

Part Three

LITIGATING A TIDELANDS CASE

INTRODUCTORY

Fifty years of litigating tidelands cases in the Supreme Court has produced more than the history and maritime boundary principles discussed above. It has provided a mass of experience. We conclude this volume by telling some of the story of how the tidelands cases have been developed and litigated. We hope that the following pages will be of assistance to future litigants in this area of the law and to others involved in Supreme Court Original actions.

CHAPTER 7

HOW LITIGATION POSITIONS ARE ESTABLISHED

If the federal government and the coastal states had agreed on the location of the coast line and the limits of the states' offshore interests the numerous cases discussed here would not have been litigated. But they did not. And, with the increased importance of offshore resources, not to mention basic questions of sovereignty, both the federal government and the states had an interest in resolving their common boundary issues. It is useful to review how those issues are joined.

The seminal legal issues of tidelands litigation — (1) whether states entered the Union with jurisdiction over offshore areas, and (2) what principles were to be applied for locating the coast line (both pre- and post-Submerged Lands Act) — were long ago decided by the Supreme Court by reviewing history, the Constitution, and legislative actions. But since the Court decided 35 years ago that the Convention's principles would be employed for purposes of implementing the Submerged Lands Act, most litigation has centered on disputes as to how those principles are to be interpreted and then applied to particular geographic features. We turn now to how the parties' litigation positions have evolved.

THE FEDERAL POSITION

Although a number of federal agencies have long administered legislation that affects activities seaward of our coastline, it was not until 1970 that a procedure was established to assure that they all were defining the geographic limits of their jurisdiction in the same way. Early in that year the secretary of commerce, whose Department and the United States Coast Guard were jointly responsible for enforcing federal fisheries restrictions against foreign fleets operating off our coasts, suggested to the secretary of state that an interagency committee be set up to establish a common federal position on the limits of our inland waters, territorial sea, and contiguous zone. The secretary of state agreed.

On August 17, 1970, the Ad Hoc Committee on Delimitation of the United States Coastline was established. Agencies "most directly concerned with implementation of United States policy with respect to the coastline" made up its membership. These included the Departments of State, Commerce, Interior, Transportation (Coast Guard), and Justice. In addition to noting the Coast Guard's need for a definitive position with respect to

federal maritime jurisdiction, the Committee's charter referred to recent "inquiries from both foreign Governments and States" regarding those same limits.

The Committee began its work immediately. It was chaired by the State Department representative from the Office of the Legal Adviser and met almost once a week. It systematically reviewed charts of the entire coastline of the United States, applying the principles of the Convention on the Territorial Sea and the Contiguous Zone to delimit the territorial sea, contiguous zone, and, wherever they had an effect on the seaward limit of the territorial sea, closing lines across inland water bodies. In less than eight months that initial task was completed. Copies of the product were distributed to all interested agencies along with states and foreign governments that had requested the information.¹ Sets were also forwarded to all United States Attorneys in coastal districts to assure that federal maritime laws would be consistently enforced.

But the Committee's task was not complete. Because the United States' coast line and maritime zones measured from it are ambulatory, the Committee's lines would not remain authoritative for long. Members agreed that as new additions of nautical charts were issued each would be reviewed by the Environmental Sciences Services Administration (now the National Oceanic and Atmospheric Administration) and appropriate corrections to the territorial sea and contiguous zone boundaries proposed. The geographer of the Department of State would then comment on those proposals and the entire Committee would consider them. The official lines would then be altered as necessary. That process has continued for the subsequent 30 years, keeping the federal boundary positions up to date through subsequent editions of official government charts.

Changes have also occurred in two other circumstances. First, errors come to the Committee's attention through any number of sources. For example, during the phase of *United States v. California* in which the state was contending that piers should be treated as harborworks and, therefore, part of the coast line, California pointed out that the territorial sea off California seemed to be measured from some of those piers. Dr. Robert Hodgson, the State Department geographer, testified that that was not the intention and explained how such errors might occur. The United States was not bound by the depiction and piers were ultimately ruled not to be part of the coast line.

1. The Committee's work was done on full-scale nautical charts provided by the Commerce Department and then reproduced on one-quarter scale black and white copies for distribution. The Commerce Department later included the Committee's lines on its full-scale charts commonly available to the public. That practice continues today. Anyone interested in knowing the official federal position on the limit of the United States' territorial sea need only visit his chart supplier or order from the National Ocean Service.

Likewise, when charts of the north coast of Alaska were first prepared a feature known as Dinkum Sands was thought to be an island and a territorial sea was drawn around it. The Committee later learned that it did not qualify as part of the coast line and the chart was corrected.²

The Committee has also amended its charts when the Supreme Court's tidelands decisions have gone against the government. For example, when Louisiana successfully argued that Ascension Bay, on the western side of the Mississippi River delta, is an overlarge bay, the Committee revised the appropriate chart to include the 24-mile fallback line included in the Court's decree. It also altered charts to portray Mississippi Sound as inland water when the Court determined that that body had been historically claimed by the United States.³

In sum, the Baseline Committee charts reflect the federal position on the proper application of international law, to the geographic circumstances appearing on the base charts being used, for purposes of depicting limits of maritime jurisdiction. They establish the federal position in tidelands litigation, with the caveats that accretion and erosion may have altered the actual coast line and minor errors in drafting may be found.

The Supreme Court and its special masters have referred to the work of the Coastline Committee with approval.

THE STATE POSITIONS

Generally the states do not have such regularized means of publicizing their boundary positions. A number have had constitutional or statutory boundaries that extend offshore but those are typically not precisely described. No state, so far as we know, has published charts depicting precise claims.

State positions are usually first articulated when federal and state sovereign interests begin to clash offshore. This has often occurred when one sovereign has sought to sell oil and gas rights in an area claimed by the other, but no such potential trespass is necessary to prompt litigation. It is enough that the two sovereigns have conflicting claims to submerged lands. *United States v. Alaska*, 503 U.S. 569, 575 (1992).

2. In fact each chart includes a printed note, which provides in part that "[t]hese maritime limits are subject to modification, as represented on future charts. The lines shown on the most recent chart edition take precedence."

3. The Court's tidelands decisions are made in the context of domestic controversies over the implementation of the Submerged Lands Act. Clearly they are the final word on that subject. The Committee's actions to conform its charts are not critical to implementation of the Court's decrees. But the Committee's primary purpose is to portray the government's international position with respect to federal maritime jurisdiction. The Court has regularly stated that the development of international positions is the prerogative of the political branches, not the judiciary. It has also acknowledged that the United States' domestic and international coast lines need not coincide. *United States v. Alaska*, 503 U.S. 569 (1992). Thus it is not certain that the federal government must alter its international position or Committee charts merely because they do not accurately reflect a state's Submerged Lands Act boundary.

When a controversy occurs the states have used a number of bases for contending that their actual boundaries are seaward of those delineated on the federal charts. Popular examples are: historic water claims, contentions that Article 4 straight baselines either have been traditionally used by the United States or should be, and disagreements with the federal government's application of the Convention's principles to their particular coastlines. The actual location of the low-water line may also be in dispute.

When such disputes have arisen they have, in all instances, been resolved by the Supreme Court. We turn now to a discussion of how that process is commenced.

CHAPTER 8 PLEADINGS AND PARTIES

All but one of the cases referred to here as the "tidelands litigation" have begun in the United States Supreme Court.⁴ Article III, Section 2, clause 2 of the Constitution provides that that Court shall have "original" jurisdiction over cases in which a state is a party, including actions between the United States and a state. And that is where they have typically been filed.

But the Supreme Court's jurisdiction over actions between the United States and a state is not exclusive. Congress has conferred concurrent jurisdiction on the federal District Courts. 28 U.S.C. 1251(b)(2), 1345 and 1346. Nor does the Constitution require that the Supreme Court accept litigation between the United States and a state. It may decline jurisdiction and force the parties to take their dispute to a federal district court in the first instance.⁵ Consequently, Original actions are initiated through a slightly different process than are traditional trial court proceedings.

The "complaint" in an Original action must be accompanied by a "motion for leave to file" and may include a "brief in support" of the motion. S. Ct. Rule 17.3.⁶ Adverse parties may file briefs in opposition to

4. *United States v. Alaska*, litigation to establish title to the submerged lands in lower Cook Inlet was filed in the United States District Court for the District of Alaska. The trial judge found that Cook Inlet is historic inland water and the property of the state. 352 F.Supp. 815 (1972). That ruling was upheld by the Ninth Circuit Court of Appeals. 497 F.2d 1155 (1974). But the Supreme Court took the case on *certiorari* and reversed. In so doing it commented that "It would appear that the case qualifies, under Art. III, Sec. 2, cl. 2, of the Constitution, for our original jurisdiction We are not enlightened as to why the United States chose not to bring an original action in this Court." 422 U.S. 184, 186 n.2 (1975).

The answer is straightforward. Department of Justice attorneys responsible for the decision were not sure whether the Court would consider a tidelands case which raised only one issue and involved only a small portion of one state's coastline worthy of original status. Prior tidelands cases had been much more expansive and the Court had, in unrelated cases, indicated that it was not inclined to expand its original docket. Stern, Gressman, Shapiro and Geller, *Supreme Court Practice*, 7th ed. (1993) at 476. However, the government considered the footnote in the *Alaska* decision to be an invitation and brought all future tidelands controversies directly to the Supreme Court.

5. According to Stern, *et al.* "When the district courts have jurisdiction, the Court has shown an increased tendency to decline to exercise its original jurisdiction, in accordance with its feeling that such jurisdiction should be 'sparingly' exercised and its reluctance 'to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.' *United States v. Nevada*, 412 U.S. 534, 538 (1973), in which the Court found it unnecessary to employ its 'original jurisdiction to settle competing claims to water with a single State.'" *Supreme Court Practice, supra*, at 469.

6. At this point the Court assigns an Original docket number which will remain with the case until its conclusion. That has not always been the case, which explains the fact that the *California* case, for example, had more than one "Original action number" during its lifetime.

Stern, *et al.* advise that "[w]hether a brief should be attached depends upon the nature of the case. If counsel is certain, because of the type of case, that the motion for leave to file will be granted, and that there will be subsequent opportunity to present the arguments, a supporting brief may be dispensed with. This procedure might be appropriate in suits between states with respect to boundaries or water rights, for example, since these are recognized classes of cases falling within the Court's original jurisdiction." *Supreme Court Practice, supra*, at 480. Tidelands cases would also seem to fall within these "recognized classes of cases," at least since the Court's comment in *United States v. Alaska, supra*, 422 U.S. at 186, n.2. The Supreme Court Rules referred to herein are those adopted by the Court on January 11, 1999, and put into effect on May 3, 1999.

the motion within 60 days. S. Ct. Rule 17.5.⁷ Thereafter the schedule and procedures are set by the Court. S. Ct. Rule 17.5.⁸

In practice, the parties to modern tidelands cases have looked forward to the Court's assistance in resolving their boundary problems and have not objected to the initiation of Original actions.

Until 1972 the federal government traditionally initiated tidelands litigation. State actions against the United States were subject to a defense of sovereign immunity, an unnecessary complication when both parties desired judicial resolution. In 1972 Congress waived sovereign immunity through the Quiet Title Act, 28 U.S.C. 2409a. Tidelands cases are actions to quiet title to submerged lands; thus, from that date on, the states could file against the federal government without fear of the sovereign immunity defense.⁹ The states are now as likely to initiate tidelands actions as is the federal government.¹⁰

On occasion, non-original parties have sought to intervene in tidelands cases. As a general proposition, private parties may not intervene as a matter of right in an Original action, *Utah v. United States*, 394 U.S. 89, 92 (1969), and rarely have they sought to do so.¹¹ Governments have often joined the cases. When the United States sued Louisiana over tidelands issues, the remaining Gulf Coast states, because of their closely connected interests, were allowed to intervene. *United States v. Louisiana*, 354 U.S. 515 (1957). Similarly, the United States and the city of Port Arthur, Texas, were permitted to intervene in *Texas v. Louisiana*, a boundary dispute in the Sabine River, when it became apparent that they might have claims to islands in the Sabine. 414 U.S. 1107 (1973) and 416 U.S. 965 (1974). Finally, Inupiat native organizations from the north slope of Alaska intervened in *United States v. Alaska*. They claimed, in separate litigation, that they and not the United States had paramount rights to the outer continental shelf off the

7. Note that an "answer" is not filed at this stage of the process.

8. Although a case will be accepted on *certiorari* on the vote of only 4 Justices, a majority of those participating is necessary to grant a motion to file an Original action. *Oklahoma ex rel. Williamson v. Woodring*, 309 U.S. 623 (1940). *Stern et al., supra*, at 480.

9. Such suits may, however, have procedural and statute of limitations requirements. See: 28 U.S.C. 2409a(i)-(m).

10. See, for example, *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982).

11. Although the Supreme Court generally follows the Federal Rules of Civil Procedure in Original actions, see Supreme Court Rule 17.2, their application was considered inappropriate to the intervention question in *Utah*. *Id.* at 92.

An individual, R.E.L. Jordan, and an Indian Tribe did attempt to participate in the early proceedings in *United States v. California* but were denied permission to intervene. 329 U.S. 689 (1946) and 334 U.S. 825 (1948). Oil companies that hold leases to submerged lands in dispute certainly have an interest in tidelands questions but they have not actively participated in litigation. The states and federal government have been careful in crafting final decrees to assure that lessees do not lose their property interests when submerged lands change hands through tidelands decisions.

Stern, et al suggest that in recent years "the Court appears to have relaxed its stance on intervention," citing *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981) in which the United States, the State of New Jersey and 17 pipeline companies were allowed to intervene in a tax case "without much ado." *Supreme Court Practice, supra*, at 483.

north slope. They sought to intervene in Number 84 Original and were allowed to participate on the side of the United States in an effort to maximize the area that they ultimately hoped to win in the separate action.¹² When that case was decided in favor of the federal government the Inupiat were dismissed, at their request, from the tidelands case. *Inupiat Community v. United States*, 548 F.Supp. 182 (D. Ak. 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985). *United States v. Alaska*, Order of the Special Master of June 3, 1986, reprinted at Report of the Special Master of March 1996, at Appendix D.

It is much more usual for outside parties to participate as *amicus curiae*. This has most commonly occurred in the Supreme Court itself, rather than in special master proceedings. The federal government, states and political subdivisions of states are always entitled to file *amicus* briefs with the Court to express their positions on a case before it. S. Ct. Rule 37.4. Others may do so with consent of the parties or upon Court order in response to their motions. S. Ct. Rules 37.2 and 37.3.

This then is how tidelands cases have been initiated and the participants determined. We look now at the various procedures for their disposition.

12. The Inupiat's effort was made in the special master proceedings and Dean Mann prepared a report recommending their limited intervention and, at the request of Alaska and the federal government, permitted their participation without further action by the Court. *United States v. Alaska* Number 84 Original, Report of the Special Master of January 10, 1984, Appendix B to the Report of the Special Master of March 1996; and Order of January 10, 1984 Appendix C.

CHAPTER 9

RESOLUTION

Tidelands actions initiated in the Supreme Court may be resolved by the Court alone or following its review of a Special Master's Report. The choice of methods turns on the importance of factual determinations to the ultimate issues. If the parties agree on all relevant facts, the Court may resolve the controversy alone, relying on briefs and oral argument. If there are factual disputes, the Court will typically appoint a special master to take evidence and submit a report with his findings and recommendations. The procedures are distinctly different and we review them separately.

DISPOSITION ON THE PLEADINGS AND DOCUMENTARY RECORD

By far the most efficient means of resolving an Original action is to brief and argue the issues before the Court only, relying on the law alone or the law and an agreed-upon documentary record. That may occur either before or after the Court has agreed to accept the case.

The Court decided an early tidelands case based solely on the papers in support of the motion to file an Original action, opposition papers and oral argument. *Alabama v. Texas*, 347 U.S. 272 (1954). But more commonly it will grant the motion to file and accept another round of briefing before argument. That approach has been followed in three recent tidelands controversies.

In the first, the federal government sought a supplemental decree in the original *California* case declaring its title to submerged lands within one nautical mile of the islands that comprise the Channel Islands National Monument. California claimed the area under the Submerged Lands Act's general grant of all such lands within 3 miles of the coast. The Channel Islands are agreed to form part of California's coast, but the federal government contended that a pre-Submerged Lands Act expansion of the monument to include a 1-mile belt around each island operated to except the area from the grant as provided by Section 5 of the Act. The critical issue was whether Congress intended the grant's exception to encompass such areas as the submerged lands within the expanded monument boundaries.

The outcome would depend on arguments of law, Congressional intent, and a few public documents. The parties agreed to a collection of documents upon which they would base their arguments and submitted it to the Court. The case was then briefed, oral argument was held, and a decision was rendered. *United States v. California*, 436 U.S. 32 (1978). No master was required.

In July 1981, California commenced a new Original action against the federal government. The controversy was over accretions to federally owned beachfront property on the California coast. The United States Coast Guard station at Humboldt, California, is located just north of the jetty that forms the entrance to Humboldt Bay. Littoral currents, affected by the jetty, caused accretion to the Coast Guard's property. Under California law accretions caused by artificial structures belong to the state. The upland land owner, in this case the Coast Guard, is cut off from the sea. But federal law is contrary. It provides that accretion to beachfront property belongs to that property owner, whatever its cause, just as erosion reduces his or her interest.

The parties agreed that the issue was purely legal, whether California or federal law is to be applied in determining ownership of the accreted lands. Again the Court resolved the case on briefs and oral argument.¹³ In less than a year after the complaint was filed, the Supreme Court issued its opinion. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982).

Finally, the United States and Alaska had a tidelands disagreement that raised a single legal question. The City of Nome, Alaska, requested a Corps of Engineers permit to construct a jetty from its shoreline into the open sea. Normally such structures become part of the coast line from which a state's Submerged Lands Act grant is measured. But, to avoid the loss of its outer continental shelf lands, the federal government conditioned the issuance of a permit on the state's waiver of any Submerged Lands Act consequences. The state submitted the disclaimer but included a provision questioning the United State's authority to require it as a permit condition and reserving its "right to file an appropriate action" testing that authority.

In 1991 the federal government proposed leasing submerged lands for gold exploration that were within 3 nautical miles of the Nome jetty but more than 3 miles of the natural coast. Alaska questioned federal title to the area and *United States v. Alaska*, Number 118 Original, was filed to resolve the controversy. The federal government asserted that the matter was appropriate for the Court's original jurisdiction and, because "the issue is purely one of law," no special master would be required. Alaska agreed with both propositions and again the case was resolved on briefs and argument before the Court. Its decision was issued less than 16 months after the Motion To File Complaint had been submitted. *United States v. Alaska*, 503 U.S. 569 (1992).

These are three examples of how efficiently an Original action may be disposed of when the parties agree that only legal issues are involved or that factual matters can be dealt with through agreed-upon documentary

13. California submitted documentary "exhibits" in support of its Motion for Leave to File Complaint and asked the Court to take judicial notice of the facts included. The exhibits provided a chronological history of the accretion and were not opposed by the United States.

evidence. Each of these actions could, of course, have been initiated in a federal district court under its concurrent jurisdiction. But when it is apparent that the question qualifies for original jurisdiction and will, in all likelihood, wend its way to the Supreme Court eventually, this procedure has proved an efficient means of resolution.

We suggest that advocates who wish to take advantage of this process make clear to the Court in their original filings that they agree that their controversy is appropriate for Original jurisdiction, that material facts are agreed upon, and that a special master is not required.¹⁴

ON SUBMISSION TO A SPECIAL MASTER

In a large majority of instances, the tidelands cases have raised significant factual questions requiring a trial. In those cases, the Supreme Court has appointed special masters to conduct evidentiary proceedings.¹⁵ Although the Court's rules say nothing of special masters, orders appointing them in tidelands cases have typically provided authority to summon witnesses, issue subpoenas, take evidence, and conduct proceedings as may be necessary. See: *United States v. Alaska*, 444 U.S. 1065 (1980). The masters then submit reports to the Court forwarding findings and recommendations with respect to the issues. Those reports are in appearance much like a trial court decision. But, at least formally, they have no independent force of law. Supreme Court Practice, *supra*, at 474 and 488. The parties are permitted to "take exception" to the masters' findings and argue to the Court that the recommendations should not be adopted.¹⁶ Even if no exceptions are voiced, the Court will review the entire record *de novo* and reach an independent conclusion.

The purpose of this section is to describe procedures that have been employed in various special master proceedings in the hope that they may be useful to future practitioners. The Supreme Court's Rules provide little guidance, saying only that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides." S. Ct. Rule 17.2. But that lack of specificity has not been a drawback. The special masters and parties have always been able to agree upon procedures best suited to the particular problems before them.

The following are some areas that may be worthy of discussion.

14. See *California ex rel. State Lands Comm'n v. United States*, in which the Court noted that "[n]o essential facts being in dispute, a special master was not appointed and the case was briefed and argued." 457 U.S. 273, 278 (1982).

15. The Court has suggested that there may be some presumption in favor of master proceedings, saying that "[t]he Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas* 339 U.S. 707, 715 (1950).

16. In fact, masters' recommendations are probably adopted in a larger percentage of cases than are lower court decisions upheld by the Supreme Court, although we have done no survey to verify that observation.

Selection and Appointment of a Special Master

The special master is always selected and appointed by the Supreme Court. However, the Court has, on occasion, permitted parties to recommend potential masters or comment on alternatives being considered by the Court. The Court has generally not, it would seem, sought to appoint masters who are already steeped in tidelands law, except to the extent that masters who have handled prior proceedings in the same case may be asked to step back in.¹⁷ Masters have always been highly qualified federal judges, academics, or private practitioners.¹⁸

Proceedings before the Special Master

But for S. Ct. Rule 17.2's suggestion that the Federal Rules of Civil Procedure and the Federal Rules of Evidence "may be taken as guides," the Supreme Court Rules provide no hint as to how the trial of an Original action is to proceed. Typically the master's appointment will include authority to: schedule further pleadings and proceedings, summon witnesses, issue subpoenas, take evidence, and submit a report. The Court's Order will also provide that the master will be allowed his expenses and, if he or she is not a federal judge, there is also provision for "reasonable compensation for services."

It is usual for the master to contact counsel of record soon after his appointment and arrange a planning or scheduling conference. It is during that meeting that the ground rules for proceeding are usually established. The absence of official rules governing the process gives the master and counsel substantial leeway, something that has seemed to foster efficiency. The following steps have at least sometimes been adopted.

Preparation of a Joint Statement of Issues

It has been the author's experience that complaints and answers, even when accompanied by motions and supporting memoranda as they are in Original actions, rarely narrow the issues to a point useful for efficient

17. For example, Special Master Walter Armstrong conducted the extensive proceedings to determine the coast line of Louisiana in Number 9 Original and was later asked to resolve supplemental issues between the parties in that case and conduct proceedings to establish title to the submerged lands in Mississippi Sound. Judge Albert Maris was assigned as special master in *United States v. Maine, et al.*, Number 35 Original and took on *United States v. Florida*, Number 52 Original when Florida was severed from the *Maine* case. Likewise, Judge Walter Hoffman served as master in two supplemental proceedings under *United States v. Maine*, the *Massachusetts* and *Rhode Island/New York* boundary cases. Judge Hoffman also undertook the river boundary Original action between Georgia and South Carolina, Number 74 Original.

18. Appointments typically include a provision for the Chief Justice to name a new master should the position become vacant while the Court is in recess.

adjudication. Without more, participants' theories of the case, and even their characterizations of the issues before the court, may seem to be continually changing. That creates considerable frustration and delay. Participants in the most complicated of the tidelands cases have streamlined their proceedings by preparing in advance of trial an agreed-upon statement of the precise issues before the master.

For example, in *United States v. Louisiana*, Special Master Armstrong was asked to recommend a coast line for measuring that state's Submerged Lands Act grant along the entirety of its extremely complicated shore. The parties divided the coast by segments for trial and agreed to a catalogue of issues applicable to each segment. A typical example is their treatment of the coastal stretch from Pass a Loutre to Southeast Pass, for which the following issues were identified:

- (a) Are there islands or low-tide elevations that should be considered part of the mainland?
- (b) If the closing line of Blind Bay affects the three-mile limit, where are the natural entrance points between which the closing line should be drawn?
- (c) Should islands or low-tide elevations be regarded as forming separate mouths of a bay if one or more direct lines could be drawn between other natural entrance points of the bay so as to run wholly landward of such islands or low-tide elevations?
- (d) Are there islands or low-tide elevations at Blind Bay that form separate mouths to it?¹⁹

As any litigator will readily recognize, this enumeration is much more specific than traditional complaints and answers.

A similar but even more comprehensive approach was adopted in *United States v. Alaska*, Number 84 Original. There each of 15 litigation issues was concisely stated, and followed by a short explanation of the relevance of the issue to the proceedings and a summary of each party's position on the issue. For example, Question 5 was set out as "[i]s the formation known as Dinkum Sands an island constituting part of Alaska's coast line for purposes of delimiting Alaska's offshore submerged lands?" It was then explained that "[t]he status of the Dinkum Sands formation as an island forming part of Alaska's coast line for purposes of delimiting Alaska's offshore submerged lands is disputed. As part of this inquiry, the parties agree that the relationship of the Dinkum Sands formation to the mean tidal planes of the Beaufort Sea must be determined. The Parties are negotiating a monitoring agreement which, it is anticipated, will lead to a set of stipulated facts on this question. But it is probable that a dispute will

19. *United States v. Louisiana*, Supreme Court Number 9 Original, Pretrial Statement, Appendix A-1 to the Report of the Special Master of July 31, 1974. Reproduced in Reed, Koester and Briscoe, *supra*, at 242.

remain as to effect of the Dinkum Sands formation in delimiting the offshore submerged lands belonging to Alaska.” Joint Statement of Questions Presented and Contentions of the Parties of May 1980, at 12-13. The Statement then continued with a recitation of the parties’ positions on the issue.²⁰ A similar procedure was followed in *United States v. Florida*, Number 52 Original. See Report of Special Master Maris of December 1973, at 538; reprinted at Reed, Koester and Briscoe, *supra*, at 538.

The joint submissions in all of these cases did much to focus the parties’ trial preparation. They probably contributed more than any other procedural step to their efficient litigation.

Pretrial Proceedings

Trial preparation has been surprisingly civil and, again, efficient in tidelands litigation. Discovery has been kept to a minimum, at least compared to what might be expected in such complicated cases.²¹ In other litigation it has, in recent years, become a source of substantial delay and controversy. But that has not been so in the tidelands cases. Procedures have usually been agreed to that fulfill the litigants’ needs without creating acrimony.

20. “The *United States* contends (1) that the principles set out in the international Convention control resolution of this issue; and (2) that the Dinkum Sands formation is not an island forming a part of the coast line for purposes of measuring the territorial sea under the Convention, because it does not qualify as a ‘naturally formed area of land, surrounded by water, which is above water at high tide,’ but is, at best, a ‘low-tide elevation,’ defined as ‘a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide,’ which enjoys no territorial sea of its own when, as here, it lies outside the territorial sea measured from the mainland or any island; and (3) that, accordingly, the Dinkum Sands formation and the submerged lands underlying the three-mile belt around the formation, and not within three miles of the mainland or any island, do not belong to Alaska. The United States further contends that the Dinkum Sands formation does not qualify as an island for any relevant purpose or any relevant period, even if (which is not admitted) the formation rises above the level of mean high water during portions of each year. In the alternative, the United States contends that the Dinkum Sands formation has no effect on the extent of Alaska’s submerged lands for such periods as it is submerged at mean high tide.

The *State of Alaska* contends (1) that the principles of the international Convention do not control resolution of this question; (2) that the Dinkum Sands formation possesses a ‘line of ordinary low water’ for purposes of the Submerged Lands Act, thereby qualifying it as an island forming part of Alaska’s coast line for purposes of the Act; and (3) that Alaska therefore is entitled to the resources of the Dinkum Sands formation and of the submerged lands within a three-mile radius. In the alternative, Alaska contends that it is entitled to the resources of the Dinkum Sands formation and the submerged lands within a three-mile radius for such periods as the formation is determined to possess a line of ordinary low water. Insofar as the principles of the Convention may control the extent of the grant of submerged lands to Alaska under the Submerged Lands Act, Alaska contends that the Dinkum Sands formation qualifies as an island under the Convention for all relevant purposes and at all relevant times, even if (which is denied) it is submerged below the level of mean high water during portions of the year. Alternatively, to the extent that the principles of the Convention control, Alaska contends that it is entitled to the resources of the Dinkum Sands formation and the submerged lands within a three-mile radius to the same extent that the United States claims in its relations with other countries that the waters within that three-mile radius constitute a part of the United States’ territorial sea.” *Id.* at 13-15.

21. Discovery is the means by which a party learns about the opponent’s case and/or seeks to narrow the issues for trial. It may be through oral or written depositions, written interrogatories, requests for production of documents, physical or mental examinations, and requests for admissions.

For example, it has not been unusual to exchange documentary evidence before trial, giving counsel an opportunity to prepare cross-examination and rebuttal. Witness lists and summaries of anticipated testimony are typically exchanged, as are expert witness reports. Depositions have been used, but probably not as extensively as in traditional cases. The use of interrogatories has been atypical.

Judge Albert Maris, who served as special master in *United States v. Maine*, Number 35 Original, and *United States v. Florida*, Number 52 Original, entered prehearing orders which were more precise than most. He required that all testimony in chief be written, preferably in question and answer form, and copies exchanged a month before trial. Documentary evidence was likewise provided a month in advance. Even with that lead time, cross-examination could be deferred for a reasonable period. See Prehearing Orders reproduced in Reed, Koester and Briscoe, *supra*, at 679-684 and 531-537. Judge Maris had used a similar procedure in another large Original action and concluded that “the testimony, both that in chief and that adduced on cross-examination, was rendered much more concise and helpful by the procedure which was followed than it would have been if the witnesses had been required to testify in chief extemporaneously and if opposing counsel had been required to cross-examine them immediately thereafter.” *Wisconsin v. Illinois*, Report of the Special Master of December 8, 1966, at 19-20.

Judge Alfred Arraj, sitting as special master in the “piers” phase of *United States v. California*, received the direct testimony of three expert witnesses in written form. Although the testimony was read from the stand, it was submitted to the master and opposing counsel prior to trial. According to the master “[b]ecause of the technical nature of the testimony involved I found this to be a very satisfactory method of receiving the evidence.” *United States v. California*, Report of the Special Master of August 20, 1979, at 3 n.3. The procedure also made cross-examination much more efficient than would otherwise have been the case.

The early identification of precise litigation issues, a clear statement of the parties’ positions on each, and an open exchange of proposed evidence have gone a long way to assuring efficient hearings before the special masters.

The Pretrial Memorandum

The parties to tidelands litigation have traditionally submitted pretrial memoranda which, like opening statements, provide a road map for the upcoming proceedings. These too have been helpful in understanding the

evidence to come and how it fits into the big picture. Such memoranda have been most useful when they did not include argument beyond a statement of the issue and the party's position on that issue, followed by a short summary of each witness's testimony and the exhibits to be presented by each. Such memoranda have either replaced or supplemented opening statements.

The Trial

Not surprisingly, trials, or "hearings," before special masters have not differed much from other federal proceedings. But some distinctions may be worth noting.

First is the location of trial. Federal judges sitting as special masters will, of course, have access to their own courtrooms. Those have frequently been used, but federal judges have also conducted special master proceedings away from home for the convenience of witnesses or counsel.²² When away from home they have usually borrowed the courtrooms of local judges. Masters who have not been judges have often asked the parties to arrange for facilities, although Dean J. Keith Mann of Stanford Law School utilized that institution's moot courtroom for the trial of *United States v. Alaska*, Number 84 Original. In all, special masters have been most accommodating in agreeing to hear evidence wherever it was most convenient for counsel and the witnesses.

A few words should be said about the order of trial. Traditionally, of course, the burden of proof in litigation is on the plaintiff and he will go first and last in an evidentiary hearing. Tidelands cases have differed. On most questions the parties have agreed that a particular order of presentation makes most sense and that sequence has been followed, regardless of which party was plaintiff. Two regular tidelands issues provide good examples. Many states have alleged that the United States has enclosed specified water bodies with "straight baselines" or has made historic inland water claims to them. In both instances the states have usually understood, given prior Supreme Court decisions, that they have a burden of proof on those issues. Indeed, the federal case would require proving a negative. Consequently, it has usually been agreed that the state would put on its case first on such issues, despite the fact that the federal government was plaintiff in the case.²³

22. Judge Arraj of Denver, hearing *United States v. California*, sat in New York to take the testimony of the distinguished international lawyer and jurist Philip Jessup who was called by the state. Judge Maris traveled from Philadelphia to Florida to hear witnesses in *United States v. Florida*. Judge Hoffman from Norfolk, Virginia, held court in Boston for parts of the proceedings in the *Massachusetts Boundary Case*. And Judge Van Pelt, from Lincoln, Nebraska, conducted parts of the *Texas v. Louisiana* trial in New Orleans, Louisiana. Some hearings in *New Jersey v. New York* were conducted on Ellis Island.

23. As previously noted, tidelands cases were often initiated by the United States to avoid questions of sovereign immunity. Since the enactment of the Quiet Title Act they may be brought by states, and often are, but the parties have generally agreed that the order or burden of proof may be unrelated to a party's status as plaintiff or defendant.

On issues for which prior decisions had not placed the burden on the state or federal government, the parties have typically ignored the burden question in setting the order of proceedings.

When cases have included a number of factual and legal questions, related issues have often been grouped for trial, with all proceedings being conducted on a particular issue or group of issues before going on to the next. For example, *United States v. Alaska*, Number 84 Original was tried in three phases. One of those phases, concerning the status of Dinkum Sands, ran for three weeks. During that time each side put on its direct case, and all cross-examinations were conducted.

The procedure was efficient. Counsel, witnesses, and the master were able to concentrate on the preparation and presentation of evidence on finite issues during each stage. Consideration of this procedure is recommended for any complex litigation.²⁴

Views

The tidelands cases have, by definition, involved the application of legal principles to particular geographic circumstances. Most attorneys have considered it imperative to become acquainted with the coastal features about which they are litigating. It is particularly helpful to visit the areas with one's witnesses and to do so before theories of the case have been solidified.

Such familiarization is equally critical to the master's understanding of what is being presented. Most masters have participated in views and, we believe, have found them useful in their deliberations.²⁵

But planning a view can produce controversies. They may involve: who will participate, what may be said during the view and by whom, what route will be followed and if by aircraft at what altitude, and whether the view is evidence, requiring a court reporter.

Obviously lead counsel and the master will participate. Someone familiar with the area may also be useful if it is likely that explanations of what is being seen would be helpful. A potential witness has usually been able to fill that role. Other experts, as considered useful and able to be accommodated, have been included.

Some counsel have been concerned that their counterparts would be unable to control the urge to argue their cases during a view. That has sometimes led to agreements about what could be said and by whom. But

24. It should be mentioned that because each stage was treated as a separate trial, pretrial and post-trial memoranda were submitted with each phase of the proceedings.

25. Judge Hoffman visited Nantucket Sound; Judge Maris flew the length of the Florida Keys and across the mouth of Florida Bay; Special Master Armstrong flew the Louisiana coastline; Judge Arraj visited the California coastal piers; and Special Master Mann sailed into the Arctic Ocean in search of the elusive Dinkum Sands.

such constraints have not, in the end, seemed necessary. Participants have tended not to discuss issues during a view. Conversation has been limited to that necessary to identify features being observed and to respond to inquiries from the special master.

The means of transportation and route of travel may favor one party's position in the litigation and should be carefully considered as part of the preparation for a view. For example, one of the issues in *United States v. Florida* was whether Florida Bay, between the Keys and the Florida mainland, is a landlocked body of water. Judge Maris agreed to a view of the bay, including a trip across its mouth. To make that trip in a boat would have put the group out of sight of land for a considerable time, presumably supporting the contention that the area is open sea and not landlocked. At the other extreme, flying the route at a high altitude would have enabled the observer to take in the entire bay at once, much like consulting a small-scale chart. That view, presumably, would more likely create an impression of "landlockedness." The parties agreed to fly the line but negotiated the altitude of the flight.

But the question remains whether the view is evidence in the proceeding. Good arguments can be made on either side. But the most logical approach would seem to be that a view is not evidence but a means of assisting the trier of fact in understanding. That approach resolves a number of lesser problems. It does away with the need for a reporter and for swearing in any participant who is likely to speak. It also obviates the need for a running description of everything that is being seen so that the evidentiary record is complete.

Like most phases of a judicial proceeding, views are most productive when least constrained. They should be used to enable the master to better understand the evidence, not as part of that evidence. When conducted for that purpose they can be an invaluable addition to a trial.

Post-Trial Memoranda

It has been traditional in tidelands litigation for the parties to pull together their cases in simultaneous post-trial briefs to the special master, followed by reply briefs and sometimes sur-reply submissions. These offerings have usually been voluminous efforts to review all of the evidence in light of the law as contended by the party. For example, the United States' 156-page post-trial brief in *United States v. Louisiana* was dwarfed by the state's multi-volume submission.

It is believed that these thorough presentations have been especially useful to the masters in bringing the law and evidence into context. Closing arguments have been much more succinct, if delivered at all.

The Special Master's Report

After hearing all of the evidence and arguments, the master retires to make findings and recommendations on the issues assigned to him by the Supreme Court. His report is printed and submitted to the Court upon completion.

Since 1974 the federal government has proposed that special masters in tidelands cases permit the parties to review a draft of the report before it is printed. The purpose is to guard against technical errors that might require opposition to the report if not corrected prior to submission.²⁶ Special masters are understandably wary of the suggestion but are usually convinced that it can only improve their product.

When the parties are given an opportunity to review drafts, they are typically sworn not to divulge their contents, to destroy drafts following their review, and to forego the urge to reargue their cases, limiting their comments to truly technical or factual corrections. The process has worked well. Occasional corrections have been made at the suggestions of the parties. None has altered a substantive finding or recommendation.

Special masters' reports often include appendices that the Court might find useful to have close at hand. These have included pretrial orders, statements of issues, and stipulations. The parties may request that the master include anything that might be useful to the Court. Louisiana asked Special Master Armstrong to include a summary of its historic waters evidence as an appendix to his Report of July 31, 1974, which he did.

A final suggestion is that special masters be encouraged to date their reports. Many Original actions produce more than one master's report and for future reference it is convenient to be able to distinguish among them.

Supreme Court Consideration

When the Supreme Court receives its special master's report it sets a schedule for the parties' comments or, technically, "exceptions." The Rules do not specify a schedule for briefing in Original actions but the Court typically provides 45 days from its order for exceptions and supporting briefs and 30 days thereafter for replies to the opponent's exceptions. Sur-reply briefs are sometimes allowed.²⁷

26. The policy began when the special master in *United States v. Florida* made two recommendations that had been suggested by neither party and which, in the federal view, were inconsistent with the law and represented dangerous precedents. The recommendations forced the United States to take exception and the Court returned the case to its master for further consideration. Neither recommendation was important to the State of Florida and it stipulated to the entry of a decree which did not include them.

27. S.Ct. Rule 33 sets out the technical requirements for Supreme Court briefs.

The parties may take exception to the master's findings of fact and conclusions of law.²⁸ The Court has the entire record of the case before it and its review is *de novo*.²⁹ Despite that fact, and the tendency of some parties to take exception to every recommendation upon which they were unsuccessful, the Court has adopted a vast majority of its masters' recommendations.

When the briefs on exceptions have been submitted, oral argument is scheduled. Each side is typically allowed one-half hour in which to promote its own exceptions and oppose those of its opponent.³⁰ The case is then considered "submitted" and the parties await the Court's decision. The Court hears arguments from October through April and issues decisions in all argued cases by the end of June. The Court's rules allow a disappointed party to file a petition for rehearing within 25 days of the decision. S. Ct. Rule 44. States frequently have done so but none has been successful in the tidelands cases. Rule 44 does not permit responses to petitions for rehearing unless requested by the Court.

Supreme Court decisions in tidelands cases invariably conclude with two provisions. The first is an instruction to the parties to prepare and submit to the Court a decree implementing the decision. Decrees usually state in straightforward terms the Court's answers to the questions that were litigated. They may also describe, through a coordinate system, the coast line that results from the Court's decision and/or the offshore boundary between federal and state submerged lands as measured from that coast line. The Submerged Lands Act now provides that boundaries so described in a Supreme Court decree are thereafter fixed and are not subject to abatement with accretion and erosion of the coast line. 43 U.S.C. 1301(b).

The second provision common to tidelands decrees provides that the Court retains jurisdiction to conduct further proceedings and enter additional orders as necessary to give force and effect to existing decrees in the case. As a practical matter this has allowed the parties to resolve future problems by merely requesting a supplemental decree in an existing case rather than asking that a new Original action be permitted.

Expenses and Special Master Fees

All special masters are entitled to reimbursement of expenses. These, not surprisingly, have included: travel costs, court reporter fees, clerks'

28. At this stage the litigation approaches of the parties begin to diverge. States have typically taken exception to all or most of the recommendations against them. The federal government is more circumspect. The solicitor general carefully considers both the importance of the disputed matter and the strength of the competing arguments in taking exceptions.

29. This is true whether or not the parties take exceptions.

30. A longer time may be allowed on order of the Court.

wages, postage, and anything else properly attributable to their assignment from the Court. It has been traditional, in tidelands cases at least, for the parties to contribute to a fund for the master's expenses at the outset of proceedings and make additional contributions as the fund becomes depleted. The masters have kept precise accounts of expenditures from the fund and returned any excess to the parties at the end of the case.

Federal judges who are serving as masters are already on the government payroll and receive no additional compensation. In contrast, masters from the private sector are entitled to fees for their services, pursuant to the orders appointing them. In lengthy cases the parties have sometimes asked the masters to accept advances on their eventual fees so as to avoid a large one-time expenditure at the conclusion.

At the conclusion of the litigation a master will petition the Court for approval of his expenses and fees. The Court will fix amounts due and allocate costs among the parties. In most cases the obligations will be divided equally. However, success on the issues, or even ability to pay, may alter the formula.

Original actions have proven to be an efficient means of resolving tidelands controversies. Although the federal district courts have concurrent jurisdiction, it is anticipated that controversies between the federal government and coastal states over title to submerged lands and maritime boundaries will continue to be taken directly to the Supreme Court.

We hope that the legal principles and practical experience recounted in this volume will provide some assistance to those who litigate similar issues in our wake.