measurement

drawn out over years. It does not vary from day to day with that day's tides.

QUESTION: Well, do we know what that is?

MR. RYAN: In relation to these islands?

QUESTION: Yes.

MR. RYAN: I honestly do not, Mr. Justice, and it is not in these records. I am sure that someone does. It is a fact and it is a fact that judicial notice could be taken of, if we knew what the fact was.

QUESTION: It is an established boundary.

MR. RYAN: Yes.

If the Court determines in favor of the United States that all waters and lands were included in President Truman's proclamation, that brings up the second question in the case which is whether the Submerged Lands Act gave this all to California in 1953.

The Submerged Lands Act was enacted by Congress in 1953 to give the States title to the lands and resources lying up to three miles seaward of their coastlines. Had Congress stopped there, a case could be made that the disputed area here was relinquished to California, but Congress, for very good reasons, did not stop there. In Section 5(a) of the Act, it excepted from the operation of the Act, and I quote, "Any rights the United States has in lands presently and actually occupied by the United States under claim of right," end quote.

The parties have stipulated, for purposes of this litigation, the disputed areas here were, quote, "presently and actually occupied within the meaning of the statute by the United States after the 1949 proclamation." And so we agree that the only issue is whether the United States occupied them under claim of right.

Both parties agree that the legislative history of the Submerged Lands Act shows beyond any doubt that Congress did not include, under the claim of right exception, the so-called doctrine of paramount rights, to which I referred a moment earlier, which this Court announced in 1947. The reason that Congress made clear that claim of rights did not include paramount rights is obvious. Such a construction would have retained everything that the Congress was trying to give back. It would have rendered the Act a nullity.

On the other hand, the reason Congress inserted the claim of right language, in the first place, is equally obvious. It was giving back to the States only those areas which the United States occupied, or where jurisdiction extended, based on paramount rights. It was certainly not giving to the States Federal military bases, naval ranges, national monuments and other areas which the Federal Government was actually using at the time for various purposes. Congress also did not want to give up any claim or rights that the United States might have to areas then in dispute. And so it shows the language,

"claim of right," to include those disputed areas, as well as areas which the Federal Government occupied without dispute.

QUESTION: Mr. Ryan, what if then President Eisenhower, after the Submerged Lands Act had passed both houses of Congress, feeling that he didn't really like the Act but knew he had to sign it, issued a proclamation proclaiming the entire three-mile coastal zone a national monument. And then went ahead and signed the tidelands bill. Do you think that would be a claim of right?

MR. RYAN: Presidential proclamation for the entire three-mile belt beyond the Coast of California?

QUESTION: Yes.

MR. RYAN: I would think you would have to look first at what authority he had to do that. The Antiquities Act of 1906, which is the statutory authority for these two proclamations, I think, probably could not be construed to include the thousands of square miles, like you suggest would include; but, assuming there was some statutory authority to do that, and he could reserve it as a national monument, or something of that nature, I would say that that would be a claim of right.

QUESTION: But you said there must be statutory authority for the President --

MR. RYAN: At a minimum, the Presidential Proclamation has to be a valid one. For purposes of this case, I wouldn't want to say that a claim of right could be voided if it could

be shown that the statutory authority underlying it was insufficient.

QUESTION: Does that mean that both the United States must have had title and the President authorized to make the proclamation?

MR. RYAN: The United States did not need title. A claim of right is something which is generally understood to mean something less than title.

QUESTION: It means at least good faith and reasonable belief that you own it, doesn't it?

MR. RYAN: Yes. And a claim that you own it.

QUESTION: And what do you say is the source of the Government claim of right in this case?

MR. RYAN: The 1949 proclamation by President Truman.

QUESTION: And what was the authority for him to make that?

MR. RYAN: The Antiquities Act of 1906. But California has taken the position that the Antiquities Act of 1906 does not authorize President Truman to do as much as he did in 1949. Our position is, first, that's wrong, that it did authorize him. But, secondly, if it came to that, that we would say that that does not void the entire Presidential Proclamation.

QUESTION: Then we would still have to decide that question, wouldn't we? The claim of right exception, if you prevail on it, simply leaves you where you were with respect to

the validity of President Truman's proclamation.

MR. RYAN: That's right. The claim of right exception, time after time, in the Congressional debate was considered to be something that neither validated nor prejudiced any claims. And we certainly don't rely on that as validating this claim. It's the Presidential Proclamation. But it is difficult to imagine a claim of right more definite and more explicit than a statement by the President of the United States that he is reserving these areas for purposes, statutory purposes, authorized by the Congress.

QUESTION: What if the United States owned them?

MR. RYAN: There is no dispute, I think -- perhaps I shouldn't say that, but we think it's certainly clear that by the doctrine of paramount rights the United States had a right to proclaim this area in 1949. Now, whether --

QUESTION: I thought the decision in California specifically reserved the question of ownership.

MR. RYAN: Well, the decree did not use the word "own."

QUESTION: It was stricken out of the decree, wasn't it?

MR. RYAN: The decree said, "now has and exercises paramount rights over" the territory. But in California II, there is a footnote that says the issue in California I was who owned the three-mile belt. So, I would think that the

distinction between ownership and paramount rights is, at most, a technical one.

I will reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Mr. Iungerich.

ORAL ARGUMENT OF RUSSELL IUNGERICH, ESQ.

ON BEHALF OF THE RESPONDENT

MR. IUNGERICH: Mr. Chief Justice, and may it please the Court:

I would first like to briefly address the question of tidelands in this case. California bases its ownership of tidelands on the basic doctrine enunciated first in Pollard's Lessee v. Hagen and followed most recently in the Oregon v. Corvallis Sand & Gravel case. And that is that by virtue of the equal footing doctrine, by virtue of our sovereignty, we receive title to all and ownership of all tidelands within our political boundaries. And since our political boundaries included, not only the coast of the mainland up to mean low water, but also the islands off shore which were within our political jurisdiction, the tidelands around these islands are also owned by the State of California and not the United States, as was originally claimed in this proceeding. The important --

QUESTION: The reliance of the Government in this case is on the proclamations.

MR. IUNGERICH: Yes.

QUESTION: While absent a proclamation, as a general rule, you, California owns its tidelands along its shores, including around the shores of the islands that are part of California. But if the whole reliance of the Government, in its exercise of paramount rights over both these islands, and now under President Truman's proclamation, the one-mile belt around them -- and I know that's the basic issue in this case -- why didn't it get the tidelands under the proclamation?

MR. IUNGERICH: It didn't get the tidelands because we owned them and because the Antiquities Act of 1906 says that you can only place in a national monument --

QUESTION: Well, you didn't, in fact, own them, did you? You had paramount rights to them --

MR. IUNGERICH: It was more than that, as far as the decision in 1947 and later cases point out, that point -- the point that was made was that we did have rights with respect to the tidelands that I think were broader than the rights that the Federal Government received in 1947 in the one-mile belt, and that those rights were historic rights that even the Federal Government recognized and did not contest in the 1947 decision.

QUESTION: It wasn't belt. I thought that under President Roosevelt's original proclamation, providing that "these islands shall be a national monument," the islands are the islands, down to the shore.

MR. IUNGERICH: Well, if you take a close look at the 1938 proclamation of President Roosevelt and look at the calls of the island that are set forth, Santa Barbara Island, the calls are only to the high water mark.

QUESTION: No, they aren't.

MR. IUNGERICH: Recognizing only, with regard to Santa Barbara Island, Federal ownership down to the high water mark and apparently recognizing our ownership of tidelands at that point in time, there is no mention specifically with regard to Anacapa Island, but there is that specific call in the Santa Barbara Island portion --

QUESTION: By its own terms, at least, with respect to Santa Barbara Island.

MR. IUNGERICH: So at least as far as the tidelands are concerned, we think that we should have a decree affirmatively stating that California owns those tidelands, and clearly specifying what the shoreline of the Anacapa Island is.

The United States' proposed supplemental decree would merely exclude them from the proclamation and not affirmatively state that California has its rights adjudicated by this Court and the fact that we have the right to administer those tidelands and exercise jurisdiction over them.

That does present, if the Federal position prevails, this problem of what appears to be concentric rates, and we submit that the interpretation of the 1949 proclamation which

the Government presents here, is an erroneous interpretation of that proclamation, and as a matter of law the proclamation must be construed as not to have added either the submerged lands of the one-mile belt around each of the two islands, or the waters of the Pacific Ocean that are above those submerged lands.

And we submit that that follows for the following reasons. First of all, if we examine the use of the word "area," the preamble to the proclamation which we referred to to discover the intent of the President or, in this case, a statute and the intent of Congress, only refers to the islets and rocks that are located in the one-mile belt. And then at a later point in the preamble there is a reference to the areas hereinafter described, and making it very unclear what those areas will be.

The use of the word "areas," as we analyze the definition of the word "areas," normally connotes surface, or is a term of surface reference. In other words, a two-dimensional reference which in its normal usage would only include the surface of the waters. Indeed, there is one document that is cited in the Federal Government's brief, which specifically indicates an intent on the part of the National Park Service to add only waters. And I refer to the U.S. Brief at page 15 and their reference to Joint Appendix, page 13, a Park Service memorandum that suggests the addition of surface areas only.

Now, if that's the case, we are looking here at the possibility of only adding the surface areas of the water.

QUESTION: Well, that's not true when you are certainly construing a deed that's deeding land rather than water, is it?

MR. IUNGERICH: Mr. Justice Rehnquist, I think the whole continuity, all of the factors in the matter of interpretation have to be taken into account. To look at this one isolated factor, I'd have to concede that it might be equivocal one way or another. I think looking over the entire proclamation with all the factors that I plan to bring to the Court's attention, and which we have brought to the Court's attention in the brief, we really can't tell what areas were really intended to cover. But one thing I can say, and one thing the Federal Government has not brought out in its brief or here at oral argument, is the fact that throughout the Executive history, throughout the language of either the '38 proclamation or the 1949 proclamation, there is not one reference to the term "submerged lands" as being intended to be added to this national monument. There is not one reference. And they can cite nowhere in the record to a reference to submerged lands.

We submit that what they were concerned about was protecting the marine life that was out in the water next to these islands. And, as we make the point, in Executive Order

9633 in 1945, President Truman had already reserved the submerged lands of the Continental Shelf for future legislation so that they couldn't have been added to this monument unless there was a repeal by implication of the 1945 proclamation. And that's a point that the United States does not answer. There has to have been that revocation by implication, and that revocation by implication cannot stand here because the information from the language of the proclamation, the information that we have from the Executive history points in many directions. But it does not support any claim to submerge lands being added to the monument in 1949. And I think that's the relevant point here.

It suggests, at most -- Well, it clearly adds the rocks and islands within the one-mile belt, because they are named specifically in the proclamation. And it may add the surface areas of the water and some rights in the water areas, but we submit, under the Antiquities Act, the waters alone could not have been added to the monument in and of themselves without submerged lands.

QUESTION: When you say the surface area of the water alone, you do agree, don't you, that to deed someone a surface area of land, and nothing more, is almost meaningless. If you can't plow a six-inch furrow in the land, it doesn't do you much good. Most deeds convey mineral rights unless they are excepted.

MR. IUNGERICH: Well, the problem here is we have an inartful description and it is not clear what's meant. And I don't necessarily rely on the surface areas. I am just trying to basically grapple with what President Truman intended.

QUESTION: But isn't one of the least reasonable constructions the argument that he intended to reserve a kind of a film of water --

MR. IUNGERICH: It wouldn't be the film of water. It would have to be the bulk of the water, but not the underlying seabed.

QUESTION: Aren't you reversing the ancient approach to it, that the critical thing is the owner of the land and what's above it and what's below it. Now, the water is above it here, is it not?

MR. IUNGERICH: But the problem is that the land has to be expressly placed in the monument and not the water alone. In other words, the Antiquities Act of 1906 says that the Government can only add the lands owned or controlled by the Government of the United States to a national monument.

Examining the Secretary of Interior's letter to the President, he said he wanted to add the rocks and islets and water within one nautical mile. That was subsequently changed to areas. But there is no indication that submerged lands were intended to be added.

QUESTION: Would you take just the reservation

intended to reserve the United States the right to conserve the sea life that lives on the bottom?

MR. IUNGERICH: No. The proclamation, as I see it, is not intended to protect sea life. Because Assistant Solicitor General Washington who wrote the memo that ultimately went to the Attorney General and was then sent to the President, recommending approval of this proclamation, specifically disavowed any intention to protect marine life.

QUESTION: Let's put it this way. If you assume that the proclamation was intended to reserve the water, I suppose the United States could control sea life in it?

MR. IUNGERICH: Yes.

QUESTION: How about the ones living on the bottom?

MR. IUNGERICH: I don't know how we would divide that up. I think the simple answer to that is that it is very difficult to grapple with the actual intent of the President in this case because it is very hard to deal with those terms. I think the way to resolve this problem is the way that California has suggested. And that is simply this --

QUESTION: And if United States wanted to build a pier, or something, out from the land, they would be trespassing.

MR. IUNGERICH: Yes.

QUESTION: And would have no right to have anything built out into the water, under your submission.

MR. IUNGERICH: Yes, sir.

What I am submitting here is that the reason, the probable reason why this term "waters" and the word "areas" was used was the fact that in 1945 there had already been a reservation in Executive Order 9633 of the natural resources of the subsoil and seabed of the continental shelf, which reserved those lands for legislation. Being aware of that in the Department of Interior, they wanted expressly to avoid the possibility of taking some lands out of that reservation and placing them in the national monument. And so they carefully tried to draft a proclamation that avoided that result. And the end result is a proclamation that will not stand the test of the Antiquities Act because it didn't add the submerged lands underneath, because there has been no repeal --

QUESTION: But if it doesn't withstand what you call the test of the Antiquities Act, all that means is the President didn't have the authority to put it in a national monument. It doesn't mean that the Government no longer owned it or had a claim of right, does it?

MR. IUNGERICH: If it didn't -- If the Government didn't own it, it does not have a claim of right.

QUESTION: Let me ask you, do you think under the Antiquities Act the President could proclaim all the incorporated area within the City of Santa Barbara as a national monument because of the early friars, and so forth, even though

the land was owned by private citizens?

MR. IUNGERICH: No, I do not. It states that the land must either be owned or controlled by the United States. And that means that we either have to have some type of public domain land or we have to have a type of land that is under the control of the United States. The question of title was left in doubt in the 1947 U.S. v. California decision, and the Federal Government was awarded paramount rights and full dominion over the natural resources of the subsurface. But, under those cirumstances, what we have there is the Government controlling those lands in the sense that it had very broad rights. But if the Federal Government does not own lands or does not control them, I submit the Antiquities Act says that the President does not have any authority of any type to put those lands in any kind of reservation. And I think that's a clear statement of what Congress meant --

QUESTION: Do you think the proclamation was valid under the Antiquities Act with respect to the islands?

MR. IUNGERICH: Yes, it was, because those islands were ceded to the United States under the Treaty of Guadalupe Hildalgo, from Mexico, and as a result based on that they were public domain lands. And being public domain lands the United States could place them in a national monument down to the high water mark. But it couldn't place our tidelands in there because, by virtue of our sovereignty, in 1850 the treaty of

Guadalupe Hildalgo was in 1848 --

QUESTION: Would you say that the Antiquities Act would have authorized the President to reserve the seabed beyond the tidelands if he had said so expressly?

MR. IUNGERICH: Yes, if he had said so expressly in 1949, he could have reserved the submerged lands in that one-mile belt.

QUESTION: The Antiquities Act would have authorized that?

MR. IUNGERICH: Yes. The point is it is unclear whether he did that, because he had already reserved those lands in Executive Order 9633. And this order can be construed in such a way as not repealing by implication Executive Order 9633, and giving National Park Service jurisdiction over everything that's in the water and still reserving under 9633 submerged lands for purposes of natural resource development.

QUESTION: How can you profit, though, from any imperfection in the Presidential proclamations, based on the Antiquities Act, since, as I understand the Antiquities Act, it's only purpose is,Congress says, "With respect to this kind of land that the United States owns or controls, the President may make a national monument of it."

Supposing he didn't succeed in making a national monument, the United States would still own or control.

MR. IUNGERICH: No, it wouldn't, because in 1953 -- and that's my next point -- the Submerged Lands Act relinquished to California all Federal rights in the entire three-mile belt.

And our point is that this is not a valid claim of right that is preserved by Section 5 in the claim of right exception in the Submerged Lands Act.

QUESTION: On that very point, supposing the '49 proclamation had been as clear as I think Justice Rehnquist suggested, and said, "We reserve as a national monument the submerged lands, as well as the water, the inlets and the outlets and all the rest." Would you still make the same argument based --

MR. IUNGERICH: Based on the interpretation of the proclamation?

QUESTION: No, no. Based on the interpretation of the '53 statute.

MR. IUNGERICH: Yes, because -- the reason is if they had put the submerged lands into the monument in 1949 --

QUESTION: Expressly, which you said they had the power to do. You conceded they had the power to do that.

MR. IUNGERICH: They had the power to do that, but our point is that's a claim of right resting solely upon the paramount rights doctrine of the '47 decision.

QUESTION: Why isn't it a claim of right, resting on the Presidential proclamation pursuant to the Antiquities Act?

MR. IUNGERICH: Presidential proclamation is simply a reservation. That proclamation is not a claim of right. The antecedent claim of right to a piece of property is the source of the Federal Government's title or its source of control of that property.

QUESTION: That just depends on how you interpret claim of right in the Submerged Lands Act.

MR. IUNGERICH: Well, I would submit that the clear indication here is that in talking about claim of right and looking at the legislative history which California has set forth in detail in its brief, the purpose of this was not to preserve reservation of this language. It was a savings clause, that if there was a claim that might later be brought up in court or clain pending in court that the United States had, the broad language of the Submerged Lands Act would have made that --

QUESTION: Suppose the Goverment had -- there were ten piers built out from these islands far out and all attached to the seabed, and there were 100 offshore oil platforms operating within the one-mile zone under leases from the United States. Do you think the 1953 reservation wouldn't have --

MR. IUNGERICH: They were expressly covered by another exception, Your Honor. They were covered by "all lands filled in, built up and otherwise reclaimed by the United States for its own use." They were expressly thought of and

were not encompassed in the actual occupancy under claim of right exception.

QUESTION: You don't think a Presidential proclamation expressly reserving the seabed would have been a reservation for its own use?

MR. IUNGERICH: Suppose the President tomorrow walked into your home and announced, "I proclaim this as a national monument," would he have a claim of right to that property?

QUESTION: That isn't the situation. In 1949, the Government -- Until 1958, it was the Government's underwater seabed.

MR. IUNGERICH: How did the Government get the title to that underwater seabed? Whatever right it had --

QUESTION: Sort of the same way California got the tidelands.

MR. IUNGERICH: We got them by --

QUESTION: Through a decision of this Court.

MR. IUNGERICH: Yes, sir.

QUESTION: Let me follow through on Justice White's suggestion as to piers. Suppose today United States put out a pier from one of these islands. On your theory, could they do that?

MR.IUNGERICH: Our theory is that we own that particular --

QUESTION: If you lose this case, could they do it?

MR. IUNGERICH: If we lose this case, then you will be adjudicating that they own the submerged lands and they could put out a pier.

QUESTION: How would they get over your tidelands?

MR. IUNGERICH: Well, they would have to get a permit.

QUESTION: Then they couldn't do it.

MR. IUNGERICH: I am not saying that California wouldn't exercise its jurisdiction to allow them a permit across their tidelands. But, yes, there is that intervening area and they would have to resolve that with the State of California. And we clearly own those tidelands. And, basically, what has happened here is that we have a situation that is probably an exception to all of the uniform rules that mariners can rely on, that governments can rely on, that the States, at the present time, are the agencies that have jurisdiction over the three-mile belt, except around Anacapa and Santa Barbara Islands and possibly for Jefferson National Monument in the Dry Tortogas in Florida. But those are the exceptional situations, where the Federal Government has claimed prior to 1953 in area.

But I submit a reservation is not a claim of right. A Presidential Proclamation is not a claim of right in and of itself. It is merely a statement by the President that "I think under the Antiquities Act the Federal Government owns or controls

this property." And it is merely an assertion of that by the President of the United States. It does not create --

QUESTION: What's the difference between a claim of right and an assertion of right?

MR. IUNGERICH: Well, a claim of right must have a basis, and the basis here is the paramount rights decision in 1949. There is no basis. I mean a reservation is simply a mechanical feature that's used within the Department of Interior to transfer normally public domain lands from the general category where their entering sale is allowed over to a special category where they are administered for special purposes. But I don't believe that a reservation metamorphosizes a claim of right based on the paramount rights doctrine into a claim of right of some other nature to -- in the style of Gertrude Stein -- a reservation is a reservation is a reservation, but not a claim of right. And that is the basic point I am making as far as this particular area. There was a reservation here in 1949, -- but for the 1947 decision the Federal Government had no claim that it had a right to own or to control the submerged lands in the one-mile belt. Without the submerged lands, they had no right to control the supra-adjacent waters, because the Antiquities Act does not allow addition of waters in and of themselves. It says expressly it must be lands that are added, and then if we have any implied rights those rights are to water.

What the Federal Government does is turn that on its head and says, "Well, we reserved the waters and therefore we ought to get the submerged lands."

QUESTION: But you put a great big "but for" in there and it is the absence of that "but for" upon which the Government relies, i.e., the 1947 decision in the first California case.

MR. IUNGERICH: But the Senate report expressly states with regard to the claim of right exception that there is not a good claim of right when that claim of right rests solely upon the doctrine of paramount rights.

And I submit we don't look to the reservation. We look to the way in which the Federal Government owned or controlled that land, the reason why it owned or controlled that land as being the claim of right. That's my basic point and the basic point of difference with the United States. We submit that if you look at the language of the Antiquities Act, and the reason why the Government owned or controlled it, that reason is the paramount rights doctrine of the '47 California decision. In light of that, the requirement has to be that it is not a good claim of right because it rests solely --

QUESTION: I'll repeat. The Government's claim of right doesn't -- it rests only derivatively on the paramount rights, because it rests directly on President Truman's

proclamation.

MR. IUNGERICH: I don't see a proclamation as being a claim of right in any sense.

QUESTION: You say a proclamation is basically a reservation of land that the Government already owns, transferring it out of one category into a national monument.

MR. IUNGERICH: The proclamation says --

QUESTION: That's the extent of their authority under the Antiquities Act, too, isn't it?

MR. IUNGERICH: In the statement of President Truman, he says he does "proclaim the areas within one nautical mile are withdrawn from all forms of appropriation and are reserved as part of the Channel Islands National Monument."

Now, the proclamation, in and of itself, doesn't do anything. It just reserves those lands, and it takes them out of the area where they can be appropriated under public land laws and it puts them into the national monument category. It is not a claim of right in and of itself. What we are talking about is a claim of right where the Federal Government has some claim that it owns or controls this land. This isn't a claim that it owns or controls the land. This is merely a statement that it is transferring it from one category to another. I think that is a critical point.

QUESTION: Would this be a fair statement of your argument: We should read the original decision and the statute

as saying, in effect, that any claim of right shall be decided as though the California case had been decided the other way?

MR. IUNGERICH: Yes, I think that would be a fair statement, because that's what the legislative history, the Senate report, says, that we, in effect, are not allowing the claim of right based solely on the paramount rights doctrine. The 1953 Act.

QUESTION: The Submerged Lands Act.

MR. IUNGERICH: Yes. The claim of right language that is contained within Section 5 of that Act.

QUESTION: If it had been decided the other way, then President Truman would not have had the power in 1949 to make any reservations.

MR. IUNGERICH: That's correct.

And I would submit as well, in analyzing the legislative history of the proclamation, that the essence of what was intended by the actual occupancy under claim of right exception was the situation where the Federal Government had a claim in litigation or a claim that may have been brought in litigation. And if that language had not been placed in Section 5, all of those claims, either good or bad, would have passed to California.

QUESTION: Why, then, did California stipulate that this land met the actually occupied clause?

MR. IUNGERICH: We answer why it met the actually

occupied, because we don't think they've got a good claim of right. And, therefore, the two parts of the language --

QUESTION: You give away one --

MR. IUNGERICH: We give away one part, but we don't give away the claim of right part.

QUESTION: Why don't you hold onto both parts of your case and litigate?

MR. IUNGERICH: Because that would involve an extensive factual issue, and I think probably that the Federal Government would have prevailed on that issue and that was a tactical judgment.

In conclusion, California submits that, first, with regard to the interpretation of the proclamation, we have a concession on the part of the Federal Government that both the language of the proclamation does not cover the tidelands and that, under those circumstances, California submits that it is entitled to an affirmative decree such as it proposes, recognizing its rights in those tidelands, and not really excluding the tidelands, as the Federal Government does, from its decree.

We also submit that the interpretation of the 1949 proclamation should be such that it should indicate that the submerged lands had been placed in Executive Order 9633 in 1945, and therefore, since there is an ambiguity as to what was actually placed in 1949 in the Channel Islands National Monument by the enlargement, without a repeal by implication of

the '45 proclamation, as a matter of law, and by established canons of statutory construction applied in this case to a proclamation, there should be a determination, as a matter of law, that this proclamation is interpreted as not including submerged lands. If it doesn't include submerged lands, our argument is that waters alone could not have been added, just the waters above the submerged lands, because the Antiquities Act only permits the addition of lands owned or controlled by the Government of the United States. And it doesn't allow the reservation of water, per se, without lands beneath them, or without lands adjacent to them having been placed within the national monument.

We further submit that as to the claim of right exception the basic point here again, and I emphasize that is that we look to the claim of right as being the underlying claim that the Federal Government has that it owned or controlled those lands in 1945. And, again, we submit that the claim of right is not a reservation in and of itself, because a proclamation such as this works no magic. It doesn't improve the quality of the Federal Government's title. It doesn't make the Federal Government own something that it does not own, and it does not take a reservation that was based solely on the fact that the Federal Government adjudicated in 1949 to own in one sense or control in another sense the submerged lands of the one-mile belt, and work a metamorphosis of that claim into

something that is separate and apart from the paramount rights doctrine.

And I think that's the fundamental point, at least as far as our case. On either of these two points, I think that the decree proposed by California should be adopted by this Court and that judgment should be in favor of the State of California with respect to this decree.

MR. CHIEF JUSTICE BURGER: Mr. Ryan.

REBUTTAL ORAL ARGUMENT OF ALLAN A. RYAN, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. RYAN: California argues, as to the first stage of this dispute, that the whole thing is really a problem with sloppy draftsmanship, and that President Truman could have accomplished everything that the United States says he did accomplish had he only done it a little more carefully. And that, as I understand it, is a two-part argument. He should have said, according to California, rocks, waters, islets, submerged lands, and so forth, instead of just saying areas.

Well, I grant you, had he said that, we perhaps would not be in Court today.

QUESTION: Oh, yes, you would. They say that the '52 Submerged Lands Act would, nevertheless, run you out of court.

MR. RYAN: On that respect we would. I am corrected. The United States has contended that the President

accomplished the same thing by the word "areas," and I don't see any need to go over that.

The second part of California's argument on this point is that the 1945 Executive Order, reserving the Outer Continental Shelf, was not revoked by implication in the 1949 proclamation, as it should have been. I think the answer to that is to consider that the Executive Order of 1945 does the following, and I quote from the Order, itself. As to the Outer Continental Shelf, it is, quote, "placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto."

And there it stood from 1945 until 1949. In 1949, two square miles of that 400,000 square mile Outer Continental Shelf, 1/4,000th of 1%, is conveyed, if you will, or transfered from the Secretary of the Interior back to the President. It is taken out of that category in which it was as a result of the '45 decree and it is given back to the President, who then proclaims it to be a national monument.

Now, to call this a revocation by implication, if that's the test, then that's what it is. Regardless of what one calls it, it is very clear that the land went to the Secretary of the Interior in 1945, as part of the Outer Continental Shelf, and two square miles of it came back four years later. There is no problem with that. There is no

necessity for the 1949 proclamation to say, "We revoke 1/4,000th of the 1945 proclamation." That's looking for things that shouldn't be there in the first place. It is a very simple matter that the land went to the Secretary of the Interior in '45 and it was given back, transfered back four years later.

QUESTION: And then three miles of it all went to the State, including these two miles.

MR. RYAN: Not including these two miles. These were not part of the two miles that went to the State.

QUESTION: Because of the claim of right.

MR. RYAN: Because they were specifically excepted in Section 5(a), by virtue of the claim of right, yes.

QUESTION: Yes, because of the statutory language excluding claim of right.

MR. RYAN: Yes. And I think California's argument that this is simply an -- admitted that the 1949 proclamation was simply an administrative rearranging of the Department of Interior's land is just not so.

QUESTION: But you said, yourself, a minute ago, I thought it was, that it was transfered from the Department of the Interior to the President and then he made a national monument of it.

MR. RYAN: The second part. The making of the national monument is the critical part. To say it simply was

a rearrangement of land is only half the story. The second half is that a national monument was made out of it.

Certainly, you don't need a Presidential proclamation to reclassify land in the Interior Department. If that's all that was being done, there was no need for a Presidential proclamation. The proclamation was there because a national monument was to be made out of it.

QUESTION: The assumption was quite apart from the language of the proclamation that the United States owned or controlled that land under the Antiquities Act.

MR. RYAN: Yes.

There is, for example, in 16 U.S. Code 433, it is a criminal offense to molest property on a national monument. That is not so in other lands owned by the Interior Department. So the making of a national monument out of these two square miles was much more than simply an administrative transfer that could have been accomplished by a memorandum from the Secretary of the Interior to the National Park Service.

I think, as far as the second part of the argument, the claim of right doctrine, that California simply reads too much into what must be a claim of right, that there is -- if the Congress had meant to follow California's interpretation of what is a claim of right, it would have simply given everything back to the States. And demonstrably it did not intend to do that. Section 5(a) of the Act -- there were several

categories of lands and territories and waters, and so forth, that the Congress wished to retain for the United States. This comes into one of them, and I don't think California can contend otherwise.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:34 o'clock, p.m., the case in the above-entitled matter was submitted.)