SHORE AND SEA BOUNDARIES

Volume Three

National Oceanic and Atmospheric Administration Ship *Rainier*

SHORE AND SEA BOUNDARIES

BY

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Volume Three

U.S. Department of Commerce
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Volume Three

THE DEVELOPMENT
OF
INTERNATIONAL MARITIME BOUNDARY PRINCIPLES
THROUGH
UNITED STATES PRACTICE

In memory of

Millington Lockwood

1943–1999

This book is dedicated to the memory of Millington Lockwood for the outstanding role he played in the development of the field of marine and coastal geographic information systems.

Lockwood was born in San Francisco, California, in 1943. He earned a B.S. degree in Meteorology and Oceanography from the State University of New York Maritime College and a M.S. degree in Environmental Systems Management–Ocean Affairs from American University.

For 29 years he held a variety of positions within the National Oceanic and Atmospheric Administration and was actively involved in U.S. national policy with respect to the implementation of the National Spatial Data Infrastructure.

People who knew Millington Lockwood would variously describe him as professional, energetic, genuine, persistent, mercurial, humorous, and altruistic. Lockwood loved his work, influenced national policy and research perspectives for spatial data, and mentored a generation of scientists, technologists, and policy makers who are now advocates for his vision and teachings.

Millington Lockwood lost a courageous fight against cancer on July 22, 1999. He is survived by his wife Susan, and children Lisa and Billy.

Acknowledgments

Thanks alone are inadequate to express my appreciation to the many colleagues whose contributions have made this volume a reality. First mentioned must be Millington Lockwood and Lee Thormahlen whose vision and enthusiasm got the project underway and sustained it to the end.

Equally important was the team assembled for its production. Cindy Fowler coordinated and oversaw the entire endeavor; Donna McCaskill supervised production and printing; Lauren Parker edited textual material; Frank Ruopoli produced all graphics in addition to the book jacket and layout; Nancy Cofer-Shabica edited graphics and—through her knowledge of the subject matter—melded graphics and text; Chuck Baxley kept the computers running throughout; and Gerald Esch, an incomparable editor, turned these combined efforts into a finished work.

Thanks also to the experts who graciously reviewed the manuscript and contributed invaluable suggestions. They include Ashley Roach, Bob Smith, Jeff Minear, Lee Thormahlen, Richard Naito, Michael Vertress, Cindy Fowler, Curt Loy, Dennis Romesburg, Jim Dailey, Doug Martin, and Steve Gill. They did their best to keep me on the straight and narrow. Any remaining errors, and all personal opinions, are mine alone.

Recognition is also due the attorneys with whom I have had the pleasure of litigating most of the tidelands cases discussed in the succeeding pages: George Swarth, Louis Claiborne, Jeff Minear, Spinner Findlay, Peggy Strand, Don Carr, John Briscoe, Tom Koester, and Bruce Flushman to name but a few. And to the Supreme Court's special masters before whom we have been privileged to practice our trade: Retired Justice Tom Clark, Judges Albert Maris, Robert Van Pelt, Walter Hoffman and Alfred Arraj, and Messrs. William Davis, Walter Armstrong, and J. Keith Mann. These individuals have not only contributed substantially to the development of maritime boundary law—they have also made its practice most enjoyable. Whether ally, adversary, or judge, I count them all as personal friends.

Experts both within and without federal agencies, who have worked tirelessly to resolve maritime boundary problems, are too numerous to identify separately. The former are ably represented by Tom Warren and Stan Ashmore of the Department of the Interior and all members of the Coastline Committee. The latter include Judge Philip Jessup, Lou DeVorsey, Clive Symmons, Victor Prescott, and Elihu Lauterpacht, internationally recognized experts who have dedicated their lives to the subject and have participated in the tidelands litigation. Each of these, and their many

unnamed colleagues, has contributed substantially to the body of law that is discussed here and its application to real-life controversies.

Finally, I must acknowledge the collaboration of my wife Donna Reed who has lent her energy and expertise throughout, translating authorities from the original French, editing drafts, providing photographic illustrations, offering sage advice, and doing everything possible to keep me on an even keel.

To all I owe an immeasurable debt. My heartfelt thanks.

Mike Reed

Preface

In Recognition of Aaron Shalowitz

Aaron Shalowitz, who served as special assistant to the director of the U.S. Coast and Geodetic Survey, produced his historic two-volume *Shore and Sea Boundaries* in the early 1960s. At the time they were considered to be the largest collection of background on the subject of maritime boundary delimitation. The concepts which he developed and explained led to a deeper understanding of the issues in the multibillion dollar tidelands battles. His treatise represented the culmination of the first phase of the Coast Survey's involvement in providing federal and state agencies, industry, engineers, and attorneys with authoritative guidance in the clarification and application of the technical and legal-technical provisions in international law, Supreme Court decisions, and Acts of Congress. Volumes One and Two continue to be relied upon by numerous users—including the United States Supreme Court.

Shalowitz brought to the preparation of these documents a keen awareness of engineering, legal, and Coast and Geodetic Survey experience as a commissioned officer in the field, a cartographic engineer, and as the technical advisor to the Department of Justice in the California "tidelands" litigation.

It is a source of personal pride to realize that these volumes prepared by Aaron Shalowitz, which bore the stamp of many hours of dedication, continue to be recognized by the federal government, and are being expanded with the publication of a Volume Three.

The Shalowitz family

Foreword

More than two decades ago, I was a green law student working with a team of private and government lawyers, law professors, and law clerks engaged in a lengthy disagreement between the State of Louisiana and the U.S. Department of Interior. At issue were the differing interpretations of the state/federal boundary off the coast of Louisiana. This boundary was important because of the extensive petroleum reserves that lay off that state's coast. At stake was each party's proportionate share of these reserves, which would be based on where the state's legal shoreline was determined to be, and the extent of the state's seaward jurisdiction.

For those of us embroiled in the infinite details of the case, there was a guiding light—*Shore and Sea Boundaries* by Aaron L. Shalowitz. This richly informative manuscript provided an important foundation for the case as presented by the State of Louisiana. As witness to this legal clash of titans, the law clerks spoke reverently of the scope and details of this text, which we read and reread until it seemed as though we could recite it word for word.

Since that time, there have been more than a dozen tidelands cases that have found their way to the U.S. Supreme Court. I feel confident that in each and every one of those instances, there were lawyers and law clerks who pursued *Shore and Sea Boundaries* with the same fervor that we did searching for illumination and controlling authority.

Mike Reed has done a superb job of updating this luminous manuscript. I feel confident that this will be a landmark publication used not only by legal staffs, but coastal resource managers, state and local governments, and universities.

I am delighted that my organization could help support such a noteworthy effort. For me, it is a personal honor to tag along behind the vision of Millington Lockwood, which drove this revision, and provide a foreword to such an important work.

Margaret A. Davidson
Director,
NOAA Coastal Services Center

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Introduction to Volume Three

In 1962 and 1964 Volumes One and Two of *Shore and Sea Boundaries* were published. Since that time they have provided an invaluable resource to attorneys and judges engaged in defining the maritime boundaries of the United States. But much has happened in the subsequent 35 years. The Supreme Court and its special masters have resolved at least 16 maritime boundary cases in that period. The time has come to update Aaron Shalowitz' epic effort.

My purpose in Volume Three is to organize and preserve the legal principles that have been applied by the Supreme Court to define our coast line and the numerous maritime boundaries which are measured from it. That undertaking seems particularly important where, as here, much of the law and legal reasoning is contained not in readily available judicial opinions but in the Reports of the Supreme Court's special masters. That is so because the cases with which we are concerned do not reach the Supreme Court in the usual manner. They are known as "Original actions," cases which are initiated in the Supreme Court rather than arriving there following a course through the Federal District and Circuit Courts. When the resolution of Original actions requires factual findings they are typically assigned to a special master who is delegated the responsibility of conducting hearings, receiving evidence, and making findings and recommendations in a Report to the Court. Although the Reports are public, there is no system for their publication, and they are not easily available to practitioners. Despite the fact that the Supreme Court often writes a substantial decision following its receipt of the Report, more often than not it is the Report that contains the more extensive explanation of how issues were resolved.

Three sources are emphasized in Volume Three. The Supreme Court decisions in the tidelands cases provide the primary authority. Next come its Masters' Reports which almost always contain a greater depth of analysis than is practical for the Court. Finally, the positions of international authorities on the law of the sea, many of whom have served as witnesses in the tidelands cases, are reviewed to indicate how their interpretations either support or conflict with the Court's conclusions.

The volume is divided into three parts.

Part I follows the history of the tidelands litigation from its pre–Submerged Lands Act infancy, through that Act and the various

decisions interpreting its provisions, and finally to the application of the baseline provisions of the Convention on the Territorial Sea and the Contiguous Zone to the coastal geography of the United States to precisely define the limits of each state's Submerged Lands Act grant.

Part II emphasizes the legal principles for coast line delimitation that are derived from the numerous tidelands decisions. This part is organized by issue in hopes that it will provide the practitioner with a useful resource in future litigation.

Part III offers the gratuitous insights of a single practitioner regarding the trial of a tidelands case or other complex federal litigation. I hope that it will prove of interest or value to those who follow.

There are many excellent works on the law of the sea which include chapters on maritime boundary delimitation. Some have been cited extensively in these tidelands cases. The authors of some have participated as witnesses in the tidelands cases. This volume does not attempt to replace those authoritative works. Rather its purpose is to focus on the American experience. The United States Supreme Court and its masters have dealt with each of the Convention's provisions for coast line delimitation. Few other courts worldwide have had that opportunity. These Supreme Court precedents will not only be applicable to future tidelands litigation but to any controversy that requires a determination of the limits of our inland waters, navigable waters, territorial sea, or other maritime zones.

Part One

THE TIDELANDS LITIGATION

INTRODUCTORY

Long before discovery of the New World the English common law recognized navigable waters as open to the public for fisheries and commerce. The sovereign held title to the beds of navigable waters, in trust for the public.[1] Following the Magna Carta it was established that lands beneath navigable waters were so closely aligned with the concept of sovereignty that, unlike other public lands, they could not be disposed of by the Crown, but only by act of Parliament.

This tradition followed the common law to our shores and was first applied in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). That controversy arose over title to submerged lands in Raritan Bay, a navigable water body in New Jersey. New Jersey began as a proprietary colony of England. The grantees were given title to the lands within its boundaries as well as all governmental powers. In 1702 the proprietors returned governmental authority to the Crown, while retaining title to the land.

The American Revolution followed and the State of New Jersey succeeded to the Crown's governmental authority. Thereafter the state patented oyster beds in Raritan Bay to Martin and the successors to the colonial proprietors made a similar grant to Waddell. An ejectment action was initiated by Waddell and wound up in the Supreme Court, the critical question being whether the beds of navigable water bodies were returned to the Crown as part of the governmental power or retained by the proprietors as part of the land. The Court adopted the former position, holding that title to lands under navigable waters was part of the *jura regalia* rather than the right to property. As such, title went back to the Crown in 1702 and was acquired by New Jersey after the Revolution. The state, and not the colonists' successors, had authority to grant oyster leases.

The identical issue arose just three years later in Mobile Bay. Alabama, which was not one of the 13 original states, nevertheless argued that it too entered the Union with title to submerged lands beneath navigable waters. The Supreme Court agreed. Referring back to *Martin v. Waddell*, it reasoned that if sovereignty included title to submerged lands in the original 13 states it must also in subsequently admitted states if they were to enter the Union on an "equal footing." *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

So the law was clear. Or was it? The Supreme Court had established that the individual states held title to the beds of certain navigable waters. But exactly 100 years later the federal government and the coastal states

1. The significance of this "public trust" to the sovereign's management of submerged lands goes beyond the scope of this effort. It has, however, been exhaustively discussed in two recent works. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources*: *Questioning the Public Trust Doctrine*, 71 Iowa L.Rev. 631 (1986); Coastal States Organization, Inc., *Putting the Public Trust Doctrine to Work*, (2nd ed. 1997).

began what has now been more than a half century of litigation to determine whether the states' title extended to all navigable waters and how the boundaries of our navigable waters are to be determined.[2] That litigation has created a vast body of law on the delimitation of maritime boundaries. Because the Supreme Court decided to apply international law to these domestic controversies, the rules that have evolved are equally applicable to domestic and international disputes. What is more, they are applicable to any maritime boundary controversy, not just those involving title to submerged lands.[3]

2. These lawsuits have been referred to as the "submerged lands" or "tidelands" cases. "Tidelands" are technically those areas which are covered and uncovered by the daily tides, commonly thought of as "the beach." The cases, of course, involve vastly greater areas of permanently submerged inland waters and territorial seas. Nevertheless, we follow tradition and use the terms interchangeably here.

3. The historic discussion of submerged lands rights liberally cribs (with permission) from an article by George S. Swarth, "Offshore Submerged Lands, An Historical Synopsis" published in the Department of Justice's *Land and Natural Resources Division Journal* of April 1968. Mr. Swarth hired and trained many of the attorneys who represented the United States in the submerged lands litigation. Any successes were largely due to his extraordinary legal abilities. Setbacks would probably have been avoided had he not retired at an early age.

CHAPTER 1
NON-SUBMERGED LANDS ACT ISSUES

The maritime boundary law upon which this volume focuses has generally come from Supreme Court decisions interpreting the Submerged Lands Act, 43 U.S.C. 1301 *et seq*., a federal statute enacted in 1953 granting coastal states exclusive rights in the adjacent seas. However, to jump right into a discussion of those boundary principles would be to begin the story in the middle. Tidiness dictates that we first review litigation that led up to the Act, and coastal state claims that lay on other foundations.

UNITED STATES V. CALIFORNIA: THE GENESIS

As just discussed, the Supreme Court ruled in 1842 that the original states acquired title to the submerged lands beneath their navigable waters at independence, *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), and later held that subsequently admitted states enjoyed the same right under the equal footing doctrine. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). "Navigable waters," as that term has come to be used in the United States, includes both inland waters and the maritime belt known as the territorial sea.[4]

That may be the reason that for many years all involved assumed that the rules of *Martin* and *Pollard* applied equally to offshore as well as inland navigable waters. The question of offshore application took on practical consequences when, in the early 1930s, it was learned that California's oil fields extended offshore. Producers applied to the Department of the Interior for oil and gas leases or prospecting permits. Interior rejected the applications, explaining that the state and not the federal government owned the offshore lands.[5] As further evidence of its assumption of state ownership, the federal government sought title from the states when it needed submerged lands in the territorial sea. *United States v. California*, 332 U.S. 19, 39 (1947).

In the early 1940s the federal government began to reassess its legal position. Secretary of the Interior Ickes concluded that the United States

4. At the risk of severe oversimplification we can define American navigable waters as those which are "navigable in fact" or are "subject to the ebb and flow of the tide." However, readers who are dealing with a navigability issue should consult the numerous authorities and extensive body of case law on that issue.

5. A congressional committee was provided with 21 such decisions of Interior. Senate Committee on Interior and Insular Affairs, S.J. Res. 20, 82nd Cong., 1st sess., p. 562.

might indeed have a claim to offshore submerged lands because previous litigation had dealt only with inland waters and the shore between the high- and low-tide lines. He suggested to President Roosevelt that the attorney general bring an action to test the proposition.[6]

In the fall of 1945 the attorney general filed an action challenging California's right to offshore submerged lands and the minerals that they held.[7] He went directly to the Supreme Court, asking that it declare the United States to be "the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles . . . ."[8]

The United States asserted title to the territorial sea and its bed in two capacities "transcending those of a mere property owner." 332 U.S. at 29. The first was described as "the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean." *Id*. In addition, the government contended that "proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and land under it." *Id.*

California defended its claim on two unrelated theories. First it emphasized that its original constitution, adopted in 1849, included a 3-mile offshore belt and that boundary was ratified by the Enabling Act that

6. At about the same time the United States took an unprecedented step claiming, with respect to the international community, all "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Proclamation No. 2667, September 28, 1945, 59 Stat. 884. That claim did not rest on any theory that our navigable waters or boundaries extended so far offshore. In fact, the Proclamation specifically provided that the waters above the continental shelf remained high seas. The United States' action was generally accepted by the international community and the concept was codified in the Convention on the Continental Shelf, Geneva, 1958, 15 U.S.T. 471.

7. Actually, the federal government had filed a similar test case some six months before, not against the state but one of its lessees, the Pacific Western Oil Company, in the United States District Court for the Southern District of California. That action was dismissed when the government decided that it was more appropriate to test the constitutional issue in the Supreme Court and with the state as a party.

8. The United States invoked the Supreme Court's jurisdiction under Article III, Sec. 2 of the Constitution which provides that "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." All subsequent tidelands cases save one have been filed as Supreme Court Original actions. The exception, to determine the status of Cook Inlet, Alaska, was filed in the United States District Court for the District of Alaska because the government was concerned that a single tidelands issue, in a limited geographic area, might not justify an Original action. When the case completed its course through the Federal District and Circuit courts, the Supreme Court went out of its way to note that it had not been informed why the matter wasn't initiated as an Original action. *United States v. Alaska*, 422 U.S. 184, 186, n.2. (1975). Thereafter all such cases were initiated in the Supreme Court.

admitted California to the Union. 9 Stat. 452.[9] The state also relied heavily on an equal footing argument. It assumed, from *Martin v. Waddell*, *Pollard v. Hagan*, and their progeny, that the original states had entered the Union with territorial seas and that it must have done so too.

And that is where the issue was joined. Following California's Amended Answer to the Complaint, the United States moved for judgment.[10] Despite the fact that the parties relied upon extensive factual evidence regarding the history of the law of the sea, they proceeded without evidentiary hearings, referring instead to published authorities in briefs and argument to the Court.

On June 23, 1947, the Court issued the first of its many "tidelands" opinions. Its first step was to test California's assumption that the original states had entered the Union with territorial seas. We recall that *Martin v. Waddell*, which involved the bed of Raritan Bay, was decided in favor of New Jersey's grantee because under English common law the sovereign held title to lands beneath "navigable waters" as an attribute of sovereignty, not merely as a property owner. Because "navigable waters" included a 3-mile territorial sea in the 19th and 20th centuries, California (and most everyone else) assumed that the *Martin v. Waddell* doctrine applied equally offshore. But the United States argued, and the Supreme Court agreed, that a distinction should be made.

As a matter of fact, the Supreme Court found that although England claimed title to inland "navigable waters," in 1776 "the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a 3-mile ocean belt for colonial or state ownership." 332 U.S. at 32. "At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a 3-mile water belt along its borders." *Id.* "From all of the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it . . . ." *Id*. at 31.

In fact, the United States, acting after independence, is generally credited with having been in the forefront of efforts to establish an offshore belt of

9. It is interesting to note that California's belt was described as extending "three English miles from the shore." Cal. Const. (1849) Art. XII. An English, or statute, mile runs 5280 feet. Territorial seas are traditionally measured in nautical, or geographical, miles of approximately 6080 feet. The federal complaint claimed 3 nautical miles, a line almost one-half mile seaward of California's constitutional boundary. The difference played no role in the Court's analysis or decision.

10. California's first effort, exceeding 500 pages in length, more resembled a brief than an Answer and was ordered stricken by the Court on the United States' motion.

maritime sovereignty. Scholars traditionally cite Secretary of State Jefferson as the author of the United States' first official claim to a territorial sea in 1793. *Id*. at 33.[11] Cited at 332 U.S. at 33 n.16. England, by contrast, was said to have "considerable doubt" as to the scope, and even the existence, of a marginal belt almost 100 years later. *Id.* at 33, citing *The Queen v. Keyn*, 2 Ex. D. 63 (1876).

Hence, the rationale behind *Martin v. Waddell* did not apply offshore. Because England claimed no territorial sea in 1776, the original states could have succeeded to no rights from her seaward of the coast line.

The Court went on to consider whether local or national interests were predominant in the 3-mile belt. In *Pollard* it had emphasized the importance of inland waters to local concerns. In *California* it found the opposite to be true for the 3-mile belt. It reasoned that "insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.

"The ocean, even its 3-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation." *Id.* at 35. (Footnotes and internal citations omitted.)[12]

As if to emphasize its findings, the Court said "[n]ot only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty." *Id*. at 34. For these reasons the Court determined not to "transplant the *Pollard* rule" of state sovereignty over the beds of inland water "out into the soil beneath the ocean." *Id.* at

11. Note to the British Minister. Reprinted in H. Ex. Doc. No. 324, 42nd Cong., 2d Sess, (1872) 553-554. Jefferson repeated his position in a note to French Minister Benet, American State Papers, 1 Foreign Relations (1883), 183, 184.

12. Some have since suggested that this strong language from the Court may have been prompted by the fact that World War II was still in the minds of all Americans. Although that may be so, and we have no way of knowing, the Court's reasoning and conclusions seem sound in whatever context.

36. It reasoned that "if this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters . . . the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." *Id.*

The Court made short work of the state's constitutional boundary argument acknowledging that coastal states might well have offshore boundaries within which police powers might be enforced. *Id*. at 36. But, it concluded, such boundaries "do not detract from the Federal Government's paramount rights in and power over this area." *Id.*[13] The Court concluded that "California is not the owner of the three-mile marginal belt along its coast, and . . . the Federal Government rather than the State has paramount right in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including the oil." *Id.* at 38-39.

Four months after issuing its opinion the Court entered a decree implementing it. *United States v. California*, 332 U.S. 804 (1947). Although that decree clearly resolved all issues raised by this litigation, it contained language, or more accurately omitted language, which may create questions in future litigation. The United States proposed a decree that, consistent with the Prayer in its Complaint, would have described the federal interest in the territorial sea as "paramount rights of proprietorship."[14] But the Court did not include the words "of proprietorship" in its decree. Without explanation it described the federal interest only as "paramount rights." *Id*.

The Court's failure to use the terms "fee simple," as requested in the Complaint, or "proprietorship," from the proposed decree, has left some

13. California also raised a number of legal arguments which were rejected by the Court. First, it contended that the federal Complaint raised no "case or controversy," as required by Article III, Sec. 2 of the Constitution, because the relief sought was not directed to a specific area of the California coast. The Court found that "such concrete conflicts as these constitute a controversy in the classic legal sense, and are the very kind of differences which can only be settled by agreement, arbitration, force, or judicial action." *Id.* at 25. Second, the state argued that the attorney general had not been authorized to file the action. It cited the fact that Congress had acted as if the states controlled the 3-mile belt and had twice considered, and refused, to give the attorney general authority to bring this very lawsuit. The Court pointed to the attorney general's broad authority "to institute and conduct litigation in order to establish and safeguard government rights and properties," and that authority had not been revoked. *Id.* at 27 and 28-29. Finally, California contended that the federal government had lost its paramount rights through the Department of the Interior's early position that California, and not the United States, held rights to the maritime belt. Again the Court disagreed, saying "even assuming that the Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *Id.* at 39- 40.

14. The federal Complaint had sought a declaration that the United States is "the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value" in the marginal belt.

doubt about the exact nature of the federal interest. Justice Frankfurter seemed later to suggest that the federal interest was something less than fee title. *United States v. Texas*, 339 U.S. 707, 723-724 (1950) (dissenting opinion). Yet language in the California opinion can be read to support a contrary conclusion. In describing the stakes at issue the Court said "the crucial question on the merits is not *merely* who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities *transcending* those of a mere property owner." 332 U.S. at 29 [emphasis added].

As George Swarth later noted, "that language certainly seems to recognize ownership as a part, though only a part, of the matter in issue; and the language of the decree as entered, declaring the United States to have 'paramount rights in, and full dominion and power over' the submerged lands and resources can hardly be read as excluding any element of total dominion, both sovereign and proprietary. This is particularly evident when it is remembered that the precise rights involved, as to which the United States prevailed, were rights to exploit the minerals — rights that are obviously proprietary in character." Swarth, *supra*, at 116.

Mr. Swarth's analysis would seem to be sound. Yet rights in the sea, even within 3 miles of the coast, have never included the total "bundle" of property interests associated with upland ownership and the Court may have wanted to discourage future temptations to equate the two. By limiting its decree to "paramount rights" in the land and resources the Court may have been resolving the question at hand, rights to undersea oil and gas, without opening unanticipated controversies.[15]

The import of the decision was clear. The federal government, and not the individual states, had the exclusive right to explore and exploit the mineral resources of the sea beyond the limit of inland waters. But the matter was not entirely resolved. Texas and Louisiana had also issued offshore leases based upon claims that they believed would distinguish their circumstance from that of California. Little more than a year after entry of the California decree the federal government brought Original actions against those two Gulf Coast states.

15. President Truman had followed a similar course with his Proclamation of September 28, 1945. There he claimed only "the natural resources of the subsoil and sea bed of the continental shelf," studiously avoiding claims of sovereignty or proprietorship over the area generally. Proclamation No. 2667, 10 Fed. Reg. 12303. The international community did the same with the Convention on the Continental Shelf, Article 2 of which gives the coastal nation state "sovereign rights for the purpose of exploring it and exploiting its natural resources" but goes on to specify that the legal status of the waters or airspace is not affected (Article 3), submarine cables and pipelines may not be impeded (Article 4), and navigation, fishing, conservation and scientific research may not be unreasonably interfered with (Article 5). 15 U.S.T. 471. Clearly exclusive rights to resources were being distinguished from traditional fee title.

United States v. Louisiana: The Statutory Boundary

Putting aside Louisiana's jurisdictional and procedural defenses – which were given short, if any, shrift by the Court – the only difference between its case and California's was the extent of their offshore claims. California, it will be remembered, had a constitutional boundary of 3 English miles. Louisiana claimed a statutory boundary 27 miles offshore. 6 Dart, La. Gen. Stats. (1939) Secs. 9311.1-9311.4. In its *Louisiana* decision the Court made clear what was implicit in *California*, that it was making no determination "on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension vis a vis persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem." *United States v. Louisiana*, 339 U.S. 699, 705 (1950).

The Court concluded that there were no distinctions between Louisiana and California that would alter the outcome. With respect to Louisiana's 27-mile claim it explained that "if . . . the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit is also. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so." *Id*.

Louisiana stood in no better stead than had California and the Court ruled that its earlier opinion controlled. A decree was entered acknowledging the federal government's "paramount rights in, and full dominion and power over" all lands within 27 miles of Louisiana's coast. *United States v. Louisiana*, 340 U.S. 899 (1950).

United States v. Texas: The Pre-Admission Boundary

Texas presented a previously unconsidered, and presumably more difficult, legal question for the Supreme Court.

California, we recall, lost its claim to offshore resources because it wrongly assumed that the original states had entered the Union with rights in the marginal sea and that it acquired similar interests under the equal footing doctrine. The Court found that England had not claimed a marginal sea prior to 1776 and, therefore, the original states succeeded to no such rights. Texas, however, stood on entirely different ground.

Prior to its admission to the Union, Texas was neither an English colony nor an American territory. It was a sovereign republic, proclaimed as such in 1836 and soon thereafter formally recognized by the United States and the community of nations. *United States v. Texas*, 339 U.S. 707, 713 (1950).

At the time of American recognition, Texas had a statutory boundary running 3 marine leagues offshore in the Gulf of Mexico. 1 Laws, Rep. of Texas, p. 133, December 19, 1836.[16] It seemed indisputable that, at least during that period, Texas held both dominium (property rights) and imperium (governmental powers) in its marginal belt.

Nine years later Texas joined the United States. Discussions leading up to that union involved, among other things, title to public lands within the new state and responsibility for its public debt. In a trade-off it was agreed that Texas would "retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands are . . . to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States." Joint Resolution [annexing Texas] approved March 1, 1845, 5 Stat. 797.[17]

Texas had two arguments not available to California and Louisiana. It had sovereignty over a marginal sea prior to joining the Union and, it contended, the submerged lands below were among those "vacant and unappropriated lands" that the republic had specifically retained at statehood when the federal government refused to assume its liabilities.

The United States argued that the term "vacant lands" was never intended to include submerged lands. But the Court's approach made that question moot. It returned to the equal footing doctrine as the foundation of its analysis. Conceding that the Republic of Texas held full sovereignty over the marginal sea, and "all the riches that it held," the Court went on to describe the necessary legal consequence of its joining the Union. At that point, it said, "she . . . became a sister State on an 'equal footing' with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation." 339 U.S. at 717-718. And, critically, it held that "as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States." *Id*. at 718.

Though Texas contended, and the Court recognized, that property rights and sovereignty are normally separable, it was not to be in these

16. A marine league is equivalent to 3 nautical miles. *United States v. Louisiana et al.*, 363 U.S. 1, 9 n.6 (1960). The 9-mile claim was not unusual at that time for nations with a Spanish heritage.

17. Texas did cede to the United States specified defense fortifications within its boundaries and "all other property and means pertaining to the public defense." 339 U.S. at 714. The United States, undoubtedly buoyed by the Court's emphasis on defense interests in the California decision, argued that the marginal seas were a defense necessity and, therefore, fell within the cession. The Court ruled on different grounds.

circumstances. The Court concluded that "this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty." *Id.* at 719. By way of explanation the Court expanded on its reasoning from the *California* decision saying "once the low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities." *Id.*

It then focused on the equal footing element, holding for the first time that "the 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among the States. For equality of States means that they are not 'less or greater, or different in dignity or power.'" *Id.* at 719-720.[18]

The original states had not entered the Union with offshore property rights; nor had subsequently admitted states from the territories. Consequently it mattered not that Texas had had such rights as a republic. It could join the Union only on an equal footing with its predecessors, which meant foregoing its offshore rights.

The *California*, *Louisiana*, and *Texas* decisions had been anchored on a determination that the original states joined the Union with submerged lands rights that ended at the open sea. But the original states had not had their day in Court. They soon remedied that shortcoming.

United States v. Maine: The Colonial Charters

Despite the Supreme Court's clearly and consistently stated rulings in the *California*, *Louisiana*, and *Texas* cases the East Coast states were determined to have a bite at the apple. The earlier tidelands cases had

18. Interestingly, the Court was faced with the reverse of this question within four years. It could be said that the *California, Louisiana*, and especially the *Texas* decisions rested substantially on the Court's insistence that an equality in offshore rights is essential to equal footing. In 1953 Congress granted offshore rights to the coastal states. 43 U.S.C. 1301 *et seq.* But it did not make equal grants. The states generally were given 3-mile belts of submerged lands. The Gulf Coast states, by contrast, were granted an opportunity to prove a right to 9 miles. Texas and Florida did so. Alabama and Rhode Island attempted to sue, challenging the constitutionality of the Submerged Lands Act. The Supreme Court denied the states' motions to file their complaints and found the Act a valid exercise of congressional authority to dispose of public property. Apparently the equal footing clause did not guarantee equal offshore rights after all. *Alabama v. Texas et al.*, *Rhode Island v. Louisiana et al.*, 347 U.S. 272 (1954). Of course non-coastal states received no benefit at all.

turned, in large part, on the Court's understanding that the original colonies had no maritime rights in 1776. Yet the original states had not participated in those controversies, except in limited *amici* roles. All of the states bordering on the Atlantic claimed extensive property rights offshore and one, the State of Maine, issued leases to submerged lands claimed by the United States. In 1969 the federal government sought leave of the Supreme Court to file an Original action to clear its title.[19] All of the Atlantic states were named as defendants and each (except Florida) claimed that its original colonial charter encompassed, in addition to uplands, a significant portion of the adjacent sea.[20]

The federal government moved for judgment immediately, arguing that the *California*, *Louisiana*, and *Texas* decisions governed. The states moved for the appointment of a special master to take evidence, make findings of fact and conclusions of law, and recommend a decree to the Court. The states' motion was granted and Judge Albert B. Maris of the United States Court of Appeals for the 2nd Circuit was appointed.

In light of the tidelands precedents, the states appeared to face an uphill battle. But they proceeded undaunted. First, they argued that the prior cases were wrong in two respects. The Court, they said, had improperly concluded that the original states entered the Union with no offshore rights and that such rights would necessarily have been transferred to the national government at independence. Second, they said that Congress had subsequently repudiated the decisions. On these grounds, they argued, the earlier cases should be overruled.

Special Master Maris questioned his authority to overrule the prior Supreme Court decisions but agreed, nevertheless, to hear the states' evidence. Fourteen days of trial focused primarily on the history of English claims to its adjacent seas. Much of the documentary evidence to which the Court had been referred in the *California* case was introduced and commented upon by witnesses of international renown offered by both sides. The evidence was fascinating from a historical perspective. It began with English maritime positions before 1603, which the master found not to involve claims to property. *United States v. Maine, et al.*, Report of the

19. By this time the context differed from that in which the first three cases had been litigated. In 1953 Congress passed the Submerged Lands Act giving the states all mineral rights within 3 miles (3 leagues for some Gulf states) of the coast. 43 U.S.C. 1301 *et seq.* So unlike California, Louisiana and Texas, the Atlantic states were not fighting for that belt. Rather they were reaching for property beyond the 3-mile limit, sometimes as much as 100 miles offshore.

20. Florida based its claim on its constitutional boundary, rather than a colonial charter, and soon asked to be severed from the *Maine* case, arguing that its contentions raised factual questions having nothing in common with the issues raised by the other Atlantic states. Florida was severed and its issues were consolidated with others pending from *U.S. v. Louisiana et al.*, Number 9 Original. The new case was denominated 52 Original and assigned to the Honorable Albert B. Maris, who was also handling the *Maine* case for the Court.

Special Master of August 27, 1974 at 27.[21] Continued through the Stuart era (1603-1688), during which property interests could be said to have been claimed. Report at 29-40. Became limited to the nebulous concept of a narrow coastal belt in the 18th century. Report at 40-47. And eventually evolved, in the 19th century, to the 3-mile belt that caught on and became the international standard for most of a century. *Id*. But the master concluded that "when in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied." Report at 47.

The states also contended that the charters contained boundaries into the sea of up to 100 miles offshore. The master thoroughly reviewed the charters and considered the states' contentions but found no evidence of maritime boundaries. Report at 47-56.

In response to the Supreme Court's oft repeated rationale that what happens seaward of the coastline is matter for the federal government in the conduct of foreign affairs, the states offered testimony that a ruling on their behalf "would not inhibit or embarrass the federal government in carrying out its foreign affairs and defense responsibilities." Report at 23. Nevertheless, the master understood the Court to have been referring not to a factual question of the relative needs of the state and federal governments but to a legal, constitutional principle that the federal government's responsibility for foreign commerce, foreign affairs, and national defense dictated federal paramountcy in the marginal sea.

Judge Maris concluded that the Supreme Court had been correct in prior tidelands decisions. The historic evidence suggested no basis for their reversal. He turned next to the states' contention that the prior cases had been repudiated by Congress.

In summary, the states contended that by granting them a maritime belt to undo the result of the earlier Supreme Court decisions Congress was indicating that its responsibilities for conducting foreign affairs, commerce, and defense could be carried out without a paramount right to minerals in the territorial sea. But in so arguing, the states seemed to ignore the obvious. The Atlantic Coast states were not fighting for a 3-mile belt, but for a vast area beyond. The master rejected their argument reasoning that

21. Hereinafter "Report at [page number]." As with all of the tidelands cases in which special masters were involved, much of the analysis necessary to understand the case and its resolution is contained in the Reports of those masters. Unfortunately those Reports are not readily available to the legal researcher. They can, of course, be reviewed at the Supreme Court. All of the Reports discussed in this volume except those in *United States v. Alaska*, Number 84 Original; *New Hampshire v. Maine*, Number 64 Original; and *Georgia v. South Carolina*, Number 74 Original, have been collected in a volume with the cumbersome title, *The Reports of the Special Masters of the Supreme Court in the Submerged Lands Cases 1949-1987* (1991) by Reed, Koester and Briscoe.

rather than repudiating the Court's decisions Congress was actually acting pursuant to them. Congress disposed of a narrow belt to the states and, much more significantly, it made clear that the submerged lands seaward of that belt were being retained by the federal government. Report at 17-19, citing 43 U.S.C. 1302. As the Master explained, "Congress could reserve to the federal government all rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the California case." Report at 19. The Atlantic states were seeking only areas that Congress had expressly retained for itself. The Master recommended judgment for the United States.

The states took exception to the master's findings and recommendation. But the Court adopted the Report *en toto.* It confirmed the master's understanding that prior tidelands decisions had not depended on an absence of prior ownership. The *Texas* decision made clear that a constitutional principle prevented a state from retaining rights in a maritime belt upon joining the Union. *United States v. Maine,* 420 U.S. 515, 522-523 (1975).

The Court also commented on the contention that Congress had repudiated the bases for the earlier decisions, saying "it is our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act . . . ." *Id.* at 524. The congressional transfer, it pointed out, was merely an exercise of the federal government's paramount authority in the area. And, agreeing with its master, the Court noted that as part of the granting legislation Congress had expressly provided that nothing therein "shall be deemed to affect in any wise the rights of the United States to . . . [those same resources] lying seaward and outside of [the granted belt], all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed." *Id.* at 525- 526, quoting 43 U.S.C. 1302. A decree acknowledging the exclusive federal right to lands and resources seaward of the grant to the states was entered. *United States v. Maine, et al.*, 423 U.S. 1 (1975).

This then was the end of state offshore claims on bases other than the Submerged Lands Act. According to the Court, "a principal purpose of [the Submerged Lands Act] was to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea." 423 U.S. at 527, citing H.R. Rep. No. 215, 83rd Cong., 1st Sess., 2 (1953). If that was so, the Congress has been mightily disappointed. Litigation over who owns resources in the marginal belt was immediately replaced by a plethora of lawsuits to determine the outer limit of the

congressional grant. After a short detour to look at the terms of the grant itself we will continue with a review of those cases and the law that they have produced.

CHAPTER 2

THE SUBMERGED LANDS ACT

In 1945, the same year that the United States filed its complaint in *United States v. California* (and two years before the Supreme Court announced its decision), Congress began to consider legislation that would convey federal interests in the marginal sea to the states. The express purpose of later bills was "to preserve the status quo as it was thought to be prior to the California decision." H.R. Rep. No. 1778, 80th Cong., 2d Sess., to accompany H.R. 5992, at 2 (April 21, 1948). That is, to fix "as the law of the land that which, throughout our history prior to the Supreme Court decision in the *California* case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective states are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters." H.R. Rep. No. 695, 82nd Cong., 1st Sess., to accompany H.R. 4484, at 5 (July 12, 1951).[22]

Early bills made it through the Congress but were vetoed by President Truman. *Id.* at 22 n.25. The subject became a matter of presidential politics in the election of 1952 when General Eisenhower pledged to sign such legislation if given the opportunity. He was, of course, elected and on May 22, 1953, the Submerged Lands Act was signed into law.[23]

Trying to discern what the states actually got from the Act can be confusing because of the way in which Congress seemingly modified the grant provision through the definitions section. But its upshot can be summarized as follows:

All coastal states were granted submerged lands, and natural resources rights, to a distance of 3 nautical miles from their coast lines, defined as the line of ordinary low water and the seaward limit of inland waters.[24]

The five Gulf Coast states were given an opportunity to prove the existence of boundaries of up to 9 nautical miles. (Here the pre-admission boundaries played a role.)

22. Although the states typically sought to recover "lands within their boundaries" or "lands within their boundaries at the time they entered the Union," Attorney General Clark reminded Congress that of the original 11 coastal states none had expressly claimed a 3-mile offshore boundary at the formation of the Union, and only 5 had subsequently done so. *United States v. Louisiana*, 363 U.S. 1, 21 n.22 (1960).

23. Public Law 31, 83rd Congress, 1st Session; 67 Stat. 29; 43 U.S.C. 1301 *et seq.*

24. One must sift through some of the confusion to reach this characterization. Section 3 of the Act makes a grant of "lands beneath navigable waters within the boundaries of the respective States" including their natural resources. That language alone might have encouraged coastal states to renew their claims to extraordinary maritime boundaries. However, in its definitions section Congress provided that "in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical [nautical] miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues [nine nautical miles] into the Gulf of Mexico." Section 3(b).

Existing 3-mile boundaries were approved as were future state claims to that distance.

States bordering on Lakes Superior, Huron, Erie, and Ontario had their jurisdictions confirmed to the international boundary with Canada.[25]

Other inland waters and their beds were confirmed to the states.[26]

The grant included title to natural resources within the marginal sea, including oil, gas, other unspecified minerals, fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and "other marine animal and plant life." Water power was specifically excluded from the definition of natural resources.

Explicitly excluded from the grant were lands: acquired by the federal government, retained by it at the time of statehood, or presently occupied under claim of right. In addition, the federal government retained its navigational servitude.

Finally, and perhaps most important, Congress disclaimed any effect on federal interests seaward of the grant.[27]

But Congress did not make all of the coastal states happy. Within months of its passage, the Submerged Lands Act was attacked as unconstitutional. Alabama and Rhode Island, in separate motions, went directly to the Supreme Court, asking that it entertain another Original action. They sought to sue Texas, Louisiana, Florida, and California and the secretaries of the treasury, navy, and interior, as well as the treasurer of the United States.[28]

The states raised two constitutional questions. First, they alleged that the Submerged Lands Act's purported grant went beyond Congress's power to dispose of public lands because, unlike uplands, the submerged lands and their natural resources were held in trust for all the states. Second, they alleged that the grant violated the equal footing clause in two specifics. It was said to constitute "unequal" treatment because only the defendant states were thought, at the time, to have valuable offshore minerals. And,

25. That boundary divides the lakes between Canada and the United States. Their waters are considered inland by both nations (that is to say there is no territorial sea extending 3 miles from their shores nor high seas in their centers). The federal government had not questioned the right of the individual states to the beds of those lakes.

26. Again, the federal government had not questioned the states' right to inland waters, either bays, rivers and lakes or the coastal tidelands. But those waters were included within the Act lest the federal government change its mind, as it had done with the maritime belt.

27. Less than three months later the Outer Continental Shelf Lands Act became law. Public Law 212, 83rd Congress, 1st Sess., 67 Stat. 462, 43 U.S.C. 1331 *et seq.* Through it Congress specifically asserted federal jurisdiction over that portion of the continental shelf lying seaward of the grant to the states and set up a scheme for the federal administration of its minerals.

28. The State of Arkansas had already filed a similar challenge to the Act's constitutionality in the United States District for the District of Arkansas. Only federal officials were named as defendants there. The issues in that case became moot when the Supreme Court ruled in the *Alabama* and *Rhode Island* actions.

because certain Gulf states would enjoy a 9-mile grant while others got only 3 miles.[29]

In an unusual step the Court denied the states' motions even to file complaints. Its *per curiam* opinion of March 15, 1954, disposed of each of their contentions in less than a page.[30]

The Court tersely stated that "the power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'" *Alabama v. Texas*, 347 U.S. 272, 273 (1954). It went on, quoting from *United States v. Midwest Oil Company*, "for it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress may deal with such lands precisely as a private individual may deal with his farming property." 236 U.S. 459, 474. That congressional authority comes from Article IV, Section 3, Clause 2 of the Constitution, which provides that "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States."

The Court did not deny that the federal government holds lands in "trust" for all citizens, but held that the Constitution leaves it to Congress alone to determine how to administer that trust. *Id.* at 273. That power, it said, "is without limitation." Citing *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940).[31]

The Court was clear. The Submerged Lands Act is constitutional even though it is a step backward from equal footing. Under the Constitution, Congress could administer the public lands without help from the judiciary.

But the *per curiam* decision in *Alabama v. Texas* seems to assume a fact not previously decided. In the original *California* case the federal government asked the Court to declare its complete title to the lands beneath the marginal sea. The Court refused to do so, going so far as to delete such language from a draft decree offered by the United States. Instead, the Court found the United States to have "paramount rights" in the area. After the *California* decision, scholars debated whether that term described something more or less than fee title. The Court may have settled

29. States with no coastline were in an even more "unequal" position.

30. A *per curiam* opinion, literally "by the court," does not carry the name of a particular justice as author. More typically the author of a decision is identified as are other justices who have joined in that opinion.

31. See also, on this authority over public lands, *Camfield v. United States*, 167 U.S. 524 (1897); and *Light v. United States*, 220 U.S. 536 (1911).

that argument, unintentionally, in the *Alabama* case.

Article IV of the Constitution, and the prior judicial decisions relied upon in *Alabama v. Texas*, clearly apply to property rights. If the Act is constitutional because it reflects an exercise of Congress's unfettered authority over federal property, then it is difficult to see why the decree proposed by the United States in the *California* case was not entered by the Court.

Justice Reed, concurring in the *per curiam* opinion, sought to shed some light on this issue. He acknowledged that the Court had not previously recognized federal proprietorship over the submerged lands beneath the marginal sea. Nevertheless, he pointed out, the Court had recognized the federal government's paramount rights "an incident to which is full dominion over the resources of the soil under that water area, including oil." *Id*. at 275; quoting *United States v. California*, 332 U.S. at 38-39. "This incident," Justice Reed went on to say, "is a property right and Congress had unlimited power to dispose of it." 347 U.S. at 275. Justice Reed appreciated the fact that if the Court's rationale relied upon congressional authority over federal property, someone had better define the property interest involved. He seems to conclude that the minerals beneath the surface are property and fit the bill. Most readers would probably assume from the *per curiam* opinion that the Court was referring to the seabed itself when using the terms "property, public lands, and public domain." It made no such clear statement. The concurring opinion sought to fill the gap without concluding that the seabed was, necessarily, the federal "property" being disposed of. *Id*. at 275-276.[32]

Of course the ownership issue is moot for Submerged Lands Act purposes. The states now have whatever rights the federal government once held to the submerged lands beneath the 3-mile marginal sea. The Supreme Court has found the congressional grant to be constitutional and there is no appeal from that ruling. But we have spent time with the nature of the prior federal interest because it may have some bearing on other future issues. For example, federal environmental legislation sometimes imposes cleanup liability on anyone in a "property's" chain of title. The relevance of prior title may emerge in untold circumstances that are entirely unrelated to traditional tidelands litigation. Whether the federal government ever had

32. Congress had avoided that problem by simply quit claiming "all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources." Section 3(b)(1). Its purpose was achieved without entering the fray over seabed ownership.

"title" to the bed of the marginal sea does not seem to have been resolved.[33]

Any hope that the Submerged Lands Act would put an end to tidelands litigation was short lived. Most federal legislation seems to be followed by a spate of litigation to resolve questions either not foreseen by Congress or deliberately left unresolved in its give and take process. The Submerged Lands Act was no exception. Many questions were left to be answered before the state and federal land managers could define the boundary that separates their offshore domains.[34] We turn now to a consideration of the numerous Supreme Court decisions that have produced that boundary and, at the same time, put meat on the bones of international maritime boundary law.

33. Two justices also wrote dissents to the *per curiam* opinion. Justice Black saw the controversy as too important to dispose of without full consideration and would have permitted the case to go forward. He strongly felt that the marginal sea is so central to our international relations that its administration should not be delegated to the states. He also expressed concern about the possibility that one state might discriminate against citizens of other states if given jurisdiction over resources of the marginal sea. *Id.* at 278-279.

Justice Douglas followed Justice Black's lead in expressing concern over the abdication to the states of responsibility for an area of national interest. But he chose an odd example to make the point. He asked, apparently rhetorically, "could Congress cede the great Columbia River or the mighty Mississippi to a State or a power company? I should think not. For they are arteries of commerce that attach to the national sovereignty and remain there until and unless the Constitution is changed . . . . It therefore would seem that unless we are to change our form of government, that domain must by its very nature attach to the National Government and the authority over it remain nondelegable." *Id.* at 282. Of course the Columbia and Mississippi had already been "ceded" to the states through which they pass. They are both navigable rivers, the beds of which were only held in trust by the federal government for the future states. The Supreme Court made that clear in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). That title has not been contested in any of the tidelands cases. The Submerged Lands Act did not give the states more offshore than they had in inland navigable waters. States have, since 1953, administered their interests in the marginal sea without a threat to our form of government.

34. It is an interesting footnote to this history to note that the attorney general sought to avoid that litigation by asking Congress to include with the Submerged Lands Act a map with a line separating federal and state interests in the sea. Hearings before Committee on Interior and Insular Affairs on S.J. Res. 13 and other Bills, 83rd Cong., 1st sess. 926 (1953). Had that course been adopted we could end our discussion here.

CHAPTER 3
THE SUBMERGED LANDS ACT ISSUES

Having ruled the Submerged Lands Act constitutional, the Supreme Court became almost immediately embroiled in litigation associated with its implementation. Congress left two critical questions unanswered in the Act; they were the breadth of the grant as to any given coastal state and the baseline from which the grant was to be measured. Both issues were foreseen but left for judicial determination.

INTERPRETING THE SUBMERGED LANDS ACT

The extent of a given state's Submerged Lands Act grant depended upon whether either of two specific provisions applied to it. The first was the extraordinary 9-mile grant available to Gulf Coast states that could prove historic offshore boundaries of that breadth. All five Gulf states sought to prove such boundaries. Only two succeeded. The second consideration was Section 5 of the Act that provided exceptions that might prevent transfer of certain submerged lands within 3 (or 9) miles of the coast line.

These "non-coast line" questions have played an important part in tidelands litigation.

The Geographic Extent of the Grant

Although members of Congress often described their purpose as "putting the states in the position that they were thought to hold prior to the Supreme Court's decision in the first California case" or "conveying interests to the limits of state boundaries in the sea," in fact the grant was much more precise. As a general proposition it gave the coastal states specified rights within 3 nautical miles of the shore. No matter if a state's boundary lay more than 3 miles offshore, it got only that distance. In the converse, if a state had no offshore boundary, or one of less than 3 miles, it was authorized to amend its boundary to take advantage of the 3-mile grant.

There was one significant exception. Gulf Coast states were granted up to 3 marine leagues (9 nautical miles) if they had entered the Union with a more expansive boundary or such a boundary had been "heretofore approved by Congress." All Gulf Coast states claimed the 9-mile grant. The United States filed an Original action in which they were all joined. It claimed that none was entitled to more than 3 nautical miles. The Supreme Court again considered the case without the help of a special master, relying

on the parties' pleadings and volumes of historic documents.

It quickly dismissed the general contentions of both sides denying, for example, the federal claim that no state could have a boundary seaward of that claimed by the nation and the states' allegation that the Act granted each of them an automatic 3-league belt.[35] Instead, the Court concluded, it was bound to test the evidence of each claimant state against the criteria set out in the Act. It described the Act as having created a "twofold test" for acquiring a 3-league grant. Either the state had to show that it had boundaries in excess of 3 nautical miles at the time of its admission to the Union or it had to show that Congress had subsequently approved such a boundary. *Id*. at 27. The Court then turned to an analysis of each of the state's evidence.[36]

Texas demanded a majority of the Court's attention and 30 pages of the majority opinion. Texas declared independence from Mexico in 1836. That same year it enacted boundary legislation that included a 3-league marginal belt.[37] Within a year of its independence the United States recognized the Republic of Texas and in 1845 Texas joined our Union. *Id.* at 37.

The question for the Court was whether Texas had a 3-league boundary at the time of its admission. Although its 1836 statutory boundary remained on the books, no boundary was included in the Annexation Resolution. What is more, Congress was well aware that Texas and Mexico had serious disagreements as to the boundary of the republic. Weighing in favor of Texas was the fact that only land boundaries were in dispute (Mexico had not contested the maritime boundary). But the Court also looked to post-admission federal positions in approaching the issue. It pointed out that the United States government pursued the Texas boundary position in subsequent negotiations with Mexico and that the resolution, incorporated into the Treaty of Guadalupe-Hidalgo, 9 Stat. 922, was a boundary between the two countries that commenced 3 leagues offshore. *Id.* at 58. That boundary was reaffirmed in the Gadsden Treaty of 1853, 10

35. In response to the federal position the Court reasoned that the Act had "purely domestic" purposes that created no irreconcilable conflict with the executive's international policy. *United States v. Louisiana*, 363 U.S. 1, 33 (1960). In other words, a state might have boundaries, for domestic purposes, which extend beyond our national boundaries.

The Court went to some lengths to distinguish between the powers of the executive and those of the legislature in these circumstances. Here it was the legislative branch, exercising its power to admit new states, that produced a 3-league maritime boundary. The executive's role in negotiating that boundary was an exercise of delegated authority from Congress, not a separate exercise of its own foreign affairs powers. According to the Court "the two powers can operate independently, and only the first is determinative in this case." *Id*. at 57.

36. The majority opinion, written by Justice Harlan, contains a thorough political history of the Gulf states, with particular emphasis on Texas.

37. The relevant portion of the boundary was described as "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico 'three leagues from the land,' to the mouth of the Rio Grande .... " *United States v. Louisiana*, 363 U.S. at 36.

Stat. 1031, and later international agreements. *Id.* at 61, n.104. Finally, the Court pointed to legislative history of the Submerged Lands Act that clearly expressed an intent to restore Texas's 3-league jurisdiction. It noted that the last sentence of Section 4 of the Act "was added for the specific purpose of assuring that the boundary claims of Texas and Florida would be preserved." *Id.* at 29.[38]

In reaching its conclusion with respect to the Texas boundary the Court said "although the Submerged Lands Act requires that a State's boundary in excess of three miles must have existed 'at the time' of its admission, that phrase was intended, in substance, to define a State's present boundaries by reference to the events surrounding its admission. As such, it clearly includes a boundary which was fixed pursuant to a mandate establishing the terms of the State's admission, even though the final execution of that mandate occurred a short time subsequent to admission." *Id*. at 61-62.

The Court concluded that "pursuant to the Annexation Resolution of 1845, Texas' maritime boundary was established at three leagues from its coast for domestic purposes." *Id*. at 64.[39] "Accordingly, Texas is entitled to a grant of three leagues from her coast under the Submerged Lands Act." *Id*.

Florida based its 3-league claim on alternative theories. Invoking both prongs of the "twofold" test, it contended that it had such boundaries at its original admission to the Union and that Congress had subsequently approved those boundaries. In a separate decision from that dealing with her sister Gulf Coast states, the Supreme Court concluded that it need only look at the latter position. *United States v. Florida*, 363 U.S. 121 (1960).

The Court's decision focused on Florida's readmission to the Union following the Civil War. The sequence of events is interesting. Florida was a member of the Union prior to the Civil War. At that time it did not have a 3-league boundary. *Id*. at 140-141 (dissenting opinion of Justice Harlan). It renounced the Union at the time of the conflict. The Reconstruction Act, 14 Stat. 428, required that the seceding states submit constitutions for congressional approval prior to their "readmission of Congressional representation." Florida submitted a new constitution that, for the first time, included a boundary description claiming a 3-league marginal belt in the Gulf.

Congress approved that constitution, among others, and Florida's right to representation in Congress was restored. 15 Stat. 73. Florida cited this

38. As to that point the Court was undoubtedly correct. The congressional delegations of Texas and Florida had played important roles in developing the Submerged Lands Act. If, seven years later, the Court had said that they had chosen the wrong words to carry out their clear intent those drafters would probably have been infuriated.

39. Immediately thereafter the Court cautioned that "we intimate no view on the effectiveness of this boundary as against other nations." *Id.*

congressional approval as meeting the Submerged Lands Act requirement. The United States disagreed, arguing that Florida was not "admitted" to the Union in 1848 but was "readmitted" in that year. It had had no such boundary at its admission. Justice Harlan, in dissent, considered the distinction especially relevant, *id.* at 133-134, particularly since the legislative history of the readmission act included no indication that Congress intended to change Florida's boundaries through readmission.

But the majority concluded otherwise. It noted that the new constitution had been examined and approved as a whole, while parts of Georgia's constitution were rejected. *Id.* at 126-127. Probably equally convincing was the fact that during consideration of the Submerged Lands Act "it was generally assumed that Congress had previously 'approved' [Florida's] three-league boundaries." *Id.* at 127-128. To top it off, Attorney General Brownell had acknowledged that "Florida's west coast would not be limited to the general three-mile line."[40]

Whatever the validity of legal arguments, as with Texas, congressional intent was relatively clear. The Submerged Lands Act was probably written with the purpose of assuring Florida a 3-league grant in the Gulf. The majority had no difficulty concluding that "Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores," *id.* at 128, and that approval "appears to be precisely the approval the [Submerged Lands] Act contemplates." *Id.* at 125. Florida was acknowledged to have a 3-league belt of submerged lands in the Gulf of Mexico.

For the Court's treatment of the remaining Gulf Coast states we return to the primary opinion in *United States v. Louisiana*. Louisiana, Alabama, and Mississippi founded 3-league claims on identical theories. Each entered the Union with a boundary that ran through the uplands "to the Gulf of Mexico," including all islands within either 3 or 6 leagues of the coast.[41] The states argued that in each case Congress had fixed a state boundary the specified distance from the coast. The federal government took the position that the language was used to include any such islands as parts of the states but not the intervening waters.

The Court accepted the federal argument. The boundary, it said, runs "to the Gulf" not "into" it, contemplating no territorial sea whatever. 363 U.S. at 67-68. The Court also reviewed pre-admission history, as it had

40. Hearings before Senate Committee on Interior and Insular Affairs on S.J. Res. 13, S. 294, S. 107 amendment, and S.J. Res. 18, 83rd Cong., 1st Sess. 931. Cited at 363 U.S. 120, n.15.

41. The language differed slightly among them. Louisiana's boundary included calls "to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast . . . ." 2 Stat. 701, 702. Mississippi's boundary ran "due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore . . . ." 2 Stat. 734. Alabama's read "thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore . . . ." 3 Stat. 489, 490.

done with Texas, but here could find no evidence of prior maritime claims of any breadth. *Id.* at 71 (Louisiana), at 81 (Mississippi) and at 82 (Alabama). The three states in the central Gulf could not establish a right to more than the general 3-nautical-mile maritime belt. *Id.* at 83.

The 1960 Supreme Court decisions answered one of the questions that Congress had apparently found too controversial for resolution in the statute. The 3-league controversy was not, however, entirely concluded.[42]

In *United States v. Louisiana*, 363 U.S. 1 (1960), the Supreme Court held that Texas qualified for the Submerged Lands Act grant of 3 marine leagues in the Gulf of Mexico, rather than the general 3-mile grant.[43] However, when the state and federal representatives tried to define Texas's offshore boundary they again came to loggerheads. The issue was whether the state's 3-league grant was to be measured from portions of the coast that had moved seaward since Texas's admission to the Union.[44]

In its second *California* opinion, 381 U.S. 139 (1965), the Supreme Court had recognized a congressional grant to be measured from the "coast line" and defined the "coast line" as an ambulatory line established according to the principles of the Geneva Convention on the Territorial Sea and the Contiguous Zone. Texas argued that it was therefore entitled to 3 leagues from its modern coast line. But the Court distinguished the two cases. It explained that the Submerged Lands Act included two separate types of grants. *United States v. Louisiana*, 389 U.S. 155, 156 (1967). "The first is an 'unconditional' grant allowing each coastal state to claim a seaward boundary out to a line three geographical miles distant from its 'coast line.' The second is a grant 'conditioned' upon a State's prior history. It allows those States bordering on the Gulf of Mexico, which at the time of their entry into the Union had a seaward boundary beyond three miles, to claim this historical boundary 'as it existed at the time such State became a member of the Union,' but with the maximum limitation that no State may claim more than 'three marine leagues'. . . ." *Id.*

42. Florida's actual boundary was eventually established in *United States v. Florida*, Number 52 Original, an action that included the interesting question of where the Atlantic Ocean ends and the Gulf of Mexico begins.

43. Actually the two decisions to be discussed here arise from *United States v. Louisiana*, which included at one time or another all of the Gulf Coast states. Only the United States and Texas were parties to these particular controversies, however, and the term *Texas Boundary Case*, as used by the Court in its 1969 decision, helps to differentiate these phases from the other numerous opinions.

44. The specific coastal features are substantial artificial jetties at the mouth of the Sabine River but the principles involved, and the Court's decision, apply equally to any post-admission accretion along the Gulf coasts of Texas and Florida. Interestingly, these same jetties became the central focus of a later action, *Texas v. Louisiana*, No. 36 Original. That litigation, among other things, dealt with the lateral offshore boundary between those two states. The United States intervened to protect its outer continental shelf interests. Because Texas has a 9-mile grant, and Louisiana only 3 miles, the federal government had a vested interest in the location and extension of their mutual offshore boundary.

As the Court saw the matter, its burden was to determine whether Congress intended the 3-league grants in the Gulf, which were based on historic boundaries, to be measured from a modern coast line. It thought not. *Id.* at 157.

As the Court explained, Congress described the two types of grants in different ways. The standard 3-mile grant is to be measured *from* the coast line. Congress left the definition of that coast line to the courts, and our international, ambulatory coast line was adopted for the purpose. 381 U.S. at 165. But the 3-league grant is to be measured *to* a boundary "as it existed at the time such state became a member of the Union . . . ." 43 U.S.C. 1301.

As the Court explained, "what Congress has done is to take into consideration the special historical situations of a few Gulf States and provide that where they can prove ownership to submerged lands in excess of three miles at the time they entered the Union, these historical lands will be granted to them up to a limitation of three marine leagues. No new state boundary is being created . . . ." 389 U.S. at 159. Thus, the Court said, "the State of Texas, which has been allowed by the United States to claim a larger portion of submerged lands because of its historical situation, is limited in its claim by fixed historical boundaries." *Id.* at 160. The Court pointed out that Texas could opt for the general 3-mile grant, or the more generous 3-league provision, but it could not pick and choose the best features of both. *Id.* In short, Texas's 3-league grant could not extend farther seaward than did her boundary on the date of admission to the Union.

That settled, the Court was almost immediately confronted with the converse legal question. The parties reconstructed Texas's 1845 coast line and projected a boundary 3 leagues seaward. The state then contended that its Submerged Lands Act grant was defined by that boundary. The United States disagreed and they were back before the Supreme Court. This time the controversy was prompted by erosion along portions of the coast. Texas contended that the erosion had no relevance; its grant was meant to extend to the 1845 boundary. If it could not benefit from subsequent accretion, as the Court had ruled just the year before, then it should not be penalized by subsequent erosion.

The Court disagreed. It pointed out that the historic boundary was only a maximum and that Congress explicitly provided that it was not to extend more than 3 leagues from the "coast line." 43 U.S.C. 1301. The Court had already determined that the term "coast line," as applied to the 3-mile grant, is an ambulatory line. It reviewed the legislative history of the Submerged Lands Act and concluded that "there is no basis for a finding that 'coast line' has a different meaning for the purpose of determining the baseline for measurement of the three-league maximum limitation." *Texas Boundary Case*, 394 U.S. l, 5 (1969). Further, "it seems evident that Congress meant

that the same 'coast line' should be the baseline of both the three-mile grant and the three-league limitation." *Id*.

A decree was entered that described Texas's historic offshore boundary by precise coordinates and provided that the United States was entitled to lands, minerals, and other natural resources seaward of that line or more than 3 leagues from the present or future coast line. *Texas Boundary Case*, 394 U.S. 836 (1969).

In sum, the Court ruled in 1967 that the 3-league grant could not extend beyond the boundary location on the date of admission. In 1968 it determined that the grant could "ambulate" landward with coastal erosion.[45] The result is a Submerged Lands Act boundary that is constructed by projecting 3-league lines from the 1845 and present coast lines and merging the more landward segments of each to produce a single line.[46] (Figure 1) Although Florida was not a party to the cases just discussed the principles adopted by the Court must apply equally to it. We turn now to an Original action in which both Texas and Florida were involved and that devolved from the consequence of different state and national boundaries.

From the first of the legislative proposals to quitclaim offshore areas to the states, the federal government expressed concern that congressional recognition of state boundaries seaward of the 3-mile national claim might "embarrass" the government in its international relations. The State Department consistently took the position that it had never recognized offshore boundaries in excess of 3 nautical miles and the executive branch opposed the 3-league grants eventually provided to Texas and Florida. That opposition continued beyond passage of the Submerged Lands Act into the tidelands cases implementing it.

In *United States v. Louisiana, et al.*, the federal government had argued that federal supremacy in the field of international relations "worked a decisive limitation upon the extent of all state maritime boundaries for purposes of the Act." 363 U.S. 1, 32-33 (1960). In other words, that executive branch position trumped any legislative effort to create more seaward boundaries. The Supreme Court disagreed, holding that the legislature had primary responsibility for the admission of new states to the Union and that authority was being exercised here.

45. Texas has complained that this is an "inequitable result." Sister states, who got only 3-mile grants, are not known to have expressed much sympathy.

46. Although the process may seem cumbersome, with modern computer mapping it is not much more difficult than constructing the ambulatory boundary applicable to the traditional 3-mile grants. It should be noted that in 1976 Congress amended the Submerged Lands Act to provide that a boundary resolved by Supreme Court decree would thereafter remained fixed. Some states, such as Louisiana, have such fixed boundaries, making offshore leasing and lease administration more efficient than it is with ambulatory boundaries. The federal government is presently trying to reach boundary agreements with Texas and Florida which would fix their composite historic and modern boundaries.

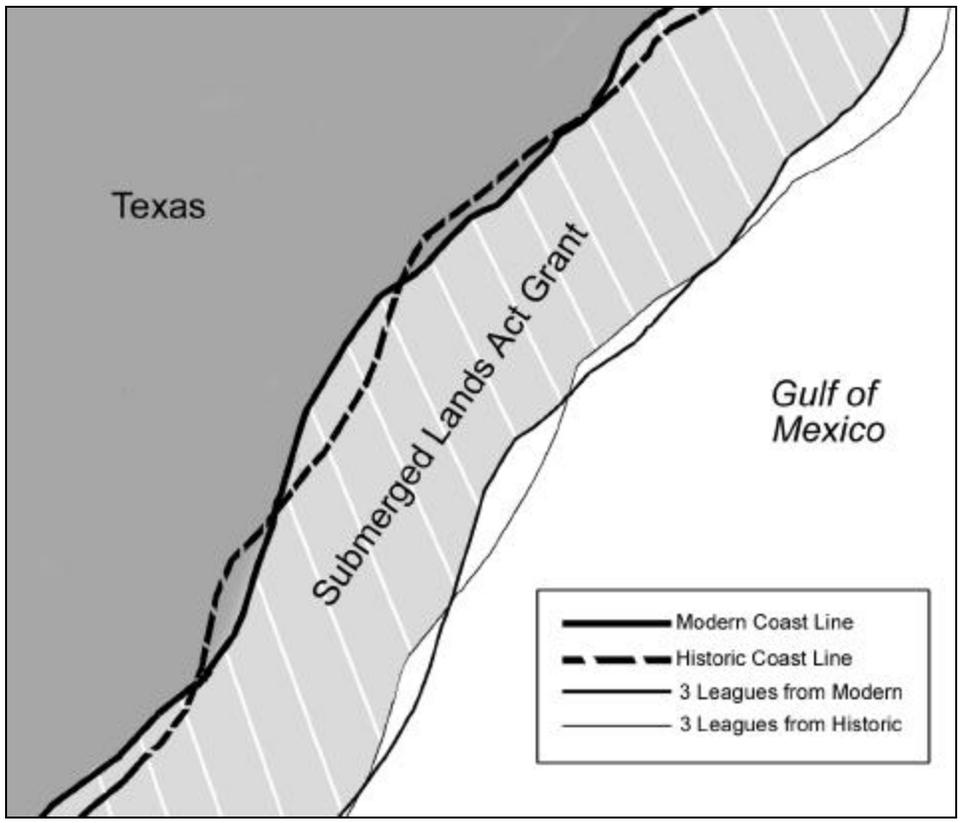

Figure 1. Texas's Submerged Lands Act grant. Texas's Submerged Lands Act grant is delimited using the lesser of 3 leagues from the modern or historic coast line.

In so doing, however, the Court regularly emphasized what it described as the "purely domestic purposes of the Act." *Id*. at 33. As it concluded, "in light of the purely domestic purposes of the Act, we see no irreconcilable conflict between the Executive policy relied on by the Government and the historical events claimed to have fixed seaward boundaries for some States in excess of three miles. We think that the Government's contentions on this score rest on an oversimplification of the problem." *Id*. And later, "there is no necessary conflict between the existence of a three-league territorial boundary for domestic purposes and the maintenance of the Executive's policy on the limit to which this country will assert rights in the marginal seas as against other nations." *Id.* at 64, n.107.

The term "domestic purposes" seems to refer to the division of seabed minerals between the national government and the states, something which was clearly not of international import after the Truman Proclamation of 1945, claiming resources of the entire continental shelf, and its codification

into international law in 1958.[47] But mere use of the term ignores the other consequences of the Act. Minerals were not the only resources granted to the states. The grant included "natural resources" generally, which were defined to include fish, shrimp, and other living resources. In 1953 the United States did not typically claim jurisdiction over such resources beyond 3 miles of its coasts, yet it appeared to be recognizing Texas's and Florida's jurisdiction out to 9 miles. Although foreign nationals may not have exploited mineral resources off our coasts, they had a long tradition of fishing nearby. Fisheries rights produced some of this country's first, and most bitterly fought, international controversies.

It was not long before this "purely domestic" matter entered the international regime. Both Texas and Florida cited foreign fishing vessels for operating within their boundaries. The federal government was indeed "embarrassed" in its foreign relations and brought a new legal action, *United States v. Florida and Texas*, No. 54 Original, requesting a declaration from the Court that the states "lack jurisdiction" to enforce their fisheries laws against foreign vessels and crews in the 3- to 9-mile belt.

A special master was appointed and procedural matters were dealt with but before the matter was tried on the merits the federal Fishery Conservation and Management Act became law. 16 U.S.C. 1801 *et seq*. That legislation outlawed all foreign fishing within 200 miles of our coasts, save only that specifically allowed by federal permit and then only for species being underutilized by American fishermen. It became clear that violations of the states' 9-mile boundary would be highly unlikely under the new regime.

Given the changed circumstance, the parties resolved the matter by agreement. The states conceded that only federal law would be enforced more than 3 miles offshore, while the United States agreed that state agents would be authorized to participate in the enforcement. As the parties' subsequent Memorandum in Support of Joint Motion to Dismiss recited, "the agreements satisfy the United States that foreign fishing beyond the territorial sea will be addressed in a uniform, national manner, and they satisfy the States that the fishery resources of the waters from 3 to 9 miles off their coasts . . . will be protected from unauthorized fishing." Memorandum and Motion of December 1977.[48] The Joint Motion was granted and the case was dismissed. 434 U.S. 1031 (1978).

Unique questions were raised in Number 54 and, at least academically, it would have been interesting to have them answered. For example, the

47. Proclamation of September 28, 1945, 59 Stat. 884. Convention on the Continental Shelf, April 26, 1958, 15 U.S.T. 471.

48. The pleadings were signed by Solicitor General Wade McCree and Attorneys General Robert Shevin and John Hill for Florida and Texas respectively.

Submerged Lands Act is clearly a quitclaim of existing federal interests. The grant conveys "all right, title, and interest of the United States, if any it has, in and to all said lands, improvements and natural resources . . . ." Section 3(b)(1). In 1953 the federal government claimed an exclusive interest in the mineral resources at issue. Presumably it could pass those interests on to the states. But in 1953 it made no similar claim to fish and shrimp in the 3- to 9-mile belt. Yet they were explicitly included in the Act among the resources granted.

It is clear from the pre–Submerged Lands Act tidelands cases that the individual states did not come into the Union with offshore boundaries. If their sole source of maritime resources is the Submerged Lands Act grant it would seem to follow that they got only what the federal government had to give. What was the purpose and effect of purporting to make a grant of international resources? The question remains unanswered but someday it may have to be faced anew.

To summarize our discussion of the Submerged Lands Act grant's geographic extent it can now be said that Texas and Florida (on its Gulf coast) have exclusive rights to the resources within the more shoreward of their historic 3-league boundaries or 3 leagues of the present coasts. All other coastal states have similar rights measured 3 nautical miles from their present coast lines.[49]

But, Congress excepted limited categories of lands from the grants. We turn now to a look at those exceptions.

Exceptions to the Submerged Lands Act Grant[50]

In 1953 Congress generally gave the coastal states the lands and natural resources within 3 nautical miles of their coast lines (or up to 9 nautical miles off Texas and the west coast of Florida). It withheld, however, limited areas that had previously been separately acquired or set aside for federal use.[51] Although there are numerous federal installations and reserves whose boundaries extend into the territorial sea, their total area is *de minimis* in

49. In fact, 3-mile Submerged Lands Act grants become fixed when established by Supreme Court decree. 43 U.S.C. 1301(b).

50. We note that the exceptions about to be discussed have no effect upon the seaward boundary of state jurisdiction or the baseline from which the territorial sea is measured. They simply carve out an area of continued federal property that would otherwise have gone to the state.

51. Section 5 of the Submerged Lands Act, 43 U.S.C. 1313(a) excepts from the grant "[1] all tracts or parcels of land . . . lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or the United States, and all lands which the United States lawfully holds under the law of the State; [2] all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); [3] all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift or otherwise in a proprietary capacity; [4] all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and [5] any rights the United States has in lands presently and actually occupied by the United States under claim of right."

comparison to what was conveyed. To date, only three such reserves have been the subject of tidelands litigation.[52]

United States v. California

In 1945 the tidelands litigation began over oil and gas rights off the coast of California. By 1977 three Supreme Court decrees had been entered, each more precisely defining the boundary between California and federal offshore rights. The fourth controversy arose over the harvest of giant sea kelp within 3 miles of the California coast. The state regularly leases areas of its seabed for the production of kelp. One area of interest was claimed by the Department of the Interior to fall within the boundaries of the Channel Islands National Monument. The state disagreed and sought a new decree from the Court establishing its right to the area. The United States responded that submerged lands within the Monument had not passed to California through the Submerged Lands Act, but had been reserved by the Congress.

The Channel Islands National Monument was established by President Roosevelt in 1938 under authority of the Antiquities Act of 1906. The Antiquities Act provides, in pertinent part, that the president may set aside lands owned or controlled by the United States that possess particular historic, prehistoric, or other scientific significance. 16 U.S.C. 431. The original proclamation identified most of Anacapa and Santa Barbara Islands as the Monument.[53]

In 1949 President Truman expanded the Monument's boundaries to provide protection to nearby rocks and islets and, according to the federal government, a 1-mile belt of sea around each. Presidential Proclamation No. 2825, 63 Stat. 1258.[54] California went to the Supreme Court, alleging that the submerged lands belonged to it for two reasons: only the islets and rocks were intended to be added in 1949 and, even if included, the submerged lands were returned to the state in 1953. The federal government responded that the submerged lands were intended to be included within the boundaries and remained part of the Monument pursuant to the final exception set out in the Submerged Lands Act grant.

52. Other decisions, from the Supreme Court and lower federal courts, have considered the closely related question of federal reserves that include inland waters, usually rivers or lakes. These cases are governed by the Constitution's equal footing doctrine, not the Submerged Lands Act. See, for example: *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) and *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). See also: *United States v. Alaska*, 423 F.2d 764 (9th Cir. 1970) *cert. denied*, 400 U.S. 967 (1970); *Utah Div. Of State Lands v. United States*, 482 U.S. 193 (1987); and *Montana v. United States*, 450 U.S. 544 (1981).

53. The United States had acquired title to these islands from Mexico in 1848 through the Treaty of Guadalupe-Hidalgo, 9 Stat. 922. It retained them as federal lands when California was admitted to the Union two years later. 9 Stat. 452.

54. The Proclamation noted the importance of "islets and rocks" and went on to reserve "the areas within one nautical mile" of Anacapa and Santa Barbara.

The federal position with respect to presidential intent was bolstered by the reservation of "areas within one nautical mile," maps accompanying the Proclamation with a line encircling Anacapa and Santa Barbara 1 mile offshore, and acreage figures on the maps that corresponded to the land and water within the lines. (Figure 2) But the Court bypassed the question of intent, skipping directly to the Submerged Lands Act issue.

The final clause of Section 5(a) of the Act exempts from the grant "any rights the United States has in lands presently and actually occupied by the United States under claim of right." The parties stipulated that the 1-mile band of water and submerged lands was "presently and actually occupied" by the federal government. Thus, the issue for the Court was simply what right the federal government had in these submerged lands in 1953.

California argued that the federal claim was only that applicable to the territorial sea generally. The United States took the position that its "claim of right" was also based upon monument designation under the Antiquities Act. The Court agreed with California.[55] It found that Congress intended to reverse *United States v. California*, 332 U.S. 19 (1947), through the Submerged Lands Act.[56] It found further that "the entire purpose of the Submerged Lands Act would have been nullified . . . if the 'claim of right' exemption saved claims of the United States based solely upon this Court's 1947 decision . . . ." *United States v. California*, 436 U.S. 32, 39 (1978). It reviewed legislative history and concluded that the "claim of right" provision "was added to preserve unperfected claims of federal title from extinction under Section 3's general 'conveyance or quitclaim or assignment.'" *Id.* at 38. The exemption, it said, neither validated nor prejudiced such claims. *Id.* at 39. The "claim of right" must arise from something other than the Court's 1947 decision.

The Court concluded that when President Truman expanded the Monument boundaries in 1949 the federal government had no basis for claiming ownership of the area other than the Paramount Rights Doctrine of the 1947 decision. Neither the Proclamation nor the Antiquities Act "enhances" that claim, and the Submerged Lands Act required more to support an exemption from the grant. The 5th exemption provision would, henceforth, require some specific source of federal title.

Twenty years later the Court faced exemption arguments under another of Section 5's provisions.

55. Unlike most Original actions in the tidelands cases, this stage of the *California* case was not assigned to a special master. The parties agreed that their minor factual differences could be argued from a collection of documents put before the Court.

56. It was that decision which recognized that the federal government, and not the states, held paramount rights seaward of the coast line.

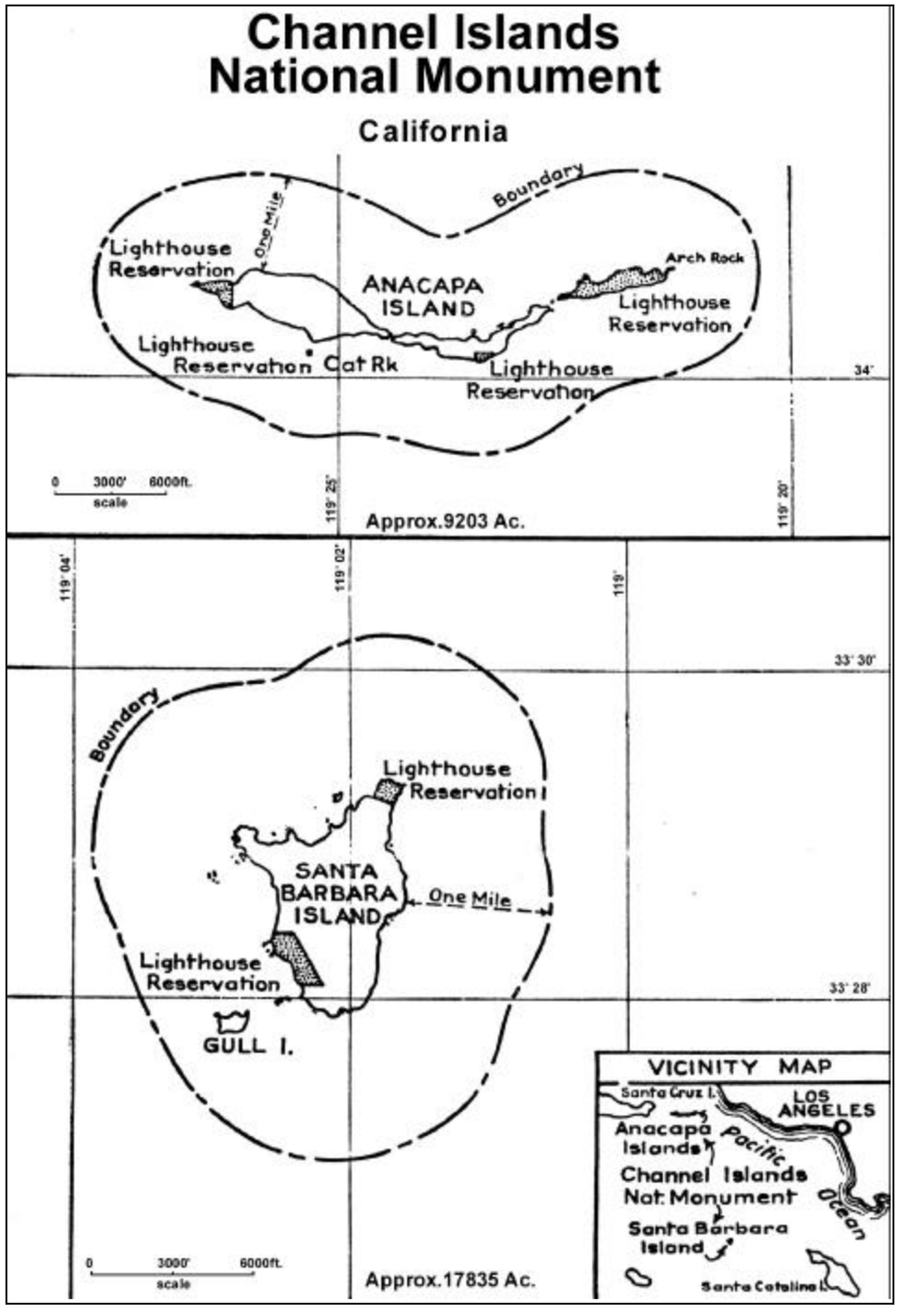

Figure 2. Map attached to Presidential Proclamation No. 2825, 63 Stat. 1258, February 9, 1949.

United States v. Alaska

In 1979 the State of Alaska was preparing to lease submerged oil and gas lands in the area of Prudhoe Bay. The United States believed that some of the lands being offered were within federal jurisdiction and sought leave to file another tidelands case in the Supreme Court to establish its title to the contested area. Alaska acquiesced and *United States v. Alaska*, Number 84 Original, was spawned.

J. Keith Mann of Stanford Law School was appointed special master. Almost immediately the state filed a counterclaim, the purpose of which was to resolve all outstanding Submerged Lands Act issues between the parties pertaining to the north slope. The United States agreed. Among these issues were the parties' respective rights along the coastal boundaries of two federal reservations, the National Petroleum Reserve–Alaska and the Arctic National Wildlife Refuge. Each raised questions as to the application of the exemption provision of the Submerged Lands Act.[57]

The two federal properties had decidedly different histories but shared some characteristics that were relevant to the legal issues. First, at least under the federal view of the case, the submerged lands at issue lay beneath both inland waters and the territorial sea. That distinguished them from the Channel Islands case, just discussed, and the long line of Supreme Court precedents involving inland waters. Second, they brought into play a different clause of Section 5 (the exemption section) of the Submerged Lands Act than had been relied upon in *United States v. California*. And third, they required the Court to determine, for the first time, whether Congress could withhold submerged lands for its own purposes at statehood as well as distribute them to private parties, the latter proposition having been long since established. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894).

As to the first proposition, the United States took the position that a different presumption applies when determining whether inland waters have been withheld at statehood than is relevant in evaluating a claimed exception to the Submerged Lands Act grant. It is well established that there is a strong presumption that lands beneath inland navigable waters will devolve to a state upon its admission to the Union. No intent to defeat state title will be inferred "unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). That statement of law derives from the equal footing doctrine of the Constitution and was not questioned by the federal government in the *Alaska* case.

However, the same presumption had never been applied to offshore submerged lands. They did not go to the states pursuant to the equal

57. We limit our discussion here to those issues. Other questions, related primarily to coast line delimitation, are discussed at length below.

footing doctrine. The Supreme Court had determined that in the 1947 *California* decision. 332 U.S. 19. Rather they were grants from Congress made necessary by that decision, and federal grants of land carry a contrary presumption. They are to be strictly construed in favor of the United States. *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 287 (1982). Thus, the United States argued here, any effort to defeat state title to such lands should not have to be "definitely declared or otherwise made very plain."

The special master accepted that reasoning, concluding that "different presumptions apply to submerged lands inside the Reserve boundary, depending on whether the waters are territorial or inland." *United States v. Alaska*, Report of the Special Master of March 1996 at 394. Nevertheless, he applied the stricter inland water standard in his analysis and concluded that even it had been met. *Id.*

The Supreme Court accepted the master's conclusion on the ultimate issue under consideration but went to some length to reject the federal proposition as to presumptions. The Court conceded that the Submerged Lands Act is a federal grant, but pointed out that the exemption clause being relied upon required that the United States have "expressly retained" lands to avoid transfer. Because of this, it explained, "we cannot resolve 'doubts' about whether the United States has withheld state title to submerged lands beneath the territorial sea in the United States' favor, for doing so would require us to find an 'express' retention where none exists." *United States v. Alaska*, 521 U.S. 1, 35 (1997). It went on to say that "in construing a single federal instrument creating a reserve, we see no reason to apply the phrase 'expressly retained' differently depending upon whether the lands in question would pass to a state by virtue of a statutory grant or by virtue of the equal footing doctrine, as confirmed by statute." *Id.* at 36.[58]

The exemption in question is found in the second clause of Section 5 and excepts from the general grant "all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea)." 43 U.S.C. 1313(a). With respect to the National Petroleum Reserve–Alaska, the Alaska Statehood Act provided that the federal government has "power of exclusive legislation . . . as provided by [the Enclave Clause of the Constitution, Art. I, Sec. 8, cl. 17] . . . over such tracts or parcels of land as, immediately prior to the admission of said state, are owned by the United States and held for military . . . purposes, including naval petroleum reserve numbered 4 [the National Petroleum Reserve]." *Id.* at 41, quoting from Section 11(b) of the Alaska Statehood Act, 72 Stat. 347.

58. The Court had previously noted that the Submerged Lands Act also confirmed state ownership of inland submerged lands and stated that "there is no indication that, in formulating the 'expressly retained' standard, Congress intended to upset settled doctrine . . . ." *Id.* at 35.

Having already determined that the "expressly retained" exemption triggered the same burden of proof applicable to inland waters, the Court turned to its test from *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). There it had announced that to defeat state title the United States would have to show that it intended to include submerged lands within the federal reservation and that it intended to defeat eventual state entitlement to those submerged lands.

The coastal boundary of the Petroleum Reserve provides a starting point for any analysis. That boundary is described as "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons." Executive Order 3797-A, February 27, 1923. (Figure 3) Clearly the boundary was intended to enclose submerged lands. Nevertheless, two prior Supreme Court decisions had established that submerged lands might fall within the boundary yet not be intended as part of the Reserve or to remain in federal ownership at statehood. *Utah Division of State Lands, supra*; and *Montana v. United States*, 450 U.S. 544 (1981). The Court looked carefully at the purposes of the Reservation to determine the original intent. It noted that "the Executive Order sought to retain federal ownership of land containing oil deposits. The Order recited that 'there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast,' and described the goal of securing a supply of oil for the Navy as 'at all times a matter of national concern.' Petroleum resources exist in subsurface formations necessarily extending beneath submerged lands and uplands." It then concluded that "the purpose of reserving in federal ownership all oil and gas deposits within the Reserve's boundaries would have been undermined if those deposits underlying lagoons and other tidally influenced waters had been excluded. It is simply not plausible that the United States sought to reserve only the upland portions of the area." 521 U.S. at 39-40. The Court went on to hold that "defeating state title to submerged lands was necessary to achieve the United States' objective – securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands. The transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands, would have thwarted that purpose." *Id.* at 42-43.[59] The Court found that the federal government had retained ownership of submerged lands within the Petroleum Reserve at Alaskan statehood. *Id.* at 45.

59. The Court's approach was consistent with that taken in the *Utah Lake* and *Montana* cases. In those instances it had looked to purpose and concluded that submerged lands did not need to be reserved, or state title defeated, to accomplish the federal purpose. "Purpose" played a critical role in a much earlier case in which the Court concluded that an area set aside for Alaska natives must have been intended to include waters because of their reliance on fishery resources – despite the fact that the boundary description did not clearly extend offshore. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

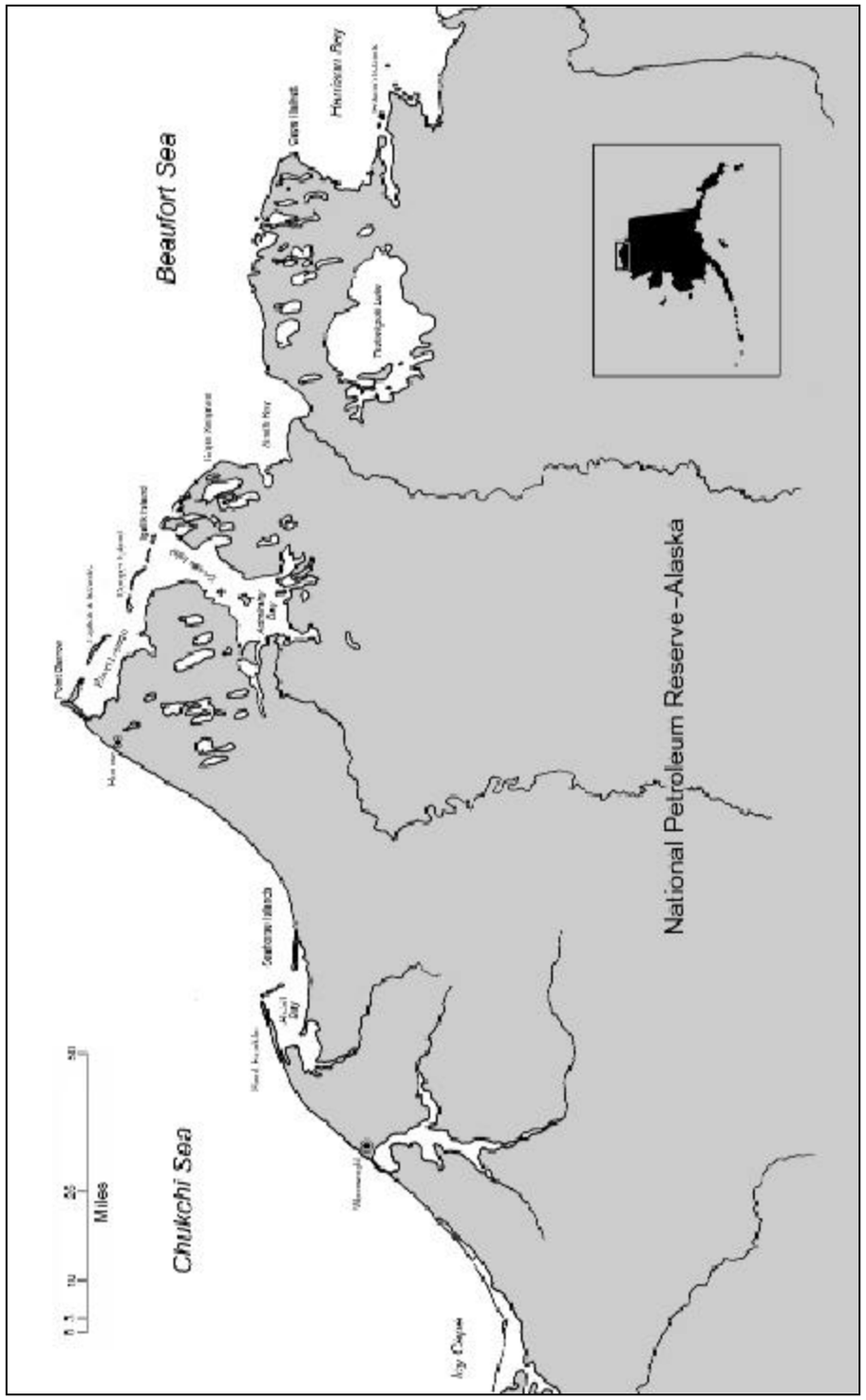

Figure 3. The coastline of the National Petroleum Reserve–Alaska. (*After Report of Special Master J. Keith Mann, Figure I.1*)

The second Arctic reserve arose under a different provision of the Alaska Statehood Act and presented an additional issue for the Court. Section 6(e) of the Act generally transferred to the new state real property used for the protection of wildlife but did not include "lands withdrawn or otherwise set apart as refuges or reservations." 72 Stat. 341. In 1957 the Department of the Interior's Bureau of Sport Fisheries and Wildlife "applied" to the secretary of the interior to have 8.9 million acres in the northeastern corner of Alaska established as an "Arctic Wildlife Range." (Figure 4) The secretary delayed acting on the application while he sought legislation to govern mining in the new reserve. In the meantime Alaska became a state. Only thereafter did the secretary act on the application.[60]

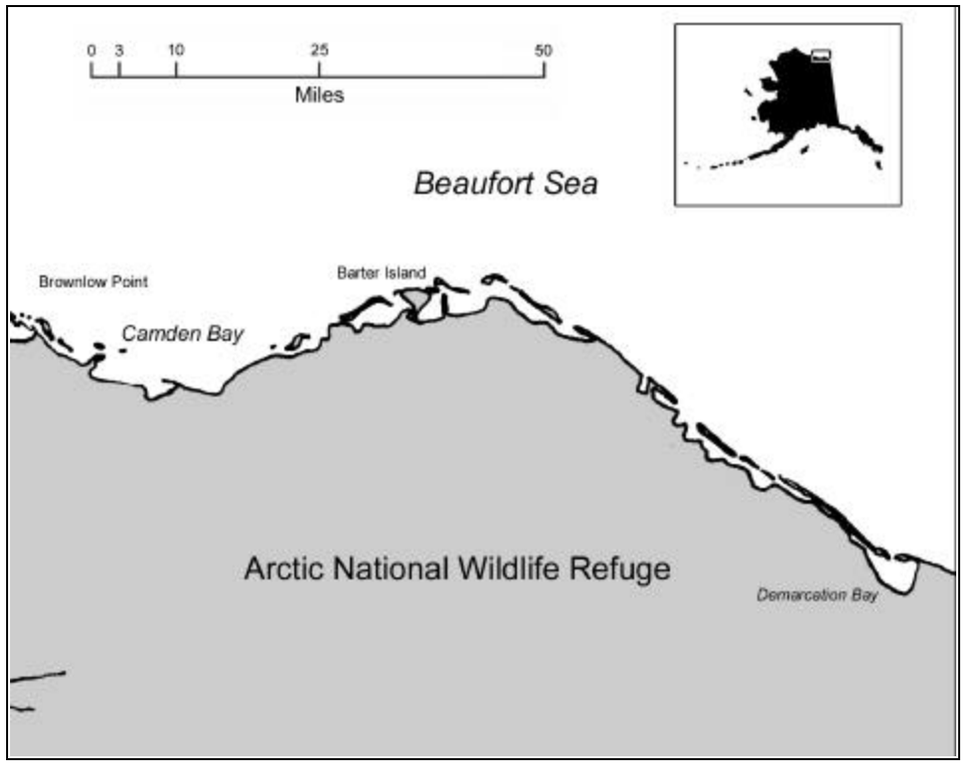

Figure 4. The coastline of the Arctic National Wildlife Refuge, Alaska. (*After Report of Special Master J. Keith Mann, Figure 1.1*)

60. Alaska was admitted to the Union in January of 1959. On December 6, 1960, the secretary issued Public Land Order 2214, reserving the area as the Arctic National Wildlife Range. 25 Fed. Reg. 12598. The Range was expanded, by Congress, in 1980 to twice its original size and renamed the Arctic National Wildlife Refuge. 94 Stat. 2390.

Thus the first legal question before the special master was whether, given the hiatus, the area had been "withdrawn or otherwise set apart" as a refuge or reservation at the time of statehood. The United States relied upon Interior Department regulations in existence when the application was filed and the Statehood Act passed. They provided that the application alone would "temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." 43 CFR Sec. 295.11(a)(Supp. 1958). This, in the federal view, "set apart" the area as that term was used in the Statehood Act.

The master disagreed. Although he agreed with the United States that it both intended to include submerged lands within the reserve and further intended to defeat Alaskan title to them at statehood, he concluded that the federal government nevertheless had not "set aside" the area in time. In reaching that conclusion the master focused on the term "set aside as refuges." He acknowledged that the application and Interior Department regulations did "set aside" the area, but it clearly had not become a "refuge" until after statehood.

The United States took exception to that conclusion and it was reconsidered by the full Court. The Supreme Court agreed with its master that the United States had intended to include submerged lands in the proposed reserve, as evidenced by the boundary description (which included tidelands) and the explicit purpose to protect maritime species (including seals and whales). 521 U.S. at 51-53. It then reviewed the requirement of Section 6(e) of the Statehood Act and disagreed with its master, saying that "under the Master's interpretation, Sec. 6(e) applies only to completed reservations of land. But Congress did not limit Sec. 6(e) to completed reservations. Rather, Congress provided that the United States would not transfer to Alaska lands 'withdrawn or *otherwise set apart* as refuges' for the protection of wildlife. (Emphasis added.) The Master's reading of Sec. 6(e) would render the broader terminology superfluous." *Id*. at 59. The Court had already recounted the secretary's understanding that these lands would be reserved in the federal government, and his communication of that position to Congress. From this the Court found a clear congressional intent to defeat state title to lands described in the application. *Id.* at 57.

Thus, the necessary intent to include submerged lands in the reservation was found in the application itself, derived from a boundary description and the stated purpose of the reservation. The intent to defeat eventual state title was supported by subsequent legislation, the Alaska Statehood Act. Jurisdiction and ownership of submerged lands within boundaries of the Arctic National Wildlife Refuge remained with the United States.

To summarize, submerged lands beneath the marginal sea did not pass to the states in certain limited circumstances. Five exceptions are set out in Section 5 of the Submerged Lands Act. 43 U.S.C. 1313(a). Only two tidelands cases have dealt with these exceptions but numerous other examples have yet to be litigated. It is important to keep in mind that although these exceptions help define the respective rights of the states and federal government in the marginal sea they have no consequence on either the states' seaward boundaries, our international boundaries, or the baseline from which they are measured.[61]

Determining the Seaward Limit of State Jurisdiction

In 1953 Congress reversed the effect of the 1947 Supreme Court decision in *United States v. California* through the Submerged Lands Act. With the minor exceptions previously discussed it granted each coastal state all rights to mineral resources within 3 nautical miles of its "coast line." Forty-five years of tidelands litigation followed. At least 11 Supreme Court Original actions, involving untold billions of dollars in mineral revenues, have sought to define that "coast line." In this section we discuss the decisions that have slowly produced the principles for coast line delimitation. However, for a thorough understanding we must revisit a pre–Submerged Lands Act decision that set the stage for all that came later.

United States v. California

In 1947 the Supreme Court announced that the federal government, and not the states, held "paramount" rights to mineral resources beneath the marginal sea. *United States v. California*, 332 U.S. 19 (1947).[62] However, that holding did not resolve all problems between the parties. It was now established that the states held submerged lands landward of the "coast line" (those beneath inland waters), pursuant to *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) and *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), and the federal government had jurisdiction seaward, under the *California* decision. The parties agreed that inland waters were those landward of the "low-water line" and the seaward limit of "inland waters." They could not agree on the definition of either of those terms. Thus, more was needed to

61. For example, the coastal boundaries of the Arctic National Wildlife Refuge and National Petroleum Reserve-Alaska do not follow the coast line as described in the international Convention on the Territorial Sea and the Contiguous Zone and adopted by the Supreme Court for Submerged Lands Act purposes.

62. Under the Court's early practice of renumbering Original actions with new Terms of the Court *United States v. California* has been referred to as Numbers 12, 11, 6, and ultimately 5 Original. The Court no longer changes the numbers of these cases and we will refer to the *California* case as Number 5, its present designation.

accurately define the boundary between federal and state interests in the valuable mineral lands off the California coast, many of which had already been leased.

Shortly after the 1947 decision the federal government asked the Court for a supplemental decree establishing rights in three areas in which there was ongoing oil and gas drilling. A special master was appointed.[63] After a series of procedural flurries that involved further directions from the Court, the master considered the problem of defining the low-water line and determining the extent of specific waters claimed by the state as inland.[64]

First came the problem of defining the low-water line. Most of the Pacific coast of the United States has a type of tide known as "mixed." That is, the tide is characterized by a conspicuous diurnal inequality in the higher high and lower high waters and/or the higher low and lower low waters each tidal day.[65] The United States noted that the Court had already defined "ordinary high tide" to be an average of the two daily high tides on the Pacific coast. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935),[66] and argued that "ordinary low tide" should be the average of daily lows. (Figure 5) California pointed out that official government charts depicted a mean of just the lower-low tides as the low-water line and that should be adopted for these purposes. In his Report to the Court of October 19, 1952, the master recommended the federal position.[67]

The more difficult questions involved the delimitation of inland waters. The Court had directed the master to "consider seven specified segments of the California coast to determine the . . . outer limit of inland waters."

63. The original appointee, retired Circuit Judge D. Lawrence Groner, withdrew within a year and was replaced by William H. Davis.

64. It is interesting to see how this first special master proceeding in a tidelands case differs from later practice. It would appear that there was significant interaction between the master's proceeding and the Court between 1948 and 1951, especially in specifically framing the issues to be litigated. In more recent practice special masters have gone forward quite independently once appointed.

65. The Atlantic, by contrast, is mostly characterized by semidiurnal tides, in which the two high waters of each tidal day are approximately equal in height. The Gulf coast is mostly characterized by diurnal tides, in which there is generally only one high water and one low water in each tidal day.

66. This average is calculated over a complete, 18.6-year node cycle required for the regression of the moon's nodes to complete a circuit of 360 degrees of longitude. The specific 19-year period adopted by the National Ocean Service as the official time segment over which observations are taken and reduced to mean values for tidal datums is known as the "tidal epoch." Periodic and apparent secular trends in sea levels make tidal epochs necessary for standardization. The National Tidal Datum Epoch of 1960 through 1978 is currently in use. Epochs are considered for revision every 25 years.

67. *United States v. California*, Number 6 Original, Report of the Special Master of October 14, 1952. See: Reed, Koester and Briscoe, *supra*, at 65. A second low-water issue arose in the litigation, that being whether effect was to be given to shoreline changes induced by artificial structures, such as groins and jetties. Federal law would treat such changes as extending the coast line, as do natural changes. But under California law artificially created accretion is disregarded for coastal boundary purposes. Probably because the federal rule would push its boundaries seaward California agreed that the federal rule should be followed and the master adopted that position.

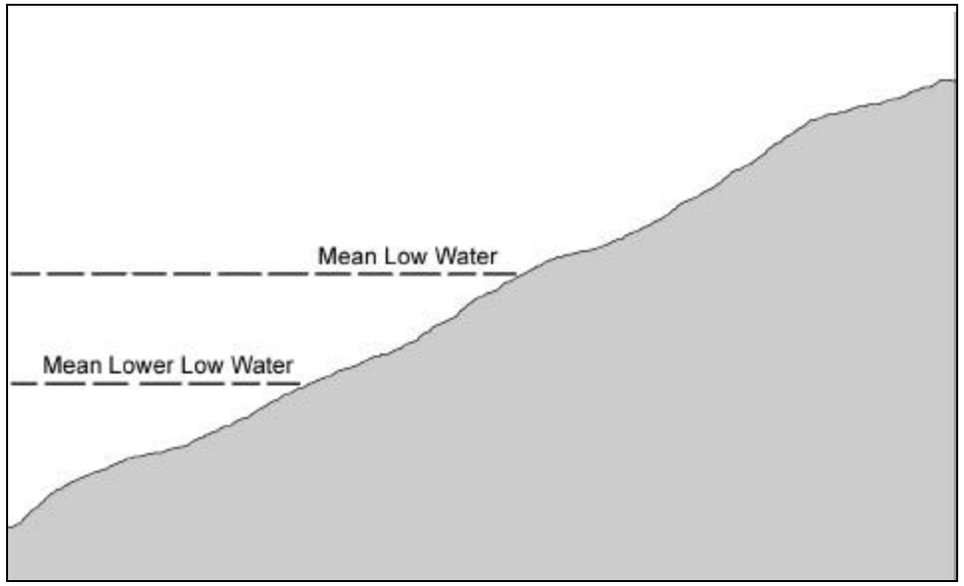

Figure 5. Shoreline cross section, comparing the low and lower low-water tidal datums. The mean lower low-water line is depicted on offical U.S. charts and was adopted by the Supreme Court as the “ordinary” low tide line.

United States v. California, 381 U.S. 139, 143 (1965).[68] In addition, the state claimed as inland all waters landward of the Channel Islands, which it called the “overall unit area.”[69] (Figure 6)

California argued that it had traditionally treated each of the claimed water bodies as falling within its jurisdiction. The United States contended that inland water status should be determined by principles employed in its international relations at the time of the 1947 decree. The master followed the latter course. He concluded that the United States did not claim, nor recognize, bays of more than 10 miles width and did not claim as inland channels such as those between California’s offshore islands and the mainland.[70]

68. The individual segments included: the coast from Point Conception to Point Hueneme; San Pedro Bay; the coast from the southern extremity of San Pedro Bay to the western headland at Newport Bay; Crescent City Bay; Monterey Bay; San Luis Obispo Bay; and Santa Monica Bay.

69. The proposed boundary ran from Point Conception 21 miles to Richardson Rock, to San Miguel Island, to Santa Rosa Island, to Gull Island then 35.5 miles to Begg Rock, to San Nicolas Island, 43 miles to San Clemente Island, and 56.8 miles back to the mainland at Point Loma. 381 U.S. 143, 139, n.4

70. During the special master proceedings the International Court of Justice announced its decision in the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)* [1951] I.C.J. Rep. 116, in which it concluded that Norway did not violate international law by employing straight baselines in circumstances similar to the California coast. The master found, however, that the ICJ opinion did not require a coastal nation to adopt such a system and the United States had chosen not to do so. Report at 29.

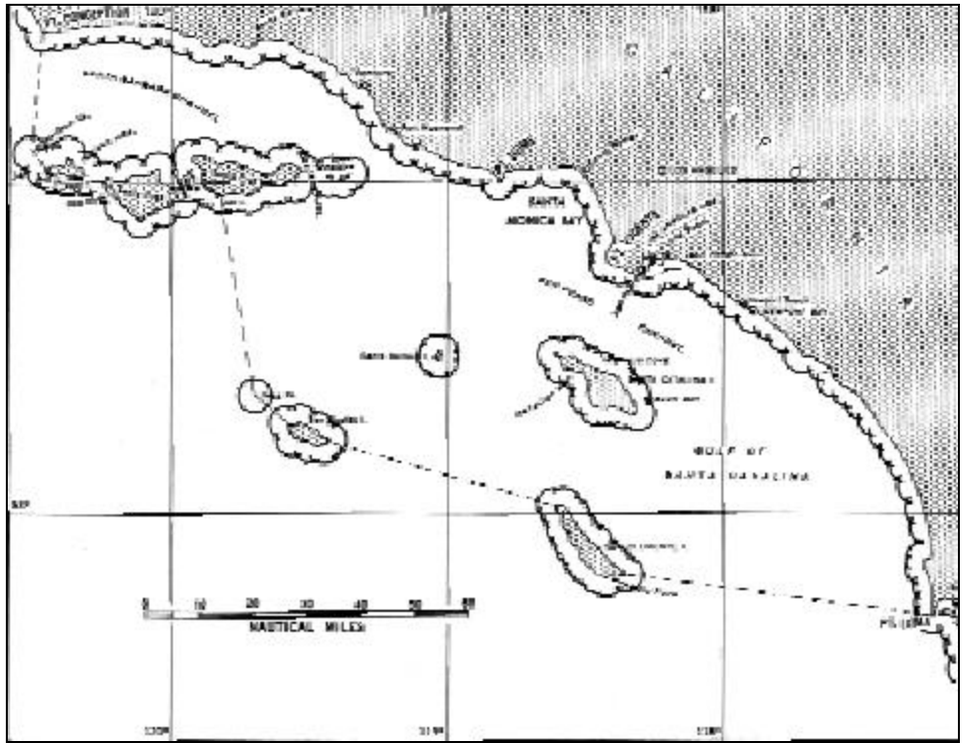

Figure 6. California's "Overall Unit Area" inland water claim. (*From I Shalowitz, Figure 13*)

The Report was submitted to the Court in 1952 and both parties filed exceptions to the master’s recommendations. However, before anything further occurred the Submerged Lands Act became law. Through congressional largess California acquired mineral rights within 3 miles of its coast. It happens that the bed of the Pacific falls away quickly off the California coast and offshore technology limited oil and gas activities to the nearshore area in the early 1950s. Petroleum production at that time was so close to shore that it all fell within the zone granted to California under anyone’s definition of “coast line.” For that reason the Master’s Report and the parties’ exceptions lay dormant in the Court for 10 years.

By 1963 however, oil and gas exploration had moved far enough seaward that the precise limits of the 3-mile grant became important. The United States filed an amended complaint asking that issues be reframed in light of the Submerged Lands Act but that the case proceed on the basis of Special Master Davis’s Report. California opposed, saying that so much was changed by the Act that the case should start anew. The Court accepted the

federal Complaint, directed an Answer from California, and permitted the parties to file new exceptions.[71]

In the renewed proceeding the United States took the position that, for most purposes, the special master's coast line could be used for projecting the state's new 3-mile grant. The state contended that Congress had not adopted the federal international position as its definition of inland waters but intended to include all waters "which the States historically considered to be inland." *United States v. California*, 381 U.S. at 149.

Without the aid of a special master the Court undertook its first consideration of tidelands issues under the Submerged Lands Act. It produced a decision that has served as the foundation for 33 years of litigation to resolve more discrete coast line questions raised by the Act.

First the Court rejected both parties' contentions as to the law to be applied. The federal government argued that its international position at the time of Submerged Lands Act passage (1953) must be taken as the congressionally intended coast line. California urged an open-ended definition of "coast line," subject to future legal changes, much as low-water lines will change with accretion and erosion, Swarth, *supra*, at 147, what the Court described as "a coast line dependent upon each State's subjective concept of its inland waters." 381 U.S. at 159-160. But the Court liked neither. It found that Congress had had no clear intention as to the definition of "coast line" but "made plain its intent to leave the meaning of the term to be elaborated by the courts, independently of the Submerged Lands Act." 381 U.S. at 151-160.

The Supreme Court looked to the recently ratified international Convention on the Territorial Sea and the Contiguous Zone.[72] In that treaty the international community had, for the first time, attempted to codify principles for coast line delimitation.

In response to the federal argument that Congress could not have intended definitions that didn't exist when the Submerged Lands Act was enacted, the Court said "we do not think that the Submerged Lands Act has so restricted us. Congress, in passing the Act, left the responsibility for defining inland waters to this Court . . . . Had Congress wished us simply to rubber-stamp the statements of the State Department as to its policy in 1953, it could readily have done so itself." 381 U.S. at 164-165.

As to the state's argument that the definition of "coast line" should change to accommodate future changes in international law, the Court explained that "before today's decision no one could say with assurance

71. Swarth, "Offshore Submerged Lands, An Historical Synopsis," *Land and Natural Resources Division Journal*, U.S. Department of Justice, Vol. 6, No. 3, April 1968 at 146.

72. 15 U.S.T. (Pt. 2) 1606. Ratified March 24, 1961, and entered into force September 10, 1964.

where lay the line of inland waters as contemplated by the Act . . . . After today that situation will have changed. Expectations will be established and reliance placed on the line we define. Allowing future shifts of international understanding respecting inland waters to alter the extent of the Submerged Lands Act grant would substantially undercut the definiteness of expectation which should attend it." It went on to say that "'freezing' the meaning of 'inland waters' in terms of the Convention definition largely avoids this, and also serves to fulfill the requirements of definiteness and stability which should attend a congressional grant of property rights . . . ." 381 U.S. at 166-167.[73]

The Court concluded that the Convention provides the "best and most workable definitions" of inland waters available, not only to resolve the issues before it but "to many of the lesser problems related to coastlines that, absent the Convention, would be most troublesome." *Id.* at 165. And so it has been. From that day forward the states and the federal government have approached their maritime boundary controversies with the Convention as a guide. Although the problems have been legion, the Convention provides a framework for the resolution that could not have been found elsewhere.

In the same decision the Court dealt with what it called the "subsidiary issues" in the case before it, each of which has also played a significant role in subsequent litigation.

The first was California's argument that Article 4 of the Convention permits the state to use "straight baselines" to enclose the waters landward of its offshore islands. The Court recognized that Article 4 "permitted" the use of such baselines but that the federal government, and not the states, gets to decide whether they will be used. "An extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves." *Id.* at 168.

At the same time it left the door ajar, saying that if such areas had been previously claimed "a contraction of a State's territory in the name of foreign policy would be highly questionable." *Id.* That comment has been treated as an invitation by at least six other states that have since made straight baseline claims. None has been successful.

73. At the same time the Court made the interesting observation that the adoption of California's position "might unduly inhibit the United States in the conduct of its foreign relations by making its ownership of submerged lands vis-a-vis the States continually dependent upon the position it takes with foreign nations." 381 U.S. 166-167. Some states have subsequently argued that federal offshore mineral interests have influenced its maritime boundary policy – especially its continuing decision not to adopt straight baselines as authorized by Article 4 of the Convention. The Supreme Court's language in the 1965 *California* decision makes clear that the subsequent adoption of straight baselines would not expand the states' grant. Thus our international policy did not need to be tailored to protect domestic interests.

The Court next dealt with California's individual bay claims and, applying the 24-mile rule and semicircle test of Article 7 of the Convention, concluded that Monterey Bay qualifies as a bay. *Id.* at 170. In that context it revisited the state's claim to the Santa Barbara Channel, this time denominated a "fictitious bay" and concluded (again) that it is not inland water. *Id.* at 170- 172.[74] The Court concluded that "in these circumstances, as with the construction of straight baselines, we hold that if the United States does not choose to employ the concept of a 'fictitious bay' in order to extend our international boundaries around the islands framing Santa Barbara Channel, it cannot be forced to do so by California." *Id.*

California also claimed a right to offshore waters through historic title, that is, assertions of dominion with the acquiescence of foreign states. Although the Convention does not deal with historic waters, other than to recognize that they exist and are not limited by its provisions,[75] other United Nations documents provide the criteria for their recognition. Although California provided some evidence that it had claimed areas more than 3 miles offshore, the Court found none of the areas to qualify.

In so doing, it again set the ground rules for future historic waters claims by the states. In particular it discussed the significance of a federal disclaimer in opposition to a state historic waters claim and the burden of proving such a claim in the face of a disclaimer. *Id.* at 175.

The parties also disagreed on the limits of inland water near harbors. The Court concluded that harbors, those areas enclosed by permanent harborworks, are inland but "roadsteads," areas seaward of the harbor that are used for anchoring, loading, and unloading, are part of the territorial sea, and not inland waters. *Id*. at 175, citing Article 9 of the Convention.

Next the Court turned to the parties' disagreement over the definition of "ordinary low water." The special master, it will be remembered, recommended acceptance of the federal position that on a coast of mixed tides the two daily low tides should be averaged to compute ordinary low water, as the two high tides are averaged to get ordinary high water. But the Court disagreed, adopting the state's position that only the lowest tide of each day is to go into the average. Looking again to the Convention, Article 3 of which provides that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State," the Court pointed out that our official charts are published by the United States Coast and

74. The term "fictitious bay" had been used in some pre-Convention practice to describe straits, formed by islands, which led to inland waters. Such "fictitious" bays play no role under the Convention where Article 4 straight baselines may be used to enclose such areas if the coastal sovereign so elects.

75. Article 7(6) states that "The foregoing provisions [regarding juridical bays] shall not apply to so-called 'historic' bays . . . ."

Geodetic Survey (now the National Oceanic and Atmospheric Administration), that depicts the lower low-water line on its products.[76] This conclusion has been universally accepted and has not led to further litigation.[77]

Finally, the United States had argued before the special masters, and continued before the Court, that California's jurisdiction could not be extended by artificial extension of the coast line. Prior to the Submerged Lands Act the affected areas were those enclosed or reclaimed by an artificial structure, or built up because of it. After the Act the question was whether the 3-mile grant was to be measured from artificial structures. Neither the master nor the Court adopted the federal contention. The Court ruled that just as artificial changes are recognized in international law to affect the coast line, so too would they under the Submerged Lands Act. *Id.* at 176. In response to the federal government's argument that this produced an inequitable result, the Court reminded the government that "the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties." *Id.* at 176.

The Court was referring, of course, to the federal government's control over the construction of structures in the navigable waters and the fact that only something in the navigable waters could affect the outer limit of the states' Submerged Lands Act grants. The United States Army Corps of Engineers, which permits such structures, has since revised its regulations to provide that any application for a permit to construct that would affect federal rights on the outer continental shelf, will be reviewed by the secretary of the interior and the attorney general before issuance.[78] In most circumstances the state will be asked to waive any enlargement of its Submerged Lands Act rights, which would otherwise result from the proposed structure, as a condition of the permit.[79]

76. The resolution seems not only well founded in law but makes practical sense. The difference between mean low water and mean lower low water will be not much more than theoretical on all but the most gently sloping coastlines with significant tidal ranges. The advantages of using a line already charted by the agency which the Court has regularly recognized as being the authority in this field would seem to far outweigh any minor loss in real estate.

77. That is not to say that the charted line is always accepted as the actual low-water line. Constant accretion and erosion make it impossible to maintain charts to the accuracy of their original surveys. For that reason the parties to tidelands litigation have been free to prove that facts have changed since a chart was issued. But it is always the chart datum employed by the National Ocean Service for its charts of the area in question which will constitute the low-water line for Convention and Submerged Lands Act purposes.

78. That policy has been the subject of tidelands litigation at least twice since. See discussions of *United States v. Alaska*, No. 84 Original and *United States v. Alaska*, No. 118 Original below.

79. Some states have characterized this as "extortion" but that conclusion is difficult to understand since the consequence is merely leaving the state where it stood prior to construction, neither gaining nor losing submerged lands.

Thus the Court set the parameters for delimiting Submerged Lands Act grants around our coasts. *United States v. California* continues to be cited in most tidelands decisions.[80] A decree was entered which implements the 1965 decision at 382 U.S. 448 (1966).

The parties have since gone back to the Court to resolve additional issues regarding California's coast line. The principles established in 1965 enabled the parties to agree on the limits of inland waters in four water bodies whose mouths are formed by artificial jetties. These include Humboldt Bay, Port Hueneme, the Santa Anna River, and Agua Hedionda Lagoon, where inland waters are enclosed by "straight lines between the mean low-water lines at the seaward ends of the jetties." *United States v. California*, 432 U.S. 40 (1977). Agreement was also reached on closing lines for San Francisco Bay and Bodega-Tomales Bay. *Id*. at 41. Finally, 16 groins and breakwaters, scattered along the California coast, were acknowledged to be harborworks and part of the coast line for Submerged Lands Act purposes. *Id.* at 41-42.

The governments could not agree on three other issues, including the location of inland water limits in San Diego Bay and the Port of San Pedro and whether the state's Submerged Lands Act grant should be measured from 15 piers along the California coast.

Again a special master was appointed, the Honorable Alfred A. Arraj, United States District Court judge from Denver, Colorado. He conducted extensive hearings in New York and Denver and heard distinguished witnesses from both sides.[81]

The Supreme Court had already ruled that San Pedro Harbor (the port for Los Angeles) is inland water to the artificial breakwaters on the south. United States v. California, 382 U.S. 448, 449 (1966). The Court had not, however, decided where its mouth lay on the east, from the southern breakwater to the mainland. The parties could not agree on a line and the issue was put before the master, where they took decidedly different approaches to its resolution.

The United States went about the task just as it would have in locating the mouth of a juridical bay. It asked "what line divides waters which are landlocked from those which are open sea?" Given the Court's earlier pronouncement, it was assumed that the eastern end of the offshore breakwater was one headland. From there it applied a number of tests to

80. For a more thorough discussion of the *California* case see, 1 Shalowitz, *Shore and Sea Boundaries* 3-22, 44-66 and 105-108 (1962).

81. Included among them were Judge Philip C. Jessup, former Judge on the International Court of Justice and author of the classic *The Law of Territorial Waters and Maritime Jurisdiction*, 1927, and Mr. Elihu Lauterpacht, Queen's Counsel, whom the master referred to as a "distinguished professor and practitioner of international law." Both testified on the role of piers in maritime boundary delimitation.

locate the opposite headland on the mainland. The only seemingly appropriate method for headland selection, given the geography, was the "shortest distance test." That process led to choosing the tip of the east Alamitos Bay jetty as the port's eastern entrance point. (Figure 7)

California used a different approach, based on the *use* of the water area in the vicinity. It emphasized that the federal line cut off waters that in fact were part of the San Pedro harbor system. The special master adopted the state's approach and concluded that the admitted inland waters and the additional area enclosed by California's proposed line constitute one unified harbor system. *United States v. California,* Report of the Special Master of August 20, 1979, at 9. The state's line ran from the offshore breakwater to the tip of the eastern jetty of Anaheim Bay. The master recommended that line; the United States did not take exception to the Supreme Court; and it was adopted in a Fourth Supplemental Decree, 449 U.S. 408 (1981).[82]

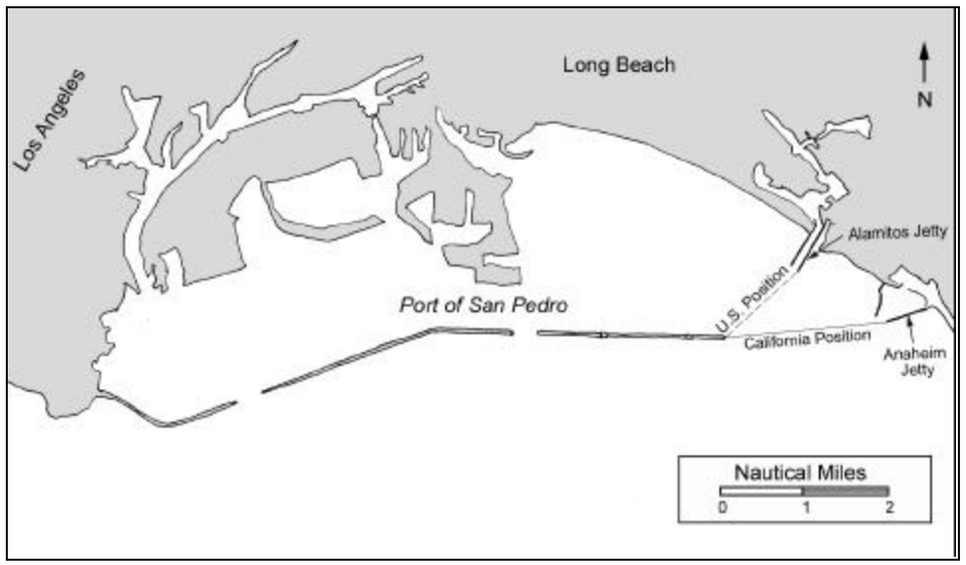

Figure 7. Port of San Pedro, California. Note the differing state and federal contentions as to the limits of inland waters.

The state also prevailed on the San Diego Bay closing line. That bay is formed by a peninsula known as Coronado (sometimes referred to as an island by locals) that parallels the mainland coast. The western headland to the bay is a massive, natural promontory called Point Loma. It was acknowledged by both parties to provide a proper headland. On the east,

82. The Court's Third Supplemental Decree in the *California* case implemented its decision on the Channel Islands National Monument issue discussed above.

however, the entrance to San Diego Bay is less obvious. Point Loma extends well seaward of the natural terminus of Coronado. However, running south from that terminus, and parallel to Point Loma, is a man-made feature, the Zuniga Jetty. (Figure 8) Vessel traffic entering or leaving the bay navigates the channel between these two features.

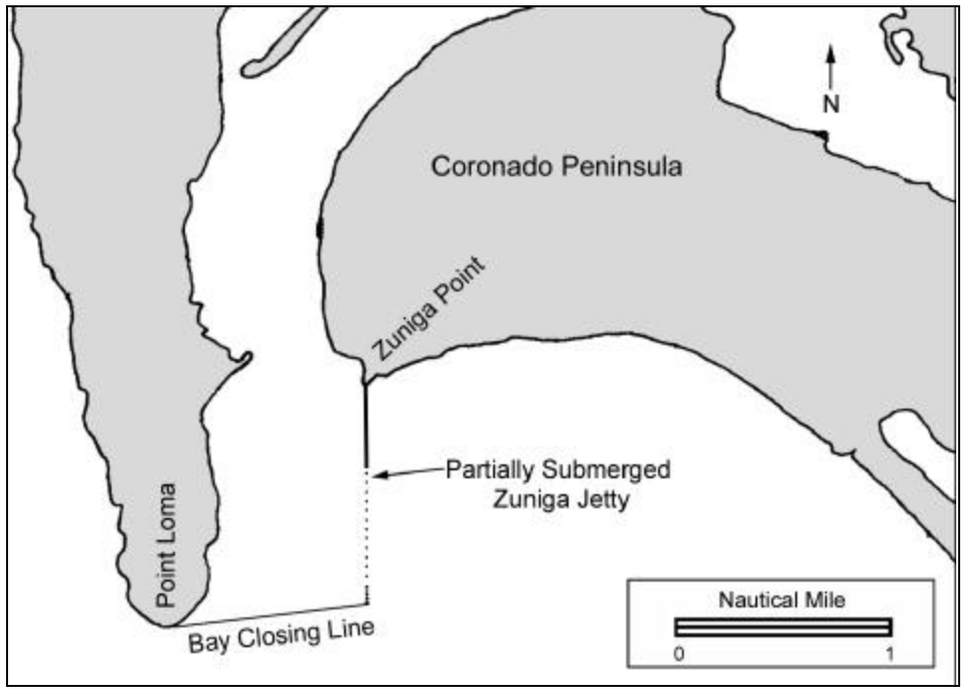

Figure 8. Headlands of San Diego Bay. Point Loma and the Zuniga Jetty constitute the headlands of San Diego Bay.

The United States had agreed that the seaward tips of a number of other California jetties form the entrance points to inland waters. They had been recognized in the Court's Second Supplemental Decree. 432 U.S. 40 (1977). However, the Zuniga Jetty is different. Each of the previously recognized jetties extends above water from the mainland to its seaward tip. The Zuniga Jetty does not. It runs some distance from Coronado above water then slumps below and occasionally reappears. Its seawardmost point, which happens to be above water, had been acknowledged as part of a continuing harborwork and therefore part of the coast for Submerged Lands Act purposes. But the United States contended that a subsurface feature could not be said to create "landlocked waters" and could not, therefore, be considered a bay headland. The federal government proposed

a closing line from the seawardmost point on that portion of the jetty that is continuously above water across the channel to Point Loma.

The state disagreed. It contended that a much larger extent of the jetty lay above tidal datum than was alleged by the United States. What is more, it said, the submerged portions were so near the surface that they could not be safely navigated. It produced evidence of damages to vessels that had tried.

The master again agreed with the state, finding that less than one-fifth of the jetty was submerged and that the United States acknowledged that the seaward tip of the jetty is a proper base point. He also seemed to rely upon his finding that even submerged portions of the jetty were not navigable, denying the federal government's contrary allegation "regardless of the definition of navigable waters which one chooses to adopt." Report at 17-18.[83] In any case, only 12 acres of submerged lands were at stake and the United States did not take exception to the recommendation. It too was adopted in the Court's subsequent decree. 449 U.S. 408 (1981).

There remained the question of piers. California, like other coastal states, has a number of piers that extend seaward from the shore. (Figure 9) Fifteen of these piers are of sufficient length that if treated as part of the coast line they would extend the territorial sea and California's Submerged Lands Act grant.[84] The piers are built on pilings; have asphalt, wood, or concrete decks; and permit the free flow of water beneath. Four are privately owned and the remainder are operated by the state's Department of Parks and Recreation. A sixteenth structure was also involved. It connects Rincon Island to the mainland. The "island" is a wholly man-made structure built to support petroleum production. As an artificial island it is clearly not part of the coast line but the state argued that its connecting causeway, which is comparable to the piers in all respects, should be included.[85]

Certain artificial structures are understood to form part of the coast line for international and Submerged Lands Act purposes. Article 8 of the Convention on the Territorial Sea and the Contiguous Zone provides that "for purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." The Supreme Court had already

83. This comment by the master is curious since the Supreme Court has always defined navigable waters of the United States to include all tidally influenced waters. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Any water flowing across the Zuniga Jetty is clearly tidally influenced.

84. The piers vary in length from 500 feet, at the Santa Barbara Biltmore Hotel, to 3,500 feet at Ocean Beach, California. Three-mile arcs drawn from them would have expanded the state's maritime jurisdiction by approximately 3000 acres.

85. Article 10(1) provides that "an island is a *naturally formed* area of land" [emphasis added]. The history of the Convention makes clear that offshore oil structures were not to be base points for territorial sea delimitation.

Figure 9. Ocean Beach Pier, San Diego, California. This pier is typical of those along California's coast. (*Photo by Donna M. Reed*)

ruled that certain coast protective works, not closely associated with a harbor, are included in the definition. *United States v. Louisiana*, 394 U.S. 11, 49-50 n.64 (1969). And, the federal government had conceded that specific jetties and groins along the California shore would be treated as part of the legal coast line. *United States v. California*, 432 U.S. 40 (1977). In addition, Article 3 of the Convention provides that "except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal [nation] State."

Neither the Convention nor the Submerged Lands Act specifically included or excluded these piers as proper coastal points. California pointed out that groins and jetties had already been excepted as harborworks and that along its coast, barren of many natural harbors, the piers serve as ports. That being so, the state contended, examples of "harborworks" should be extended to include open-pile piers.

The federal government felt that open-pile piers should be distinguished from previously accepted structures. To begin, it challenged California's contentions that these piers performed a "harborlike" function. Most are used more for fishing and promenading than by vessels. But more important, the government felt, is the fact that unlike previously accepted structures they have no continuous low-water line or coast protective function.[86] Experts for both sides agreed that the piers were intentionally constructed to avoid effects on the coastline.

The special master found no basis in the Convention or its history for resolving the question before him. He concluded that "when all is said and done it seems clear that the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers erected on the open coast and not directly connected with any conventional harbor." Report of August 20, 1979, at 150.

In the absence of drafter's intent, he found useful an approach commended by McDougal and Burke in their extensive study *The Public Order of the Oceans* (1962). They suggested that "when the construction of an area of land serves consequential purposes, it would seem to be in the common interest to permit the object to be used for delimitation purposes . . . . The principal policy issue in determining whether any effect for delimitation purposes ought to be attributed to other formations and structures is whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of territorial sea be increased . . . ." McDougal and Burke at 387-388. The master concluded that previously accepted structures create such an interest, Report at 28-29, but the piers at issue here do not. Report at 29. He recommended in favor of the federal government, that the piers not be considered part of the coast line for Submerged Lands Act purposes. *Id.*

California took exception to that recommendation. Although the Supreme Court overruled that exception, holding for the United States, it followed a more conventional course to its conclusion than had the master.

First, it recognized that California's claim might be based on either Article 3 or Article 8 of the Convention. With respect to the former, it seems to have adopted the federal position that a feature must have a low-water line to qualify. As it stated, "open piers, such as those at issue here, are elevated above the surface of the ocean on pilings. Accordingly, they do not conform to the general rule for establishing a baseline from which to measure the extent of a coastal state's jurisdiction. That rule, contained in Art. 3 of the Convention, states: 'the normal baseline for measuring the

86. The Supreme Court pointed to other of its decisions in which it discussed "the significance of factual distinctions and their attendant implications among jetties, groins, breakwaters, and spoil banks." Citing *Texas v. Louisiana*, 426 U.S. 465, 469, and n.3 (1976); and *United States v. Louisiana*, 389 U.S. 155, 158 (1967).

breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.' The type of construction of the piers does not, without more, require a determination adverse to California . . . . But the absence of a 'lower low-water line' deprives the piers of a 'normal baseline' and precludes them from falling within the ambit of Art. 3." *United States v. California*, 447 U.S. 1, 6 (1980). The piers do not qualify as "coast line" under Article 3.[87]

California also made two arguments from the official federal charts of its coastline. First it contended that the requirements of Article 3 have presumably been met because the circumference of each pier is depicted on official charts of the United States with a solid black line, as is the rest of the coastline, including groins and breakwaters. (Figure 10) Second, it pointed out that those same charts appeared to show a 3-mile line constructed from some of the piers.

Dr. Robert Hodgson, geographer of the U.S. Department of State, explained to the master how the inaccurate 3-mile line might have resulted given the multicolored printing process used to publish the charts, climatic changes, or draftsmanship at the Coastline Committee.[88] The master concluded that the charts are sometimes "erroneous and do not represent the position of the United States government." Report at 25. He gave the discrepancies no weight.

With respect to the "black line" that presumably represents the coastline, the Court stated that it "is likewise not dispositive." 447 U.S. at 6. But it appears to attribute that conclusion to its understanding that the charts "contain an aggregate of errors." In fact, the issue here is not one of errors, but of recognizing that the chart contains many solid lines that do not represent the coastline.[89] What is more, it is clear that Article 3 does not mean that the line on a chart is the low-water line; it means that the particular type of low-water line used by the coastal state in its charting will be its baseline.[90] But, like its special master, the Court rejected California's charting arguments.

87. The Court indicated that the master had "implicitly" recognized this proposition, saying that "by considering and disposing of California's claim under Art. 8 of the Convention, in effect an exception to the general rule embodied in Art. 3 . . . he necessarily found the criteria of Art. 3 were not satisfied." *Id.*

88. The Committee on Delimitation of the United States Coastline, sometimes referred to as the Baseline or Coastline Committee, is the interagency group which establishes the United States' maritime boundaries for publication on these charts.

89. For example, in addition to breakwaters, groins and jetties – wharfs, pontoons, land steps and stairs and floating docks are depicted with solid lines. As with piers, those lines indicate the outline of the feature, not a coast line. See: Chart No. 1, United States of America Nautical Chart Symbols Abbreviations and Terms, 10th Ed. 1997 at 27.

90. The question arises because a number of tidal datums might be described as "the low-water line." Different countries employ different low-water datums in their charting. So as not to require any of them to scrap their traditional definitions and redraw their charts, the Convention recognizes various low-water datums as acceptable baselines.

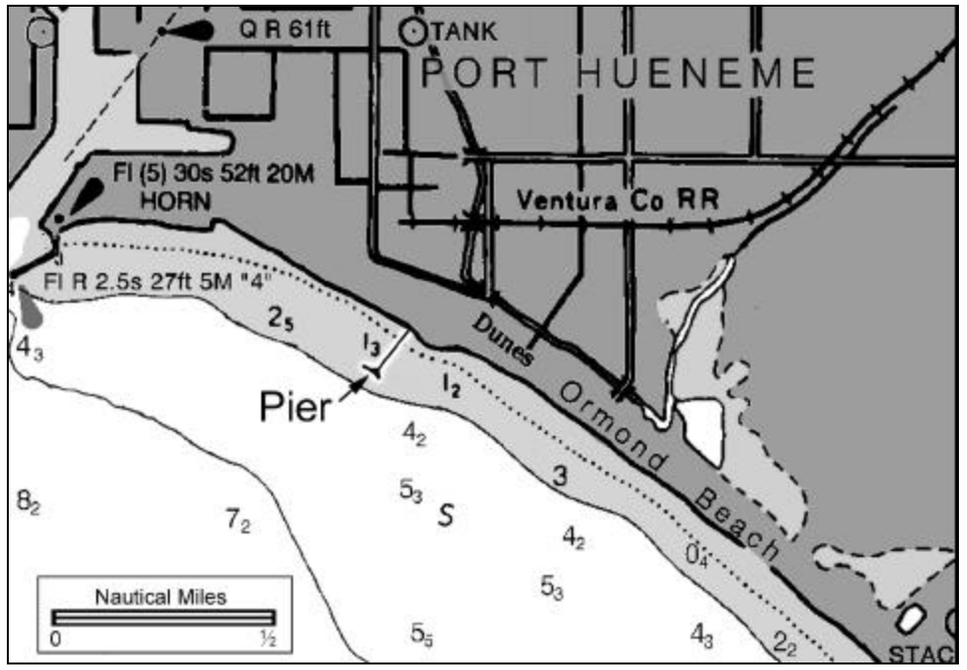

Figure 10. Typical pier on NOAA charts. The label and arrow (added) point to a pier as depicted on a NOAA chart. (*Based on NOAA Chart 18725*)

The Court then turned to the Article 8 contentions. It immediately explained that it never intended that all artificial coastal structures be treated as part of the coast. 447 U.S. at 7. It distinguished California's piers from structures along Louisiana's coast that were built "for protective purposes, or for enclosing sea areas adjacent to the coast to provide anchorage and shelter." *Id.*, quoting from *United States v. Louisiana*, 394 U.S. 11, 37 n.42 (1969). The California piers, it said, "neither 'protect,' 'enclose,' nor 'shelter;' they do not constitute harborworks within the meaning of Art. 8." 447 U.S. at 7. "A 'harbor' under Art. 8 is a body of water providing a haven for safe anchorage and shelter for vessels. See *Louisiana Boundary Case*, *supra*, at 37 n.42, citing 1 Shalowitz, *Shore and Sea Boundaries*, 60 n.65 (1962). That the piers and the Rincon Island complex provide no protection has been noted; that they are not bodies of water states the obvious. It follows that since the structures are neither harborworks nor harbors, they cannot constitute an integral part of a harbor system." 447 U.S. at 7-8.

We now know that jetties, breakwaters, and groins will constitute part of the coast line while open-pile piers will not. With that we turn to the Supreme Court's *Louisiana* decisions and their wide variety of coast line issues.

United States v. Louisiana

In 1960 the Supreme Court ruled that Louisiana was entitled, pursuant to the Submerged Lands Act, to lands and minerals within 3 nautical miles of its coast line. *United States v. Louisiana*, 363 U.S. 1 (1960). "Coast line" was, of course, defined only as the ordinary low-water line and the seaward limit of inland waters. Louisiana's complex, and constantly migrating, shoreline produced an almost infinite variety of boundary questions. The parties could not agree on the delimitation of inland waters and were soon back before the Court to have their differences resolved.

The Coast Guard Line

Louisiana began by contending that the United States had already drawn the limits of inland waters and the state had accepted those lines. Louisiana was referring to a line drawn by the Coast Guard to separate areas in which vessels are required to use "inland" rules of the road from those in which international rules apply. The lines are drawn pursuant to an 1895 statute that authorized the secretary of the treasury to "designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters." 28 Stat. 672. As is obvious from the statute, the "inland rules line" is a series of straight line segments connecting prominent features so that mariners can readily determine when the line is crossed. It is completely unrelated to any international principles of maritime boundary delimitation, either pre- or post-Territorial Sea Convention.

Nevertheless, the state reasoned that "Congress must have contemplated that a technical term such as 'inland waters' should have the same meaning in different statutes." *Louisiana Boundary Case*, 394 U.S. 11 at 19 (1969). Acknowledging that the Court had already ruled that the Submerged Lands Act's "coast line" would be defined by principles of the Convention on the Territorial Sea, the state argued that nothing in the Act compelled the same definition of inland waters around our coast. Rather, it said, the Court could adopt "the definition which best solved the problems of that case." *Id.* at 33. Given the mobility of the Louisiana coast, only the Coast Guard's inland water line would provide the "definiteness and stability which should attend any congressional grant of property rights . . . ." *Id.* at 32. However, if the Convention were to be used (argued the state) all of the areas within the Coast Guard lines would qualify as historic inland water. In either case the "Inland Water Line" would be part of Louisiana's "coast line" for Submerged Lands Act purposes.

The Supreme Court disagreed. It first reviewed the legislative history of the Submerged Lands Act and concluded that Congress had considered the

Coast Guard line and determined that it was "of no value . . . whatsoever" in implementing the Act. *Id*. at 20, quoting from Hearings on S.J. Res. No. 13 and other bills before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess., 276 (1953).

The Court was no more convinced that it should, or could, adopt different definitions of "inland waters" for different parts of the coast. It noted that in the *California* case it had adopted the Convention's principles "for purposes of the Submerged Lands Act, and not simply for the purpose of delineating the California coastline." The Court explained that "Congress left to this Court the task of defining the term used in the Act, not of drawing state boundaries by whatever method might seem appropriate in a particular case. It would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases . . . ." *Id*. at 34. "Moreover," it went on to reason, "adoption of a new definition of inland waters in this case would create uncertainty and encourage controversy over the coastlines of other States, unsure as to which, if either, of the two definitions would be applied to them." *Id.* at 34-35.[91]

Finally, the Court ruled that the Coast Guard line had not created historic inland waters. Although Louisiana characterized that line as an "assertion of sovereignty," the Court pointed out that at a minimum the assertion was not of an inland water claim. "Because it is an accepted regulation of the territorial sea itself, enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters from whose seaward border the territorial sea is measured." *Id.* at 25-26.[92]

Probably even more persuasive was the fact that "for at least the last 25 years, during which time Congress has twice reenacted both the International and Inland Rules, the responsible officials have consistently disclaimed any but navigational significance to the "Inland Water Line." *Id*. at 27. The Coast Guard itself, in publishing its line for the Louisiana shore, declared that "these lines are not for the purpose of defining Federal or State boundaries . . . ." 18 Fed. Reg. 7893 (1953).

The Court followed its precedent in *California* and declared that the Convention's principles would govern inland water determinations and

91. Those who have spent the subsequent 30 years litigating coast line cases with the other coastal states might think that the Court engaged in some wishful thinking if it expected the *Louisiana* case to resolve all controversies. The fact is, of course, that the Court was exactly correct in its point. Later cases would have been much more difficult than they were if this issue hadn't been resolved in 1969.

92. The Court pointed to the recent United Nations study on historic waters which concluded that "if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal [inland] waters, only as territorial sea. [citation omitted] Under that test, since the United States has not claimed the right to exclude foreign vessels from within the 'Inland Water Line,' that line could at most enclose historic territorial waters." *Id.* at 26 n.30.

went on to hold that the Coast Guard's "Inland Water Line" would not even support a historic inland waters claim.[93]

The Convention Issues

Louisiana did not rest its case on the Coast Guard line alone. It took the position that even if the Convention's principles were to be applied, the United States was being much too conservative in its understanding of those principles. The Court looked at the differences between the parties; made dispositive rulings on some; and assigned the remainder to a special master for findings and recommendations. We turn now to the Court's interpretations of the Convention.

DREDGED CHANNELS. The first point of contention came over the breadth of the term "harborworks." Article 8 of the Convention provides that "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." The shallowness of the Gulf of Mexico requires that channels be dredged in the seabed to accommodate vessel traffic bound for inland harbors. In what seems a clever and entirely logical position, the state argued that these subsurface channels are "an integral part of the harbor system," and are therefore "harborworks" and part of the coast.

The federal government contended that Article 8 applies only to raised structures. The Court reviewed the history of the Convention and determined that its authors contemplated "structures" and "installations" that were part of the land and served to shelter nearby waters. *Id*. at 36-37. The Court pointed out that under the Convention harborworks are to be treated as "part of the coast" and that "as part of the 'coast,' the breadth of the territorial sea is measured from the harbor works' low-water lines, attributes not possessed by dredged channels." It concluded that "Article 8 does not establish dredged channels as inland waters." *Id.* at 38.

LOW-TIDE ELEVATIONS. Article 11 of the Convention provides that "where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on the elevation may be used as the baseline for measuring the breadth of the territorial sea." Otherwise, it serves no such function.[94]

93. Louisiana actually made historic waters claims to all of its coastline. Those were assigned to a special master for consideration in the first instance and later came back to the Court on its exceptions to the master's recommendations.

94. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide." Article 11(1). It differs from an island in that the latter remains above water at high tide.

The Article's language created a very clear controversy between the parties. A low-tide elevation lay within 3 miles of a line marking the mouth of a Louisiana bay. It was, therefore, within the territorial sea. It was not, however, within 3 nautical miles of any land. Louisiana argued that any low-tide elevation within the territorial sea would have its own territorial sea and that, in any case, "mainland" includes inland waters. The United States contended that the drafters were merely using the breadth of the territorial sea as a measure of the maximum distance that the feature could lie from upland and that a low-tide elevation that lay more than that distance from dry land does not generate a territorial sea.

The Court reviewed the history of Article 11 and found that early drafts provided that all low-tide elevations located in the territorial sea were to have their own territorial seas. The United States proposed the amendment, which resulted in the present language. The change was made not to preclude the use of low-tide elevations that lay within the territorial sea of the mainland (including inland waters) but to assure that a coastal state could not leapfrog from one low-tide elevation to another. *Id.* at 46. In other words, any low-tide elevation within the territorial sea of the mainland or an island would have its own territorial sea. A low-tide elevation that lay only within the territorial sea of another low-tide elevation would not. Louisiana got to use the low-tide elevation within 3 miles of its bay closing line.

THE SEMICIRCLE TEST. The Court also resolved a number of questions involving the application of Article 7 of the Convention. Two of those concerned the proper means of measuring the area of a potential bay. Article 7 requires, among other things, that "an indentation shall not . . . be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Along most coasts that requirement raises few problems. But the geography of south Louisiana is unique. It is a patchwork of land and water. Adjacent water bodies are often connected by channels of varying width. The parties could not agree on whether, or when, such water areas could be treated as one for purposes of applying the semicircle test.[95]

Louisiana proposed that "the area of tributary bays or other indentations must be included within that of the primary indentation." *Id*. at 50. It pointed out that Article 7(3) indicates that "the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points." From that language the state concluded that one must "follow the low-water line wherever it goes, including into other indentations . . . ." *Id.*

95. See Figure 48 *infra* for application of the semicircle test.

The United States did not deny that some tributary waters should be included in the semicircle test but denied that all should be used. It focused on the Convention's reference to "that indentation" and reasoned that inner bays may be included "only if they can reasonably be considered part of the single, outer indentation." *Id.* at 51. In other words, the areas of water bodies linked only by narrow channels should not be combined for the semicircle test.

The Court did not face the issue head on. Instead it considered two areas in contention and resolved the issues there on other grounds. First, it looked at Outer Vermilion Bay and concluded that if it were to follow the state's logic the area would be too large to qualify as a bay (that is, its mouth would exceed 24 miles). One for the United States. It then considered Ascension Bay and concluded that it meets the semicircle test by including the areas of Caminada and Barataria Bays, which are only separated from Ascension Bay by a string of islands. Under the Convention islands will be ignored for semicircle purposes. One for the state. Future litigants may again have to deal with the issue, but the Court's determination that intervening islands will not preclude otherwise separate indentations from being joined for semicircle test purposes provides some guidance.

The second semicircle issue was clearly resolved. It arose in East Bay, a "V"-shaped indentation at the southern extreme of the Mississippi River delta. East Bay is formed by two mostly man-made channels of the river. The seawardmost headlands, tips of jetties at Southwest and South Passes, form an indentation that does not meet the semicircle test. However, a line can be drawn within the "V" that would enclose enough water to meet the test. Louisiana argued that because a 24-mile fallback line can be drawn within an overlarge bay, a line that satisfies the semicircle test should be allowed even though the line between an indentation's natural headlands does not meet that requirement.

The United States took the position that Louisiana's proposed closing line ignored the primary requirements for bay status. It was not, by itself, a "well-marked indentation" with identifiable headlands enclosing landlocked waters.

The Court left its master to determine whether Louisiana's proposed line met those criteria, but made clear in its decision that they must be met. Like Louisiana, other states have attempted to argue that any indentation that meets the semicircle test is a juridical bay. But the Court was precise, saying "we cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7(2), which plainly treats the semicircle test as a minimum requirement." *Id.* at 54.

ISLANDS IN THE MOUTH OF A BAY. A number of Louisiana's bays are protected by barrier islands. These islands form multiple mouths to the bays. That is, they obviously dictate that a mariner pass to one side or the other if he wishes to enter the bay. Article 7 recognizes the possibility of such circumstances and, at least for purposes of the semicircle test, provides that "where, because of the presence of islands, an indentation has more than one mouth, the semicircle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths." 7(3).

Louisiana was at pains to maximize its jurisdiction in these circumstances, or at least not sacrifice water areas that would have been inland in the absence of islands. To that end it argued that closing lines in multiple mouth bays should be drawn from the mainland headlands to the seawardmost points on the screening islands. The Court rejected that proposal, ruling that "there is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland, that is, by 'a line joining the low-water marks of [the bay's] natural entrance points.'" *Id.* at 56.

Alternatively, the state argued that in no event should any of the closing lines be drawn landward of a line between the mainland headlands. It reasoned that the Convention's intent was to recognize that islands in the mouth of a bay tend to link the waters more closely to the mainland, justifying an enlargement, not a contraction, of inland waters. The Court recognized that logic for waters landward of the island chain but concluded that "just as the 'presence of islands at the mouth of an indentation tends to link it more closely to the mainland,' so also do the islands tend to separate the waters within from those without the entrances to the bay. Even waters which would be considered within the bay therefore 'landlocked' in the absence of the islands are physically excluded from the indentation if they lie seaward of the mouths between the islands." *Id.* at 58. It ruled that "where islands intersected by a direct closing line between the mainland headlands create multiple mouths to a bay, the bay should be closed by lines between the natural entrance points on the islands, even if those points are landward of the direct line between the mainland entrance points." *Id*. at 60.[96]

ISLANDS AS HEADLANDS OF BAYS. Bays are indentations into the mainland. As a general proposition, therefore, their headlands will be projections from the mainland. Headland selection was an important issue in the *Louisiana* case and the United States took the position that islands

96. The same can now be said for islands which form multiple mouths to a bay because they screen a large portion of its width even if they are not intersected by the line between mainland headlands.

could not form the headlands of bays. But again Louisiana's geography varies from the norm. The Supreme Court has described the Louisiana coast as "marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." *Id.* at 63. In other words, in at least the delta areas, the mainland *is* islands. If an area of land surrounded by water at high tide (i.e., an island) cannot form the headland of a bay there are no bays on the Louisiana coast. That conclusion seems counterintuitive.

In fact the Supreme Court had already determined that some of this marsh land should be considered mainland. In *Louisiana v. Mississippi*, a case about those states' common boundary, the Court said "Mississippi denies that the peninsula of St. Bernard and Louisiana Marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly there are in the body of the Louisiana Marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands." *Louisiana v. Mississippi*, 202 U.S. 1, 45 (1906). It went on to treat the peninsula as mainland.

Much of the Louisiana coast is similar. In fact, the federal government had admitted that. 394 U.S. at 63. What is more, three acknowledged federal experts had assumed as much and sought to articulate principles for dealing with the situation.[97]

With that history the Court had no trouble concluding that technical islands could form headlands in limited circumstances. It determined that a particular island's status would depend on such things as "size, distance from the mainland, depth and utility of intervening waters, shape, and relationship to the configuration or curvature of the coast." *Id.* at 66. It left to its special master, in the first instance, "in the light of these and any other relevant criteria and any evidence he finds it helpful to consider, whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention . . . ." *Id*. We will look at the master's application of those criteria momentarily.

Although the Court reminded us that "the general understanding has been – and under the Convention certainly remains – that bays are indentations in the *mainland*, and that islands off the shore are not headlands . . .," *id.* at 62 [emphasis in original], a formation is not precluded from serving as the headland of a bay solely by virtue of its being surrounded by water at high tide.

97. See: Boggs, *Delimitation of Seaward Areas Under National Jurisdiction*, 45 Am. J. Int'l L. 240, 258 (1951); Pearcy, *Geographical Aspects of the Law of the Sea*, 49 Annals of Assn. Of American Geographers, No. 1, p. 1 at 9 (1959); and Memorandum of April 18, 1961, from the Director, Coast and Geodetic Survey to the Solicitor General, excerpted in 1 Shalowitz, *Shore and Sea Boundaries* 161 n.125 (1962).

FRINGING ISLANDS. The Louisiana mainland is, in many places, fringed by barrier islands that roughly parallel the coast. Although conceding that none of these islands is so closely associated with the mainland as to be considered part of it, the state contended that the waters between the islands and mainland should be treated as inland for three reasons. First, Louisiana argued that the islands form the seaward perimeter of Article 7 juridical bays. Second, it urged that the federal government should be required to construct straight baselines around the islands as is permitted by Article 4. Finally, it suggested that pre-Convention principles should be used to establish inland water status.[98]

The United States argued that under the Convention's principles, as adopted by the Court for these purposes, fringing islands would create inland water only under Article 4. And, as the Court had said in *California*, the states could not impose that method on the federal government.

Taking each of the state's options in turn, the Court explained first that Article 7 is inapplicable. Its inland waters, described as indentations into the coast, could only be formed by mainland (keeping in mind the exception through which certain islands would be treated as mainland). Louisiana conceded that the formations at issue here did not qualify.

The Convention, it pointed out, dealt with such formations but only in Article 4. Again reviewing Convention history, the Court explained that following the *Anglo-Norwegian Fisheries Case*[99] "attempts were made to draft concrete rules for the uniform treatment of such island fringes, and both the International Law Commission (ILC) and the 1958 Geneva Conference discussed the problem at length. There was, however, too little technical information or consensus among nations on that and related subjects to allow the formulation of uniform rules. It was agreed, therefore, that . . . each nation was left free to draw straight baselines along suitable insular configurations if it so desired." *Id.* at 69-70.

According to the Court "the deliberate decision was that such island formations are not to be treated differently from any other islands unless the coastal nation decides to draw straight baselines.[100] Thus, Article 4 straight baselines do not appear by operation of law. Rather, they are an optional delimitation method, along a qualifying coast, and in the United States the federal government holds that option.

98. Caillou Bay, west of the Mississippi River delta provides a good example for each of the state's proposals. The "bay" is formed by the mainland marshes on the north and on the south by the western reaches of the Isles Dernieres chain. If the Isles Dernieres were not islands, but a peninsula of the mainland, Caillou Bay would qualify under Article 7. As is, the Isles Dernieres "fringe the coast in its immediate vicinity," qualifying them for Article 4 straight baselines. And, under pre-Convention principles sometimes employed by the United States, Caillou Bay might have been treated as inland. In fact, Caillou Bay was enclosed by a coast line proposed by the federal government when it assumed that principles in place in 1953 would be employed for Submerged Lands Act purposes.

99. *United Kingdom v. Norway*, [1951] I.C.J. 116.

100. Without straight baselines "the territorial sea of an island is measured in accordance with the provisions of these articles." Article 10(2). That is, islands will have belts of territorial seas around them.

The Court dealt with Louisiana's pre-Convention thesis in a footnote. *Id.* at 73 n.97. It noted that at an earlier stage of the litigation the federal government had conceded that Louisiana's island fringes enclosed inland waters. The Court later announced that the Convention's principles would be used for Submerged Lands Act boundary delimitation and opined that the federal government was not bound by the concession based on a misconception of what law would apply. *Id.*

However, the Court left the door open on the issue, giving the states a limited opportunity to capitalize on pre-Convention boundary delimitation principles. In that regard it said "it might be argued that the United States' concession reflected its firm and continuing international policy to enclose inland waters within island fringes . . . . If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana." *Id*. at 74 n.97. Quoting from its *California* decision it said "'a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.' [*United States v. California*, 381 U.S. 139, 168] We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone." 394 U.S. at 74 n.97.

Louisiana accepted the Court's invitation and made that argument before the special master, as have other states since. None has been successful.[101]

HISTORIC INLAND WATERS. Louisiana argued before the Court that all of the waters that it was claiming in the action qualified as "historic bays" and need not conform to the principles of the Convention to achieve inland water status. Historic waters questions are always fact bound and the Court left to its special master "the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays." *Id.* at 75. It did however expand on guidance previously available.

For example, it made clear that Louisiana was free to rely on state assertions of jurisdiction in support of its claim, just as the United States

101. In an interesting conclusion to the point the Court adhered to its position that "the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy." *Id.* at 72-73. Counsel in subsequent cases have occasionally (and inaccurately, we believe) suggested that but for the tidelands litigation the United States would have long since adopted straight baselines. The Court's next sentence suggests that even if that were true it would be irrelevant. It finished the thought by declaring that "it would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law." *Id.* at 73.

could if it were making the claim. It explained that "the only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent that the United States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case." *Id.* at 77-78. That question had been left unanswered in the *California* case.

The Court also reiterated its positions from *California* that in the face of a federal disclaimer of historic title the state's evidence would have to be "clear beyond doubt." *Id*. at 77.

With those guidelines the Court left the historic waters questions to its special master.

The Special Master Proceedings

The Supreme Court soon appointed Mr. Walter P. Armstrong, Jr., of Memphis, Tennessee, as its special master "to make a preliminary determination consistent with the opinion of the Court." *United States v. Louisiana*, 395 U.S. 901 (1969). The parties prepared a joint Pretrial Statement that set out the issues that they understood to be before the special master.[102] There followed seven weeks of trial over a seven-month period. Forty-six volumes of transcript resulted and 775 exhibits were introduced.

The special master divided his Report to the Court by legal issues, including straight baselines, historic bays, and juridical bays. *United States v. Louisiana*, Report of the Special Master of July 31, 1974.

STRAIGHT BASELINES. The Supreme Court had already said much about Louisiana's straight baseline claim in the portion of its 1969 decision denominated "Fringes of Islands." *Louisiana Boundary Case*, 394 U.S. 11, 66-73 (1969). It seems to have come close in that discussion to denying all straight baseline claims, but not quite. As noted above, it appended a footnote that read "we do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention . . . ." *Id.* at 74 n.97. Louisiana accepted that invitation.[103]

102. The Statement is attached to the Special Master's Report of July 31, 1974. See: Reed, Koester and Briscoe, *supra*, at 241. A similar Statement of Issues was produced as part of the special master proceedings in *United States v. Alaska*, this time including a brief summary of each party's position on each issue. These documents added to the efficiency of both trials.

103. Article 4(1) of the Convention provides that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." Subsequent paragraphs of Article 4 provide guidance for the construction of straight baselines.

Before the special master, Louisiana contended that no fewer than five sets of federal lines along the Louisiana coast, all drawn prior to the 1958 Convention, were "straight baselines." The United States denied that any had been constructed for that purpose and the special master considered each separately.

The Coast Guard Inland Water Line. The Supreme Court had already dealt, at some length, with Louisiana's argument that the Coast Guard's line for dividing inland rules of the road from international rules constituted the state's "coast line." 394 U.S. at 17-35. It concluded that neither Congress, in authorizing the line, nor the executive branch, in constructing it, intended the "Inland Water Line" to be a territorial boundary. "While the Submerged Lands Act established boundaries between the lands of the States and the Nation, Congress' only concern in the 1895 Act was with the problem of navigation in waters close to this Nation's shores. There is no evidence in the legislative history that it was the purpose of Congress in 1953 to tie the meaning of the phrase 'inland waters' to the 1895 statute." *Id.* at 19.

Nevertheless, Louisiana persisted and put the same issue before the master. He concluded that the Court's prior determination "would appear to conclude the matter insofar as the Special Master is concerned, as only those issues not decided by the Court itself are referred to him for consideration." Report at 8. But he added "however, lest there be any doubt it is now specifically held that the Inland Water Line does not constitute a system of straight baselines within the meaning of Article 4 of the Geneva Convention . . . ." *Id.* at 9.

The Chapman Line. Louisiana's second straight baseline example was a line drawn by the federal government not for international purposes but as a proposed coast line for implementing the Court's 1950 decision in the case, and adopted in 1956 as a basis for allocating revenues and administrative responsibility for offshore leases during the ongoing litigation.[104] Perhaps more important is the fact that the 1956 Interim Agreement specifically provided that "no inference or conclusion of fact or law from the said use of the so-called 'Chapman-Line' or any other boundary of said zones is to be drawn to the benefit or prejudice of any party . . . ." Quoted at 394 U.S. at 73-74 n. 97. A 1971 Stipulation between the parties, through which the United States conceded Louisiana title to certain waters within the Chapman Line, also provided that "Louisiana recognizes . . . the United States' position that these are not wholly inland

104. It is important to remember the Chapman Line, named after the then secretary of the interior, was developed prior to the Supreme Court's announcement in the *California* case that principles of the 1958 Convention would be employed for inland water determinations under the Submerged Lands Act. For a thorough discussion of the Chapman Line see 1 Shalowitz, *supra*, at 108-112.

waters, and agrees that Louisiana does not and will not base its arguments regarding the inland water status of these or any other water in this or any future litigation between it and the United States upon this stipulation, upon the action of the United States in fixing the Chapman Line in this area or upon prior concessions regarding this area made by the United States . . . ."[105]

The master concluded that "in view of the foregoing, it clearly appears that the Chapman Line does not meet the requirements of Article 4 of the Geneva Convention for a system of straight baselines, and it is now specifically so held." Report at 10.

The Louisiana v. Mississippi Chart. Louisiana's third straight baseline claim was based upon a chart produced by the Supreme Court as an illustration to its decision in *Louisiana v. Mississippi*, 202 U.S. 1 (1906). The master pointed out that the opinion included three different versions of the line. Its purpose was to illustrate Louisiana's eastern boundary, not its inland water or offshore limits. It was used by the judicial branch, not by a branch responsible for foreign affairs. And finally, it was not a straight line at all but "an attempt to follow the coastline at a distance of one marine league." Report at 10. To top it off, in *Louisiana v. Mississippi*, the Supreme Court had clearly stated that it was not dealing with "questions as to the breadth of the maritime belt" or "the extent of the sway of the riparian States" offshore. 202 U.S. at 52. The master rejected the Supreme Court's line as evidence of an Article 4 straight baseline.

The Census Boundaries. In 1937 the Department of Commerce engaged in an exercise to measure the area of the United States and its political subdivisions for purposes of the 1940 census. As part of that process it developed its own system of delimiting water bodies. Proudfoot, *Measurement of Geographic Area*, U.S. Department of Commerce (1946). Louisiana equated that system to a straight baseline system.[106] The master disagreed, saying "this determination was made . . . many years before the adoption of the Geneva Convention, for purposes totally unconnected with it; and the results were certainly never clearly indicated on charts which were given due publicity to the nations of the world. It therefore follows that whatever their validity may have been for internal purposes, the census line established in 1937 did not constitute a system of straight baselines within the meaning of the Geneva Convention . . . ." Report at 11.

Bird Sanctuaries. President Theodore Roosevelt determined that seabirds needed protection along the Louisiana coast. To provide that protection he

105. Stipulation of January 21, 1971, signed by Solicitor General Erwin N. Griswold and Attorney General Jack P.F. Gremillion. Reproduced by the Special Master at pages 63-66 of his Report of July 31, 1974.

106. Shalowitz cites it as an application of the wholly unrelated semicircle method. 1 Shalowitz, *supra*, at 40-41.

established bird sanctuaries at the Tern Islands and Shell Keys. As was his tradition, the president took maps of the areas, drew circles on them and described the sanctuaries as "all small islets, commonly called mudlumps in or near the mouths of the Mississippi River, Louisiana, located within the area segregated and shown upon the diagram hereto attached and made part of this order." [Tern Islands.] And, "these islets, located within the area segregated and shown upon the diagram hereto attached and made a part of this order." [Shell Keys.]

Louisiana argued that the president's lines were straight baselines, setting the limits of the United States' inland water claims "which are now entitled to be recognized under the Geneva Convention." Report at 11. The master thought otherwise, concluding that "even a cursory glance at these orders and the diagrams attached to them, will, however, serve to dissipate this impression. In neither case is there a system of straight lines drawn from point to point, but merely a roughly drawn circular line enclosing an area in which there is both land and water, the line having reference to no particular points of land whatsoever. The purpose is obviously not to establish a boundary between inland and territorial waters, but to establish a limit within which bird life will be protected to the extent established by the order itself." Report at 11-12.

The state sought support in a prior Supreme Court decision that concluded that an Indian reservation, whose boundaries might have been read to include only uplands, must be understood to include adjacent waters because the tribe involved was dependent on fishing. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Louisiana argued that the seabirds being protected here are just as dependent on the adjacent waters which, therefore, must have been included within the reservations.

The master pointed out that territorial waters around the islets were adequate to provide the protection and that there was, therefore, no need to assume inland water status. He rejected the state's claim.

None of the state's straight baseline examples indicated that "the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention." The master went on to the next issue.

HISTORIC BAYS. Louisiana claimed that certain portions of its coastal waters qualified as historic inland waters. Because historic water determinations are largely factual, the Court set out applicable principles but left the primary analysis to its master. 394 U.S. at 75.

The Convention says nothing about how historic waters are to be proved, only that the usual rules of Article 7 are not applicable to them. So the Court and its masters have relied upon the United Nations study entitled *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/143 (1962). That study sets out three factors to be considered in determining historic water status: (1) exercise of authority over the area, (2) the continuity of that exercise, and (3) the attitude of foreign states. *Id*. at 13.[107]

The Supreme Court had twice said that where the federal government had disclaimed historic title the states would have to prove title by evidence that is "clear beyond doubt." *United States v. California*, 381 U.S. 139, 175 (1965) and *United States v. Louisiana*, 394 U.S. 11, 77 (1969). It had also determined that evidence of state exercises of authority, not just federal, could be used to prove the claim.

Special Master Armstrong evaluated the state's evidence in light of these principles. To begin, he found that the United States had disclaimed the historic title urged by Louisiana. As evidence he pointed to the federal position in this litigation, a letter from the secretary of state denying any historic waters claim along the Louisiana coast, and the publication of official federal charts that depict the United States' maritime claims and do not include any historic waters off Louisiana.[108]

He then turned to a review of Louisiana's evidence. The state showed that it had issued oyster and mineral leases and conducted pollution control activities in the areas claimed. But the master pointed out that each of these was within 3 miles of the shoreline. Since international law has long recognized the right of a coastal state to conduct such activities in its territorial sea, Louisiana's actions did not put foreign governments on notice of an inland water claim. Report at 19-21. The exercise of authority must be consistent only with the claim being asserted.

A state witness also testified that in 1946 or 1947 he had arrested three Mexicans for fishing about 4.3 miles from land in East Bay. There was no documentary evidence of the arrest or any indication that the Mexican government ever knew of, or acquiesced in, the arrest. Report at 20. The master concluded that "it can hardly be said that this isolated incident meets the tests set forth earlier for establishing sovereignty sufficient to support a claim to historic waters. Certainly no continuity is indicated, nor any acquiescence by a foreign government." *Id.* at 20-21. From all of the evidence the master concluded that "there is no basis for Louisiana's claim of historic inland waters extending beyond the limits of its coastline as

107. The subject of historic waters, and a separate discussion of each of the historic claims in tidelands cases, is found below.

108. These were the first edition of charts produced by the interagency "Baseline" or "Coastline" Committee. The Committee has continued its work since its inception in 1970 and its official federal position as to the location of the United States' maritime boundaries is now published on the standard National Ocean Service charts of our coast. As the special master pointed out in Louisiana, "these maps are available for sale to the general public and have been distributed to foreign governments in response to requests to the United States Department of State for documents delimiting the boundaries of the United States." Report at 17.

determined by Section 2(c) of the Submerged Lands Act." *Id.* at 21. "Far from being clear beyond doubt, the evidence here adduced resembles that introduced in the California case, which was held to be questionable, and therefore insufficient to support a finding of historic waters in the face of a contrary declaration of the United States." *Id.* at 22.

THE ACTUAL LOW-WATER LINE. Questions about the true location of the "ordinary low-water line" are likely to appear in any tidelands controversy. Special Master Armstrong approached his task assuming that large-scale nautical charts accurately depict the low-water line. Report at 25 and 44. Although he indicated that exceptions would be made only where "the departure from the large-scale charts . . . is so substantial as to affect materially the location of the coastline," Report at 25, he did not exclude any evidence of inaccuracies, no matter how slight, and any proven correction was included in the coast line described in the Court's final decree.

The lesson for future litigants is that the charted line will probably be accepted as the *prima facie* low-water line but any party will be allowed to prove that it has actually moved.[109]

JURIDICAL BAYS. Much of the Louisiana coast is composed of indentations which qualify under Article 7 as juridical bays. Usually the parties agreed on that much. They typically did not agree, however, on the locations of the mouths of those bays, that is, where inland waters ended and the territorial sea began. The special master applied Article 7's principles to the geography and made those determinations.

Although the Master's Report deals with each bay separately, working from east to west as the parties had framed their joint statement of issues, we think it more useful for our purposes here to organize the discussion around the legal questions he encountered and resolved. Most, if not all, of his work is directly applicable to coast lines elsewhere.

Islands v. Mainland. After the Supreme Court concluded that features that meet the Convention's definition of "island" may nevertheless be assimilated to the mainland and serve as headlands to bays, the special master was faced with a number of areas in which that question arose. Most common were the "mudlumps" found off the Mississippi delta. Typically these features appear just seaward of the jetties that form the mouths of the river's distributaries. These jetties frequently form the sides of indentations into the mainland. The United States contended that seaward tips of the jetties formed the headlands, and natural entrance points, to the indentations. The state took the position that the more seaward mudlumps,

109. Again we emphasize that we are not suggesting that the chart, as printed, contained errors. Rather the Court recognizes that with erosion and accretion no chart is likely to remain accurate forever.

though technically islands, should be assimilated to the mainland and serve as headlands for bay closing lines.[110]

The special master reviewed each of the examples in light of the Supreme Court's assimilation criteria, set out at 394 U.S. at 66, and concluded that mudlumps are too far removed from the actual mainland to be considered part of it. In the process he ruled that all five of the Court's criteria must be met to find assimilation to the mainland. Report at 3 and 39.

The master did recognize Cow Horn Island, along the eastern shore of East Bay, as assimilated to the mainland and therefore a proper headland for a "bay" within East Bay. Actually, the parties agreed on its status, while it existed. However, Cow Horn Island also presented a different problem. It was depicted on nautical charts from 1928 until 1969, after which it apparently slumped below even the low-water datum. The special master ruled that those charts provided the only reliable evidence of its elevation. While it existed, the master found that Cow Horn Island formed the headland of a bay within East Bay, which met all of Article 7's requirements. Upon its disappearance, however, no alternative headland existed in the vicinity.

Louisiana argued that if the Cow Horn Island closing line existed until 1969 the state "obtained certain vested rights in the area landward of that line of which it cannot now be dispossessed." Report at 34. The master disagreed, reasoning that "if this were the case, its shoreline would be fixed at the furthest extent to which it ever projected, which would be contrary to the concept of an ambulatory shoreline." *Id.* In short, when the Supreme Court referred to an ambulatory coast line, it meant inland water closing lines as well as the actual low-water line.[111]

The special master made one other important determination concerning island assimilation. The Supreme Court's criteria for island assimilation

110. In some instances the offshore features were actually low-tide elevations. For assimilation purposes the parties did not distinguish between the two. It seems that if an island is properly assimilated to the mainland, so too is a low-tide elevation. Because a bay's entrance point is on the low-water line in any case, there is no immediately obvious reason for treating them differently.

111. The master commented on one other formation in the context of "islands to be assimilated to mainland." With regard to the western Isles Dernieres, he concluded that "the Special Master would upon the evidence presented before him be inclined to hold that based upon their size, proximity, configuration, orientation and nature these islands would constitute an extension of the mainland . . . ." Report at 50-51. Nevertheless, he found that that option had been foreclosed by the Supreme Court. In its discussion of the same area the Court had said "Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description." 394 U.S. 11, 67 n.88. Future litigants who cite to Mr. Armstrong's Isles Dernieres example should take note of the fact that he was influenced by a holding of the special master in *United States v. Florida*, Number 52 Original, concerning the relationship of the Florida Keys to the mainland. The United States excepted to that ruling, the matter was returned to the master for further consideration, and Florida stipulated that the Keys are not part of the mainland. Even more compelling, the Supreme Court had another look at the matter on Louisiana's exceptions in this case. It did not change its previously announced conclusion as to the Isles Dernieres.

involve the island's relationship to the "mainland." The federal government took that to mean the nearest upland. Louisiana was more free thinking on the issue. It urged that since inland waters are, in a sense, part of the mainland (that is, the coastal state asserts similar jurisdiction over them), islands in the vicinity of an acknowledged inland water line should be assimilated to the mainland despite the fact that there may be no land nearby. Louisiana's theory would have permitted the acknowledged closing line to be extended seaward to the nearby island, and to leapfrog even farther seaward if additional islands might be assimilated to the original island or the closing line drawn to it.

The master rejected the idea reasoning that "while for some purposes inland waters may be considered a part of the mainland, they are nevertheless waters and not land, and therefore land bodies lying adjacent to them are not assimilable to them as such, but retain their characteristics as islands. It seems apparent that when the Court used the term 'mainland,' it used it to refer to an existing body of land and not to inland waters." Report at 42.[112]

The Semicircle Test. The Court provided useful guidance for determining when the area of adjacent water bodies might be included to test whether a particular indentation meets the semicircle requirements of Article 7. As a consequence there were fewer "area" questions before the master than might otherwise have been the case. The parties were unable, however, to agree on the significance, if any, of rivers that flow into the indentation being tested. Louisiana urged that "if a river does not flow directly into the sea but into a bay, a straight line should not be drawn across its mouth but instead the low-water mark around the shore of the bay should be followed up into the tributary waters." That, of course, would produce a larger water area and increase the likelihood that the indentation being measured would meet the semicircle test.

The United States contended that tributary rivers should not be included in the area measurement of a would-be bay. The master agreed. He recommended that lines be drawn across the mouths of rivers as they entered bays and their waters be excluded from the bay measurement. Report at 31.

Entrance Points. In a number of instances the parties agreed that an indentation met the requirements of Article 7 and was, therefore, inland waters, yet could not agree on the location of a water body's closing line.

112. To confuse the question, the same special master later faced what appears to be the identical issue in the Mississippi Sound case and reached a different result. There he recommended that Dauphin Island be treated as mainland because it comes in contact with the inland waters of Mobile Bay. *United States v. Louisiana (Alabama and Mississippi Boundary Cases*), Report of April 9, 1984, at 18. We make no effort to explain the difference. The United States took strong exception to the recommendation in the *Alabama and Mississippi Boundary Cases*, but the Supreme Court ruled on other grounds. 470 U.S. 93 (1985).

The Convention provides only that the line connects "the low-water marks of its natural entrance points." Article 7(3).

The United States understood this phrase to describe the point at which the coast line changes direction such that the shore in one direction faces more on the open sea and in the other direction more on the protected waters. A number of methods have been suggested for locating entrance points. But the preferred method, which seemed applicable to all contested indentations along the Louisiana coast, is known as the 45-degree test. The government had constructed proposed closing lines using that test. They were explained through the testimony of the State Department geographer, Dr. Robert Hodgson, who had devised it.[113] Louisiana selected more seaward entrance points, resulting in more seaward closing lines.

The master recommended the federal lines. Although the 45-degree test is not mentioned in his Report, or the Supreme Court decision accepting his recommendations, as the basis for the recommended closing lines, it was consistently employed in their construction. The eventual Supreme Court decree describes closing lines that reflect the test's application and can, presumably, be cited as an example of the Court's approval of the 45-degree test.[114]

OVERLARGE BAYS. Article 7 of the Convention limits the length of a bay closing line to 24 nautical miles. However, it provides that where a bay meets all other requirements of the Article "a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." Article 7(5).

Louisiana contended that its coast line includes two such "overlarge" bays. The first is referred to in the litigation as "Ascension Bay," although it is rarely named on nautical charts or maps of the Louisiana coast.[115] (Figure 11) It is the large water area just west of the Mississippi delta and its natural entrance points are said to be the eastern tip of Belle Pass jetty on the west and the seaward tip of the east jetty at Southwest Pass on the east. A line

113. The test is employed by locating the seawardmost potential headlands and constructing a closing line between them, connecting those headlands with the next landward potential headland on that side and measuring the angle between the two lines. If both angles are more than 45 degrees all enclosed waters are landlocked. If either angle is less than 45 degrees the intervening shoreline faces more on the open sea than enclosed water. In that case the original closing line is rejected, another is constructed using the more landward headland, and the process is repeated until angles on both sides of the indentation are more than 45 degrees. See Figure 57 *infra*.

114. The test was later applied in seeking a closing line in the area of Long Island Sound. *United States v. Maine (Rhode Island, New York*), Report of the Special Master, October Term, 1983, at 50 n.39. It was referred to by the Supreme Court, with approval, when it adopted the recommendations of that Report. *Rhode Island and New York Boundary Case*, 469 U.S. 504 (1985).

115. A feature need not, of course, be named a "bay" to qualify under Article 7, nor does the fact that it is so named add any weight to a bay claim.

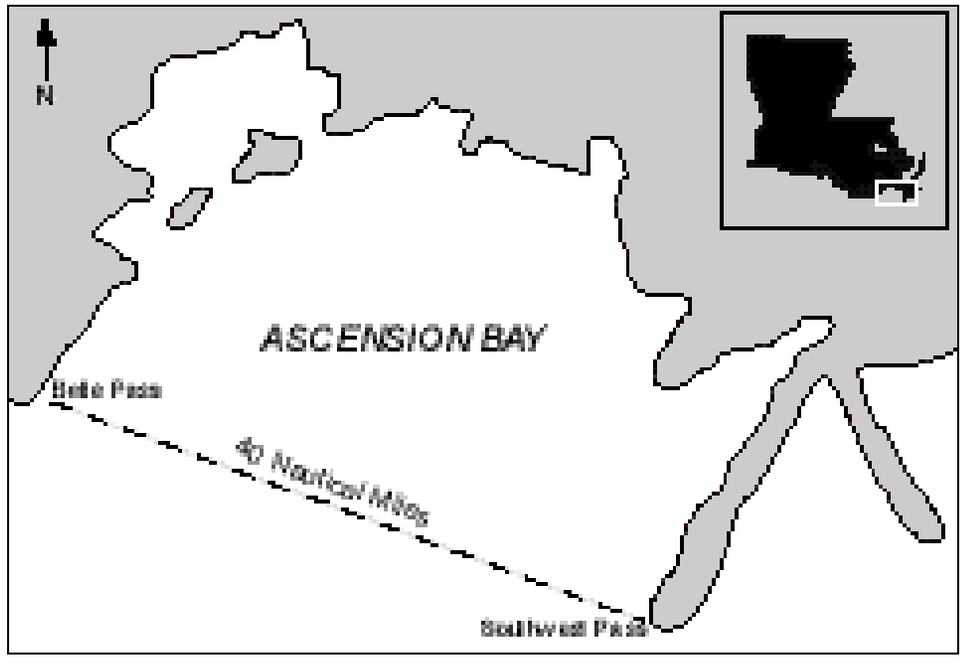

Figure 11. Ascension Bay, Louisiana, an overlarge bay.

between the points exceeds 24 miles so it cannot be closed *en toto*. The state contended, however, that in all other respects it meets the requirements of Article 7.

The Supreme Court had already ruled that Ascension Bay meets the semicircle test. 394 U.S. 11, 52-53. The state argued that it is also "a well-marked indentation," containing "landlocked waters," and "more than a mere curvature of the coast" (the primary requirements of Article 7). It introduced examples of accepted juridical bays, both in this country and abroad, whose configurations are similar to Ascension Bay. The United States had to acknowledge the similarities but contended that "landlockedness" could not be determined by shape alone and that as bays increase in size their headlands should have to "pinch" in toward each other more and more to create landlocked waters.

The master was apparently unmoved by the suggestion. Ruling for the state he noted that Ascension Bay "constitutes an over-large bay within the meaning of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. All of the evidence in the record indicates that it does. Certainly its waters are landlocked, or, as sometimes described *Inter Fauces Terrai*, with well marked natural entrance points. This is supported by the ratio of its depth of penetration to the width of its mouth, for it is almost perfectly semicircular in shape, the classic form of a bay. In this respect, it bears a startling resemblance to Monterey Bay, which was held to be a true

bay in the California case." Report at 45. The United States did not take exception to that recommendation. The parties were able to agree on the 24-mile fallback line and it was incorporated into the Court's final coast line description.[116]

Louisiana's second overlarge bay claim arose in Atchafalaya Bay. The United States acknowledged the inland water status of that water body as bounded by a line from Point Au Fer on the east to South Point on Marsh Island on the west, as the Court had already held. 394 U.S. at 40. That line is less than 24 miles and encloses an indentation that meets all requirements of Article 7. But the state wanted more. It argued that the Shell Keys south of Marsh Island and low-tide elevations west of Point Au Fer should be considered part of the mainland and headlands to an overlarge bay that includes the area already considered by the Court and additional waters to the south. Alternatively, the state contended that an overlarge bay is formed by the federal entrance point on Point Au Fer and Mound Point on Marsh Island. Both of the state's alternatives produced lines of more than 24 miles but a 24-mile fallback line could have been constructed that was seaward of the line conceded by the United States.

The special master recommended adoption of the federal position. He determined, with respect to Louisiana's primary theory, that "the size and location of the elevations [i.e., Shell Keys and low-tide elevations west of Point Au Fer] makes it impossible realistically to view them as extensions of the mainland." And, as to the alternate, "the relation of Mound Point to the coast is such that a line drawn to it would include waters that cannot be viewed as 'landlocked.' The natural entrance to Atchafalaya Bay on the west is clearly South Point." Report at 52-53.

The master submitted his Report to the Court, the parties filed exceptions and, in a one-page order, the Court adopted the master's recommendations without further comment. *Louisiana Boundary Case*, 420 U.S. 529 (1975). Between the Court and its master all Louisiana coast line issues were resolved. Decrees describing the coast line and 3-mile projection were prepared and entered. *United States v. Louisiana*, 422 U.S. 13 (1975) and 452 U.S. 726 (1981). Thereafter, complicated accountings were exchanged and oil and gas revenues collected during the life of the litigation were distributed between the parties.[117]

116. That line now appears on the National Ocean Service's large-scale chart of the area. Because the charts contain no explanation of the basis for closing lines that they depict (and there's no way that they could) some users have mistakenly assumed that this line represents the mouth of an indentation that qualifies as a juridical bay in its own right. It does not.

117. Because of the rule that coast lines are ambulatory, the entire process might have been repeated some time thereafter. However, largely due to the efforts of Louisiana's congressional delegation, the Submerged Lands Act was amended in 1986 to provide that any Submerged Lands Act boundary described in a Supreme Court decree would thereafter become fixed. (100 Stat. 151, amending 43 U.S.C. 1301[b]). The Supreme Court had suggested that course as a possibility in the *Louisiana* case when the state expressed concern about ambulatory boundaries. *United States v. Louisiana*, 394 U.S. 11, 34 (1969). Louisiana now has a fixed Submerged Lands Act boundary. 452 U.S. 726 (1981).

The Alabama and Mississippi Boundary Cases

In its 1960 decision in *United States v. Louisiana, et al.*, the Supreme Court denied Alabama's and Mississippi's claims to a 9-nautical mile historic boundary in the Gulf of Mexico. 363 U.S. 1. At the same time it held that they were entitled, under the Submerged Lands Act, to grants of 3 miles from their coast lines, *id.* at 79-82, but made no determination as to the location of that coast line. *Id*. at 82 nn.135 and 139. At the time, the parties thought that they would be able to agree on a coast line description but that was not to be.

In 1979 and 1980 the two states filed motions for a supplemental decree and the United States filed cross motions. The matter was referred to Special Master Walter P. Armstrong, Jr., who had presided over the extensive trial of Louisiana's coast line. The master was presented with one overriding issue, whether the water body known as Mississippi Sound is inland water or a combination of territorial seas and high seas.

Mississippi Sound, as the Supreme Court described it, is "a body of water immediately south of the mainland of the two States. It extends from Lake Borgne on the west to Mobile Bay at the east, and is bounded on the south by a line of barrier islands . . . . The Sound is approximately 80 miles long and 10 miles wide." *Alabama and Mississippi Boundary Cases*, 470 U.S. 93, 96 (1985). (Figure 12)

The United States argued that there was no basis for considering Mississippi Sound to be inland water and claimed that the states' jurisdiction extended 3 miles seaward from the mainland and 3 miles around each island. Because the Sound is as much as 10 miles wide in places, that left enclaves of high seas in its center. These, it said, were under federal jurisdiction.

Alabama and Mississippi raised three bases for their contention that the Sound is entirely inland waters. First, they asserted that "by its action (although not explicitly) the United States has in fact adopted . . . [Article

Figure 12. Mississippi Sound off the coasts of Alabama and Mississippi. (*Based on NOAA Chart 11006*)

4] straight baselines, which would include Mississippi Sound as inland waters." *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 5. Next, the states argued that Mississippi Sound is a juridical bay under Article 7 of the Convention. And finally, they contended that it has been claimed as a historic bay.

Straight Baselines

There is no question that Alabama and Mississippi have "a fringe of islands along the coast" such that Article 4 straight baselines could be employed, making Mississippi Sound inland waters. The states did not contend that the United States had drawn such lines but that it had "traditionally claimed as inland waters sounds and straits lying behind islands where none of the entrances between islands or islands and the mainland exceeds ten miles in width, and that this amounts to the adoption of straight baselines." Report at 5.

Only 10 years before Mr. Armstrong had rejected Louisiana's similar straight baseline claim, which had been supported by a proposed federal coast line based upon the 10-mile rule.[118] The Supreme Court had adopted his recommendations on that and all other issues in the *Louisiana* case. 420 U.S. 529 (1975).

Relying on his previous analysis, and language from the Court in *United States v. California*, the master determined that "the adoption of the 24-mile closing line together with the semi-circle test in place of the ten mile rule represents the present position of the United States and that this has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi for reasons that will hereafter appear, and that therefore Article 4 of the Convention does not apply." Report at 7.[119] Despite the master's understanding that the United States had employed the 10-mile rule for as much as 58 years, he concluded that "the United States has not in fact adopted the straight baseline method authorized by Article 4 . . . ." *Id*.

He went on to evaluate the parties' juridical bay contentions.

118. The so-called Chapman Line was created at a time when the federal government assumed that the United States' international practice in 1953, upon passage of the Submerged Lands Act, would be applied to define the term "inland waters" as used in that statute. Of course the Supreme Court adopted, instead, the much more comprehensive definitions of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and the Chapman Line became irrelevant for coast line delimitation purposes.

119. The Supreme Court passage referred to by the master reads "we conclude that the choice under the Convention to use the straight-baseline method . . . is one that rests with the Federal Government, and not with the individual States." *United States v. California*, 381 U.S. 139, 168 (1965). Interestingly the master and, upon later review, the Supreme Court gave some weight to the 10-mile rule in their historic waters analyses. Their comments that the "rule" was employed by the federal government from 1903 until 1961 became the basis for Alaska's straight baseline claim soon thereafter.

Juridical Bays

Alabama and Mississippi took the position that Mississippi Sound meets all of the requirements of Article 7 and is therefore inland water without straight baselines or historic assertions of jurisdiction. The special master agreed. Curiously, his determination is founded on a legal conclusion that appears to directly contradict his decision on the same question in the *Louisiana Boundary Case*. That issue is whether an island can be assimilated to the mainland through its relationship to admitted inland waters despite the absence of actual uplands in the vicinity.

The formation in question is Dauphin Island, which lies in the mouth of Mobile Bay at the far eastern end of Mississippi Sound. The master concluded that Dauphin Island "constitutes an extension of the mainland." We will consider his bases for that conclusion below. But first we look at its consequences.

Having concluded that Dauphin Island is in fact mainland, the master considered the specific requirements of Article 7. To determine whether the Sound is a "well marked indentation containing land locked waters" he looked for clearly distinguishable natural entrance points, which he found at Isle au Pitre and Dauphin Island. Report at 19. The parties had agreed that the Sound meets the semicircle test and the states argued that that fact alone resolved the "landlocked waters" issue in its favor. The master disagreed, pointing to the Court's ruling in the *Louisiana Boundary Case* that satisfaction of that test, by itself, does not *ipso facto* assure juridical bay status. 394 U.S. at 54. So the master applied two other tests. First he compared the total length of the Sound's multiple mouths, approximately 24 miles, to the maximum width of the Sound (the depth of penetration, in the language of Article 7) and calculated a ratio of ".4167 to 1." This, he concluded, "is enough to constitute more than a mere curvature of the coast." Report at 20.[120]

Second, he looked to the work of Hodgson and Alexander. They had opined that "if a group of islands relate to the mouth of a bay so as to exceed in length more than 50% of the length of the bay closing line, the islands screen the mouth of the bay and form the natural limit for land-locked waters."[121] Again treating Dauphin Island as part of the mainland, and using it as the eastern headland of Mississippi Sound, the master found

120. The conclusion is interesting in that one would expect to require a ratio of at least .5:1, the ratio of a semicircle which is a minimum area requirement. We note, also, that the 24-mile component of the fraction is based upon the master's prior conclusion that Dauphin Island is to be treated as mainland. Absent that assumption the ratio would be even less and the closing line would exceed the Convention's maximum length.

121. Hodgson and Alexander, *Towards an Objective Analysis of Special Circumstances*, Occasional Paper No. 13, Law of the Sea Institute, Univ. of Rhode Island, 1972, at 20.

that the barrier islands accounted for more than 50 percent of the distance between the mainland headlands.

The master seems to have determined that Hodgson and Alexander support his conclusion. The connection is tenuous, if it exists at all. These renowned geographers were not, in the passage relied upon, setting out a test for determining whether a juridical bay exists. Rather, they were concerned with how to locate the mouths of an already established Article 7 bay. The Supreme Court had already said that islands may form multiple mouths to a bay and if "a string of islands covers a large percentage of the distance between the mainland entrance points, the openings between the islands are distinct mouths outside of which the waters cannot sensibly be called 'inland.'" *Louisiana Boundary Case*, 394 U.S. at 58.

Drs. Hodgson and Alexander were proposing an objective test for determining when islands cover "a large percentage of the distance between the mainland entrance points." The United States has always taken the position, and the Court has agreed, that under the Convention a bay is an indentation into the mainland. Yet the master seems to use the Hodgson and Alexander test to determine whether landlocked waters exist in the first instance, not merely whether islands form multiple mouths to an indentation into the mainland.

After applying these tests the master purported to find support in a 1961 memorandum from the Director, Coast and Geodetic Survey, Department of Commerce. He suggested that the memo "appears to have some bearing on this issue, stating at least by inference that where islands form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, the coast line should embrace those islands. The barrier islands [off Alabama and Mississippi] do form such a portico . . . ." Report at 21.

The master referred to the memo as having been "approved by the Court in another context." *Id*. He did not mention that the context had been a consideration of what islands might be assimilated to the mainland, not whether a bay could be formed by islands. *Louisiana Boundary Case*, 394 U.S. at 65-66 n.85. Nor did he mention that the memorandum had been written four years before the Supreme Court's adoption of the Convention's definitions to define the Submerged Lands Act's coast line. When the Court "approved" the memorandum in 1969 it had long since rejected the idea that, under the Convention, islands that merely form a "portico to the mainland" create inland waters, except through the application of straight baselines.

So we return to the master's analysis of Dauphin Island, the conclusion upon which all of the master's juridical bay conclusions depend. In fact, the foregoing discussion of Article 7 criteria is superfluous if the master is wrong

as to the assimilation of Dauphin Island to the mainland. If Dauphin Island is an island, the gap between it and the actual mainland headland at Mobile Point brings the total of all closing lines, or mouths to the Sound, to more than 24 miles. The maximum allowed by Article 7(4) is exceeded. At most a 24-mile fallback line within the Sound is allowed. Dauphin Island's "mainland" status is the foundation of the Article 7 reasoning.

Recognizing Dauphin Island's critical role, the master considered four bases upon which it might be considered part of the mainland. First he looked at its proximity to the mainland. The parties had stipulated that the water gap between Dauphin Island and the nearest mainland-upland, at Cedar Point, is 1.6 nautical miles. "While this is substantially less than the distance of any of the other barrier islands from the mainland, still it is considerably more than that of Isle au Pitre therefrom, and, I believe, more than was contemplated by the Court in . . . *United States v. Louisiana, supra*." Report at 13, referring to 394 U.S. at 66. "In the other respects referred to in that language, Dauphin Island differs little if any from the other barrier islands." Report at 13.[122]

Next the master observed that Dauphin Island can be distinguished from the remainder of the barrier chain in that it is more densely populated. However, he concluded that "the degree of development of the island for human habitation and use seems to have no bearing upon the issue whatever. Many highly developed islands remain true islands and do not by being so developed become extensions of the mainland." Report at 13.

Third, he considered the fact that Dauphin Island is actually connected to the mainland by a bridge. There is no doubt that such a connection joins the two factually. But legally, the United States argued, it has no relevance. As precedent the government pointed to *United States v. Florida*, Number 52 Original, in which the Florida Keys were not treated as mainland despite their connection by causeways and bridges. The master agreed, saying "the latter view seems to me to be sound, and I therefore find that the mere fact that it is connected to the mainland by a bridge or other artificial structure does not standing alone make Dauphin Island a part of the mainland." Report at 13. This brought the master to the consideration upon which he based his determination as to Dauphin Island.

"The fourth and final distinction" he said "between Dauphin Island and the other barrier islands appears to be unique and significant. Dauphin Island is directly in the mouth of Mobile Bay, which is admittedly a juridical bay." Report at 14. In fact, he pointed out, the federal government's

122. The master had already noted that the other islands were "apparently conceded" not to be extensions of the mainland. Report at 12. The United States would agree that it is this water gap, and/or that between Mobile Point and Dauphin Island, to which the Supreme Court's criteria should have been applied, rather than the closing line across the mouth of Mobile Bay, a point which we discuss below.

Baseline Committee had drawn the Mobile Bay closing line from Mobile Point on the east, to Dauphin Island and Little Dauphin Island, and then back to the mainland at Cedar Point. The master was not suggesting that the federal government had treated Dauphin Island as an extension of the mainland, which it had not, but that the United States had acknowledged that the island formed multiple mouths to Mobile Bay and, therefore, that "Dauphin Island at least touches upon . . . inland waters of the state of Alabama." Report at 14. That is clearly true.

But then came the jump that allowed all other pieces of the puzzle to fall into place. The master concluded that "there seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland. If this is correct, then Dauphin Island, as it adjoins the mainland, is clearly an extension thereof; in effect, a peninsula extending westwardly therefrom . . . ." *Id.* He then discussed the authorities quoted by the Supreme Court, and the Court's own criteria for island assimilation.

He quoted Boggs, as had the Court, who acknowledged that "some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland."[123] Pearcy was also quoted as saying "islands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland."[124]

The 1961 Coast and Geodetic Survey memorandum mentioned above suggested that "the coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of the land form." Report at 15.[125]

And Shalowitz was quoted as having said "with regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." *Id.*

After quoting these authorities the special master concluded that "it would appear as a general rule derived from Article 7 Section 3 of the

123. Boggs, *Delimitation of Seaward Areas Under National Jurisdiction*, 45 Am. J. Int'l L. 240, 258 (1951). Quoted by the Supreme Court at 394 U.S. at 65 n.85.

124. Pearcy, *Geographical Aspects of the Law of the Sea*, 49 Annals of Assn. Of American Geographers No. 1, p. 1, at 9 (1959). Quoted by the Supreme Court at 394 U.S. at 65 n.85.

125. Memorandum of April 18, 1961, excerpted in 1 Shalowitz, *supra*, at 161, n.125.

Geneva Convention and the Court's interpretation thereof in *United States v. Louisiana, supra*, (394 U.S. at p. 55) that where islands lie within the mouth of a bay they are to be considered as part of the mainland for all purposes." Report at 16. We respectfully suggest that neither the authorities relied upon, the Supreme Court, nor the Convention supports that assertion.

There is no suggestion that when Boggs referred to "mainland" he intended to encompass inland waters. Nor, apparently, did Pearcy. He spoke of islands close to the "shore." The Convention does not equate "shore" with "coast line," much less "inland waters." Shalowitz does equate "shore" with "tidelands" and defines the latter as "the land that is covered and uncovered by the daily rise and fall of the tide. More specifically, it is the zone between the mean high-water line and the mean low-water line along a coast, and is commonly known as the 'shore' or 'beach.'" 1 Shalowitz, *supra*, at 318.

If any doubt remained, Shalowitz referred to the relationship between islands and the land form, not the mainland, *id.* at 162, and conveniently included a diagram that emphasizes the relationship between the islands and nearby uplands, not inland waters. The master does not contend that the Convention or Court has subsumed internal waters under the general category of "land form." The better reading of the authorities cited would seem to be that they had in mind the relationship between islands and other uplands, not inland waters. The Supreme Court certainly did not suggest otherwise.

The Supreme Court's treatment of the issue seems to show even more clearly that it does not equate inland waters with mainland. The master cites a single passage in the *Louisiana* decision. In so doing he attributes to the Supreme Court a conclusion that "where islands lie within the mouth of a bay they are to be considered part of the *mainland* [emphasis added] for *all* purposes [emphasis in Master's Report]." Report at 16, citing to 394 U.S. at 55. In fact, the Court said "while the only stated relevance of such islands is to the semicircle test, it is clear that the *lines* across the various mouths are to be the *baselines* for all purposes [emphasis added]."

The Court was not, in this passage, considering the status of islands. It was dealing with the multiple mouths of a bay that are created by islands in its entrance. Two points were at issue: how closing lines should be drawn to islands and whether any segment of multiple closing lines could lie landward of a direct line between the mainland headlands.[126] In resolving

126. Louisiana, in an effort to push inland waters as far seaward as possible, contended that closing lines should be drawn to the seaward points on islands, not natural entrance points that served to enclose landlocked waters, and that no portion of such lines should lie landward of a line connecting mainland headlands.

these issues in favor of the United States the Court never hinted that islands within the mouth of a bay are to be treated as mainland.[127]

To the contrary, the Court clearly distinguished between islands and mainland throughout that discussion. In stating the second issue for resolution it asked "should the lines be drawn landward of a direct line between the entrance points on the mainland?" *Id.* at 55. If islands were included within its reference to mainland there would have been no issue. In determining that termini on islands would be located using the same principles as are employed for mainland entrance points, the Court said "there is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland . . . ." *Id.* at 56. Again, islands were distinguished from mainland.

In dealing with a particular example, the Court explained that "the 'natural entrance points' may, and in some instances . . . do, coincide with the outermost edges of islands. But there is no automatic correlation, and the headlands must be selected according to the same principles that govern the location of entrance points on the mainland." *Id.* Later the Court referred to "an island which is intersected by a direct mainland-to-mainland closing line." *Id.* at 59. The discussion relied upon by the master never suggested that islands in the mouth of a bay are to be considered as part of the mainland.

Another section of the Court's *Louisiana* decision makes equally clear that the Court does not consider islands in the mouth of a bay to be part of the mainland. The Barataria-Caminada Bay complex, just west of the Mississippi delta, qualifies as inland waters under Article 7 and is fronted by barrier islands. Under the master's reasoning the islands would be mainland because they adjoin those inland waters. But Louisiana argued that an even more seaward area, which it denominated "Ascension Bay," qualified as an overlarge bay. To qualify, Ascension Bay had to be shown to meet the semicircle test. The Court ruled that it did, by including the area of Barataria-Caminada. That could be done, it reasoned, because "those inner bays are separated from the larger 'Ascension Bay' only by the string of *islands* across their entrances [emphasis added]." 394 U.S. at 52. It concluded that under the Convention those islands were to be treated as water area. *Id.* at 53. If the islands had been treated as mainland, Ascension Bay would not have qualified.[128]

127. The only explanation that we can see for this misinterpretation of the Court's position is that it did conclude that headlands on islands would be located in the same fashion as they are on the mainland.

128. The same master who heard the Mississippi Sound case must have agreed with the Court's understanding. He recommended, despite federal objections on other grounds, that Ascension Bay is an overlarge bay. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 45-46.

Nor does the Convention provide any support for the master's conclusion. If, as the master reasons, any island that touches inland water becomes, as a matter of law, part of the mainland, the final sentence of Article 7(3) becomes meaningless. It provides that, for purposes of the semicircle test, "islands within an indentation shall be included as if they were part of the water area of the indentation." The provision was included to assure that islands within an indentation would not reduce its chances of meeting the semicircle test. The master's reasoning would produce a directly contrary result. Islands within the inland waters of a bay would be treated as mainland and not available for water measurement. Article 7(3) clearly does not treat islands within inland water as part of the mainland.

Having concluded that the Convention and the Court treat inland waters as part of the mainland, the master went through what would seem to be a *pro forma* exercise of applying the Court's five tests for island assimilation: size, distance from the mainland, depth and utility of intervening waters, shape and relationship to the configuration of the mainland. Given the premise that Dauphin Island is in direct contact with the "mainland" (i.e., inland waters) it would seem impossible to fail the tests. Its size would seem to be irrelevant; a peninsula extending from the mainland, as the master described it, would be part of the mainland whatever its size. Dauphin Island, by the master's definition, was within no distance of the mainland. Nor were there "intervening waters" between it and Mobile Bay. The master pointed out, as to shape, that it appears to be an elongation of Mobile Point and "the two appear to have been connected in the Holocene era." Report at 17. The significance of the island's relation to Mobile Point is not immediately obvious. The adjacent inland waters are the "mainland" to which it is said to be assimilated. Because they abut one another, shape would not seem to be a factor. Finally, the master decided that "the configuration of Dauphin Island follows the curvature of the shoreline, with the exception of the projection of Cedar Point." *Id*. Again, reference to the true mainland seems irrelevant given the presumption that got us to this point, that is that inland waters are the "mainland." Dauphin Island and the adjacent inland waters of Mobile have identical configurations.

But none of these concerns creates the "curiosity" referred to in the beginning of our discussion. That comes about when one compares the master's positions on this issue in the *Louisiana Boundary Case*.

Like Alabama and Mississippi, Louisiana has numerous islands scattered along its coast. In many cases it argued that those islands should be assimilated to the mainland. Often the United States agreed that an indentation into the mainland qualified as a juridical bay but opposed the state's attempts to move a closing line seaward by assimilating offshore

islands to the mainland. According to Special Master Armstrong's characterization of Louisiana's position, with which we agree, Louisiana insisted that "once the closing line conceded by the United States is drawn, the waters within that closing line become inland waters and therefore constitute a part of the mainland, and that the relationship of the remaining islands to those inland waters therefore is in reality a relationship to the mainland which is sufficient to constitute them an extension thereof." The position is identical to that espoused by Alabama and Mississippi and adopted by the master at Dauphin Island. But in the *Louisiana Boundary Case* he responded by holding that "while for some purposes inland waters may be considered a part of the mainland, they are nevertheless waters and not land, and therefore land bodies lying adjacent to them are not assimilable to them as such, but retain their characteristics as islands." Report of July 31, 1974, at 43. It is clear that in so ruling the master considered himself to be following the Court's lead. He stated that "it seems apparent that when in its opinion the Court used the term 'mainland,' it used it to refer to an existing body of land and not to inland waters." *Id*. at 42.

Compare his conclusions in the Mississippi Sound case, beginning with "there seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland;" Report of April 9, 1984, at 14, "if my reasoning is correct, and inland waters are to be considered part of the mainland, then Dauphin Island is 'near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland,'" and "it would appear as a general rule derived from the Court's interpretation thereof in *United States v. Louisiana, supra*, (394 U.S. at p. 55) that where islands lie within the mouth of a bay they are to be considered as part of the mainland for all purposes." *Id*. at 15-16.

The apparent discrepancy was, of course, brought to the attention of the special master whose response was to note in his Report that "I am fully aware of the Court's language in *United States v. Louisiana, supra*, which I previously interpreted as precluding such a holding in the case of islands in the Caillou Bay area. However, I believe that the factual situation here differs materially, basically because Dauphin Island lies in the mouth of Mobile Bay which is indisputably inland waters." *Id*. at 18.

The Caillou Bay example is certainly distinguishable. The question there was whether the western Isles Dernieres could form a bay where no indentation in the coast line existed but for the existence of those islands. But it was not in Caillou Bay that the special master faced the same issue that he dealt with 10 years later at Dauphin Island. It was his consideration of Redfish Bay that produced the language quoted above. A juridical bay

existed within Redfish Bay, as it did in Mobile Bay, without the presence of islands. In both cases the states argued that those admitted bays should be treated as mainland for purposes of assimilating nearby islands. In Louisiana the master was clear — inland waters are not "mainland" for purposes of island assimilation. In Alabama and Mississippi he was just as clear — inland waters are mainland.

In the *Louisiana Boundary Case* the Supreme Court adopted all of its master's recommendations without comment, including the finding that inland waters are not "mainland" for this purpose. In the *Alabama and Mississippi Boundary Cases* the United States took strong exception to his opposite conclusion.

Because the Court accepted the master's third finding, that Mississippi Sound constitutes historic inland waters, it did not have to comment on his recommended ruling as to Dauphin Island. On two occasions, however, the Court made clear that it was not adopting the master's recommendation or ruling on the juridical bay claim. First it said "we therefore need not, and do not, address the exceptions presented by . . . the United States that relate to the question of whether Mississippi Sound qualifies as a juridical bay under Article 7 of the Convention." *Alabama and Mississippi Boundary Cases*, 470 U.S. 93, 101 (1985). And later, "we repeat that we do not address the exceptions . . . of the United States that relate to the question whether Mississippi Sound qualifies as a juridical bay." *Id*. at 115.

With this, we turn to the issue upon which the Court did base its ruling favorable to the states.

Historic Bay

The states' third, and successful, contention was that Mississippi Sound is historic inland waters. Historic waters are not defined in the Convention on the Territorial Sea and the Contiguous Zone, but are recognized as an exception to its principles for delimiting inland waters. Article 7(6) states that "the foregoing provisions shall not apply to so-called 'historic' bays."[129]

The Supreme Court had considered historic bay claims in prior tidelands cases and defined them as bays "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."[130] It described three factors relevant to historic water

129. The Supreme Court has never had to consider how "bay-like" a water body must be to qualify for consideration as a historic bay. However, in the *Louisiana Boundary Case* it noted that "under the terms of the Convention, historic bays need not conform to the normal geographic tests and therefore need not be true bays. How unlike a true bay a body of water can be and still qualify as a historic bay we need not decide, for all of the areas of the Mississippi River Delta which Louisiana claims to be historic inland waters are indentations sufficiently resembling bays that they would clearly qualify under Article 7(6) if historic title can be proved." 394 U.S. at 75 n.100. Although the United States disputed that Mississippi Sound is a juridical bay, it did not deny that the Sound is sufficiently "bay-like" to be considered a historic bay if historic title could be proven.

130. See: *United States v. California*, 381 U.S. 139, 172 (1965); *United States v. Alaska*, 422 U.S. 184, 189 (1975); and *Louisiana Boundary Case*, 394 U.S. 11, 23 (1969).

determination, including: (1) exercise of authority by the claiming nation, (2) continuity of that exercise, and (3) the acquiescence of foreign nations. *United States v. Alaska*, 422 U.S. 184, 189 (1975) and *Louisiana Boundary Case*, 394 U.S. 11, 23-24 n.27 (1969). Put another way, "the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and to have done so under the general toleration of the community of States." Juridical Regime of Historic Waters, Including Historic Bays 56, U.N. Doc. A/CN.4.143 (1962).

Special Master Armstrong and the Court applied those criteria to Mississippi Sound, and looked also to an additional factor. As the Court said, "there is substantial agreement that a fourth factor to be taken into consideration is the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense." *Alabama and Mississippi Boundary Cases*, 470 U.S. at 102.[131]

The special master found that Mississippi Sound met all of these criteria and held it to be historic inland water. *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 54. The federal government took exception to that holding.

Interestingly, the Supreme Court first considered the "fourth" factor, vital interests, before reviewing evidence of a claim, continuity and acquiescence. It traced federal interest in the sound from the early 19th century. Mississippi Sound was then recognized as "an inland waterway of importance for commerce, communications, and defense." 470 U.S. at 103. As early as 1817 Congress considered improvements in the Sound "to afford the advantages of internal navigation and intercourse throughout the United States and its Territories." *Id*. quoting H.R. Doc. No. 427, 14th Cong., 2nd Sess. (1817). "This project ultimately became the Intracoastal Waterway through Mississippi Sound." *Id*. A White House Committee on Military Affairs referred to the Sound as "the little interior sea" in 1820. H.R. Rep. No. 51, 17th Cong., 1st Sess., 7. By 1847 Ship Island, an island that helps to form the Sound, had been reserved for military purposes and by the start of the Civil War a 48-cannon fort had been constructed on the island. 470 U.S. 104-105.

In contrast, the Court pointed out, the Sound has been of little importance to foreign nations. "The Sound is shallow, ranging in depth generally from 1 to 18 feet except for artificially maintained channels . . . . Outside those channels, it is not readily navigable for oceangoing vessels. Furthermore, it is a cul de sac, and there is no reason for an oceangoing vessel to enter the Sound except to reach the Gulf ports." *Id*. at 102-103. It

131. In support of its statement the Court cited the *Juridical Regime*, at 38, 56-58; I Shalowitz, *supra*, at 48-49 and the *Fisheries Case (U.K. v. Norway)*, [1951] I.C.J. Rep.116, 142.

concluded that "the historic importance of Mississippi Sound to vital interests of the United States, and the corresponding insignificance of the Sound to the interests of foreign nations, lend support to the view that Mississippi Sound constitutes inland waters." *Id.* at 103.[132]

The Court then applied the original factors for historic water status.

It pointed to two specific examples of federal assertions of jurisdiction over the sound in the 1900s. First, however, it recited a federal policy of "enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." *Id.* at 106. Citing to the special master's findings, the Court found that the United States "confirmed this policy in a number of official communications" from 1951 to 1961. 470 U.S. at 106, n.9.[133]

The master and the Supreme Court concluded that the 10-mile rule had been employed since the beginning of the 20th century and, according to the Court, "represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903. There is no doubt," it continued, "that foreign nations were aware that the United States had adopted this policy . . . . Nor is there any doubt that Mississippi Sound constitutes inland water under that view." *Id.* at 107.[134]

The United States argued that its adoption of principles for "juridical bay" delimitation, which had since been superceded, are not a "sufficiently specific claim to the Sound . . . to establish it as a historic bay." *Id*. But the Court countered that in this case "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters."

132. The Court cited similar reasoning in United States Attorney General Edmund Randolph's opinion that Delaware Bay is historic inland water. Randolph had said, among other things, that "these remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before had a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted." *Id.* at 103 n.4, quoting 1 Op. Atty. Gen. 32, 37 (1793). [Since the adoption of 24-mile bay closing lines in the 1958 Convention, Delaware Bay is also an Article 7 juridical bay.]

133. These statements are found in a State Department response to the attorney general's request for assistance in preparing a federal position for tidelands litigation, Report of the Special Master at 48; the United States' position at the 1930 Hague Conference on the Codification of International Law, *id*. at 49-50; a second State Department letter, commenting on the Anglo-Norwegian Fisheries decision, *id*. at 51-52; State Department testimony before Congress on what would become the Submerged Lands Act, *id*. at 52; and Coast and Geodetic Survey comments to the Solicitor General. *Id.*

134. The State of Alaska relied heavily on this holding in *United States v. Alaska*, No. 84 Original. Although it was not making a historic waters claim, Alaska contended that this "long standing policy" amounted to the United States' adoption of a system of straight baselines which could not now be withdrawn to the state's detriment. The federal government countered that regardless of Special Master Armstrong's conclusion, and the Court's comments, the United States had had no consistent policy of creating inland waters with 10-mile lines between islands from 1903 until adoption of the Convention on the Territorial Sea. Special Master Mann thoroughly reviewed United States foreign policy for that period and agreed with the federal position. *United States v. Alaska*, Report of the Special Master of March 1996, at 52-141. The Supreme Court agreed. 521 U.S. 1, 19 (1997).

The Court gave three examples. It noted that in 1906 the Supreme Court had resolved a boundary dispute between Louisiana and Mississippi in Lake Borgne and Mississippi Sound. *Louisiana v. Mississippi*, 202 U.S. 1 (1906). In so doing the Court not only described the Sound as "an enclosed arm of the sea, wholly within the United States," *id*. at 48, but the Court applied the "thalweg" doctrine to determine the exact location of the states' common boundary. The doctrine, which defines a water boundary as the "deepest or most navigable channel" (as distinguished from a geographic equidistant line), is applicable to inland waters. And, despite the fact that the Court did not specifically hold that Mississippi Sound is inland waters, it said 85 years later that "the Court's [1906] conclusion that the Sound is inland waters was essential to its ruling that the doctrine of thalweg was applicable." 470 U.S. at 108.

The federal government went on to argue in 1985 that it was not a party to the 1906 controversy and could not, therefore, be bound by the holding. The Court was not influenced, pointing out that "the significance of the holding for the present case . . . is not its effect as precedent in domestic law, but rather its effect on foreign nations that would be put on notice by the decision that the United States considered Mississippi Sound to be inland waters." *Id*.

The Court then cited a second federal expression of title to Mississippi Sound. In a 1958 brief filed in the original *Louisiana* case, the federal government stated that "we need not consider whether the language, 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (although we believe it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana v. Mississippi*, 202 U.S. 1, 48." 470 U.S. at 109. And the United States went on, in that brief, to concede that "the water between the islands and the Alabama mainland is inland water." *Id.*[135] The Supreme Court concluded that "if foreign nations retained any doubt after *Louisiana v. Mississippi* that the official policy of the United States was to recognize Mississippi Sound as inland waters, that doubt must have been eliminated by the unequivocal declaration of the inland water status of Mississippi Sound by the United States in an earlier phase of this very litigation." *Id.* at 108-109.

135. Again the government argued that it should not be disadvantaged by the 1958 statement, which was based on the assumption that pre-Convention principles would be used to delimit a pre-Convention (Submerged Lands Act) boundary, especially because the Court had itself determined that the United States would not be bound by a similar concession along the Louisiana coast. See: *Louisiana Boundary Case*, 394 U.S. 11, 73-74 n.97 (1969). But the Court handled this argument as it had the contention that the federal government should not be bound by the holding in *Louisiana v. Mississippi*, saying "the significance of the United States' concession in 1958 is not that it had binding effect in domestic law, but that it represents a public acknowledgment of the official view that Mississippi Sound constitutes inland waters of the nation. 470 U.S. at 110.

The federal government contended that a claim alone is not sufficient to establish historic title; that inland water status must be enforced for title to ripen. Thus, it argued, to establish historic inland waters there must be evidence that the claimant nation has prevented the innocent passage of foreign vessels. The Court seemed impatient with the contention, ruling that "this rigid view of the requirements for establishing historic inland-water status is unrealistic and is supported neither by the Court's precedents nor by writers on international law." *Id*. at 113.[136]

It found support in the United Nations' study of historic waters, which provides that the required exercise of authority "does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken." *Juridical Regime, supra,* at 43. Quoted at 470 U.S. at 114.[137]

The Supreme Court includes no discussion of the second element of historic water status, "continuity," in its decision in the case but its other holdings probably make that unnecessary. As noted, the Court held that its own 1906 ruling in *Louisiana v. Mississippi*, 202 U.S. 1, put the world on notice of a United States claim to the sound. That claim was presumably supported by what the Court then described as the publicly stated policy "of

136. To that comment the Court appended a footnote to distinguish a prior decision. It said "In *United States v. Alaska*, 422 U.S. 184, 197 (1975), the Court noted that to establish historic title to a body of water as inland waters, 'the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation.' It is clear, however, that a nation can assert power to exclude foreign navigation in ways other than by actual resort to the use of that power in specific instances." 470 U.S. at 113 n.13.

137. Having found two specific assertions of jurisdiction the Court never returned to the federal government's concern that outdated juridical bay principles were being employed as support for historic waters claims. A related question arose in the *Louisiana Boundary Case* when headlands to a juridical bay within East Bay disappeared over time. As a result, the interior area no longer met the requirements of Article 7. The state argued that because the waters were once inland "it obtained certain vested rights in the area landward of that line of which it cannot now be dispossessed." *Louisiana Boundary Case*, Report of the Special Master of July 31, 1974, at 34. The master disagreed, reasoning that "if this were the case, its shoreline would be fixed at the furthest extent to which it ever projected, which would be contrary to the concept of an ambulatory shoreline." *Id*. The Court adopted the master's findings. *Louisiana Boundary Case*, 420 U.S. 529 (1975).

A similar controversy arose recently in Alaska. Kotzebue Sound, near the northwest corner of the state, is an overlarge bay. For many years the 24-mile fallback line ran from Cape Espenberg to the vicinity of Kotzebue. Then erosion widened that gap to just more than 24 miles. The sound still met all other requirements of Article 7 but the federal Baseline Committee amended its charts. A more landward 24-mile fallback line within the Sound now depicts the seaward limit of its inland waters.

Alaska unsuccessfully petitioned the Committee to return the closing line to its original location. The issue has not been litigated but it would seem to be covered by the Court's statement that "any line drawn by application of the rules of the Convention on the Territorial Sea and the Contiguous Zone would be ambulatory and would vary with the frequent changes in the shoreline." *Louisiana Boundary Case*, 394 U.S. 11, 32 (1969).

That is not quite the same as ruling that long-standing juridical bay status may not support a historic bay claim. That issue is yet to be litigated.

enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." 470 U.S. at 106. The Court specifically held that the United States did not withdraw its claim until the first publication of the Baseline Committee charts in 1971. *Id*. at 111.

The Court's findings indicate that the United States' claim continued for at least 68 years. The government did not contend that the span was insufficient to constitute a "usage."

The United States did argue that no evidence existed of foreign acquiescence in any claim to Mississippi Sound. The parties agreed that "no foreign government ever protested the United States' claim." *Id.* at 110. In *United States v. Alaska*, 422 U.S. 184 (1975), the Court ruled that a failure of foreign nations to object to a claim is not evidence of acquiescence unless it can be shown that they knew, or should have known, of the claim. Nevertheless, "there is substantial agreement," it later said, "that when foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a historic title to arise." 470 U.S. at 110, citing *Juridical Regime* at 48-49. "Moreover, it is necessary to prove only open and public exercise of sovereignty, not actual knowledge by foreign governments." 470 U.S. at 110. With respect to Mississippi Sound it reasoned "the United States publicly and unequivocally stated that it considered Mississippi Sound to be inland waters. We conclude that under these circumstances the failure of foreign governments to protest is sufficient proof of acquiescence or toleration necessary to historic title." *Id.* at 110-111.

Finally, the federal government argued that historic title to Mississippi Sound had been disclaimed by the United States. The 1971 Baseline Committee charts, which were distributed to foreign governments requesting information on the location of our maritime boundaries, showed the waters of Mississippi Sound to be territorial and high seas rather than inland. But, the Court said, the disclaimer came too late. It had previously warned that federal disclaimers would not be given dispositive weight in all circumstances, and that "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *United States v. California*, 381 U.S. 139, 168 (1965). The Court quoted with approval its master's statement that the disclaimer here "would appear to be more in the nature of an attempt by the United States to prevent recognition of any pre-existing historic title which might already have ripened because of past events . . . ." Report at 47. It went on to conclude that "historic title to Mississippi Sound as inland waters had ripened prior to the United States' . . . disclaimer of the inland-water status of the Sound in 1971." 470 U.S. at 112.

In sum, the Supreme Court adopted Special Master Armstrong's recommendation that Mississippi Sound is historic inland waters. The decision is notable as the only occasion upon which the Court accepted a state's historic inland water claim.[138] It had rejected similar claims from Alaska, California, Louisiana, Florida, and Massachusetts.

United States v. Maine

In 1947 the Supreme Court ruled that California entered the Union with no rights in the submerged lands seaward of its coast line. *United States v. California*, 332 U.S. 19 (1947). That decision was based specifically on the Court's determination that the original 13 states had no such rights and California entered on an equal footing. But the original 13 states had not been a party to the *California* case and continued to claim rights under their royal charters even more than 3 miles offshore.[139] In 1968 the federal government filed suit in the Supreme Court to establish its paramount right to areas seaward of the congressional 3-mile grant.

The Court appointed the Honorable Albert B. Maris as special master. Judge Maris held extensive hearings. His Report and the Court's subsequent decision adopting his recommendations are discussed above. To greatly summarize that discussion, the Court reaffirmed that it had meant what it said in *California*. That is, the original states entered the Union without offshore claims. Their rights in the sea are limited to the Submerged Lands Act grant of 3 nautical miles from the coast line. *United States v. Maine*, 420 U.S. 515 (1975).

The litigation, however, made no attempt to define the coast line and three of the original states have since sought to have portions of their coast lines established.

The Massachusetts Boundary Case

Massachusetts and the federal government could not agree on whether a number of water bodies are inland or, if inland, where their closing lines are located. In 1977 they asked the Supreme Court to resolve their differences. The Honorable Walter E. Hoffman was appointed special

138. Massachusetts' historic water claim to Vineyard Sound was upheld by Special Master Walter E. Hoffman but the United States did not take exception to that recommendation. The master recommended against historic water status for Nantucket Sound. The state excepted to that recommendation but the Court adopted it nevertheless. *Massachusetts Boundary Case*, 475 U.S. 89 (1986).

139. Since the first *California* decision the Submerged Lands Act had been passed, giving each of the states bordering on the Atlantic a 3-mile belt of submerged lands and the natural resources therein. 43 U.S.C. 1301 *et seq*.

master. He took evidence and heard arguments on the status of two areas, Vineyard and Nantucket Sounds.[140]

Nantucket Sound lies south of Cape Cod and is formed by the Cape and the islands of Martha's Vineyard and Nantucket. Vineyard Sound lies to its west and is formed by the Elizabeth Islands on the north and Martha's Vineyard on the south. (Figure 13) The federal government claimed that neither body is inland waters and that the state's Submerged Lands Act rights in each are to be measured 3 miles seaward of any island and the mainland. The state claimed that they are both inland and its coast line includes straight lines running from the outermost of the Elizabeth Islands to Martha's Vineyard, then to Nantucket Island, and finally back to Monomoy Island on the southeast corner of Cape Cod.[141]

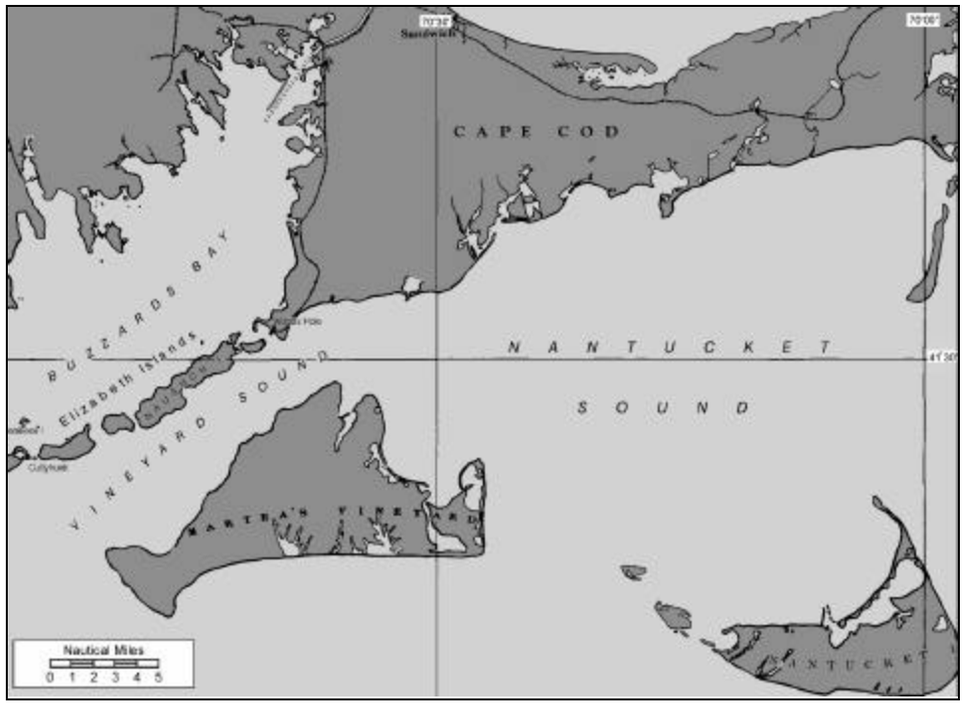

Figure 13. Vineyard and Nantucket Sounds, south of Cape Cod, Massachusetts. (*Based on NOAA Chart 13200*)

140. The parties had, in the meantime, agreed on closing lines at the mouths of Buzzards Bay and Massachusetts Bay. Those lines were incorporated in a supplemental decree of the Court. *United States v. Maine*, 452 U.S. 429 (1981).

141. Because Vineyard Sound is less than 6 miles wide it is entirely within the state's Submerged Lands Act grant. At issue were only about 1000 acres of submerged lands seaward of Massachusetts' claimed closing line at its western end. Nantucket Sound, however, has an entrance of more than 6 miles width on the east and a substantial core which is more than 3 nautical miles from any land.

Massachusetts did not contend that either Sound is a juridical bay, under Article 7 of the Convention, nor enclosed by straight baselines, under Article 4. Rather, it claimed that the Sounds are inland under the "historic waters" exception to the usual requirements of Article 7, or are held under the closely related doctrine of "ancient title."

Historic title is discussed above with respect to the *Alabama and Mississippi Boundary Cases* and has been asserted in many other tidelands cases. As the Supreme Court has often announced, historic waters are those over which a coastal nation has "traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States v. California*, 381 U.S. 139, 172 (1965). In evaluating historic waters claims the Court has applied criteria set out in the United Nations' *Juridical Regime of Historic Waters*, 2 Y.B. Int'l Law Comm'n U.N. Doc. A/CN.4/143 (1962).

But the *Juridical Regime* also recognizes the alternative doctrine of "ancient title." As the special master stated, it can apply "only to the acquisition of territories which international law considers *terra nullius*, land currently having no sovereign but susceptible to sovereignty. [citing *Juridical Regime* at 12] Applied to waters normally considered to be high seas, a claim of ancient title means that a state must affirm 'that the occupation took place before the freedom of the high seas became part of international law. In that case, the State would claim acquisition of the area by an occupation which took place long ago. Strictly speaking, the State would, however, not assert a historic title, but an ancient title based on occupation as an original mode of acquisition of territory.'" *Massachusetts Boundary Case*, Report of the Special Master of October Term 1984, at 25. Quoting *Juridical Regime* at paragraph 71. In other words, "effective occupation, from a time prior to the victory of the doctrine of freedom of the seas, suffices to establish a valid claim to a body of water under ancient title." Report at 25-26. The master concluded that ancient title is an appropriate option to the traditional historic waters claim. *Id.* at 27.

Massachusetts supported its claims with three arguments. First, it contended that Nantucket and Vineyard Sounds were inland water of the British Crown prior to independence and the state succeeded to that interest. Second, it said that the Sounds were central to the development of the colonial economies of Martha's Vineyard and Nantucket Island. Finally, as to Vineyard Sound, it introduced early legislative assertions of sovereignty to which foreign nations did not object.

The state's contention that both Sounds were inland water (technically "county waters") during British dominion prompted a thorough review of English law of the sea practice first by the parties and again by the special master in his Report to the Court. One question before the master was the nature of English claims to jurisdiction in 1664 and 1691, at the time of

Royal Charters conveying what is now Massachusetts. The analysis began with a discussion of British maritime claims, especially in the 17th century.

It happens that interests in the sea were at a peak in the 17th century, with various maritime powers promoting jurisdictional theories that best reflected their particular interests. English law on the subject was in a state of flux. Prior to the ascendency of the Stuarts in 1603, England did not recognize property rights or jurisdictional claims beyond the coastline (or county waters). *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, 67.

But, under the Stuarts, Crown claims expanded. James I (1603-1625) claimed jurisdiction over what were denominated the "King's Chambers," areas of high seas adjacent to the English coast delimited by a series of straight lines connecting mainland headlands. Fulton, *The Sovereignty of the Sea*, (1911), at 120-122. Interestingly, the King's Chambers were not a proprietary claim but the creation of a "neutral zone" in which foreign ships were prohibited from engaging in combat. However, a proprietary interest was claimed to high seas fishing grounds in the North Sea. Charles I (1625-1649) added, for the first time, a claim to a maritime belt around the British Isles known as the "narrow" or "English" seas. Report at 29.

A scholarly debate was conducted that influenced the development of the law of the sea well into the future. In 1609 Hugo Grotius (employed by the Dutch government) published his *Mare Liberum (The Free [open] Sea)*. Grotius, whose interest it was to encourage a minimum of interference with navigation, contended that the seas are open to all. The English rebuttal came in 1635 in the form of John Selden's *Mare Clausum* [*The Closed Sea*]. Charles I had requested the work to defend "the claims of the English Crown to sovereignty over the seas." *Id.* at 30.

However, the English position did not survive the 17th century. As Special Master Maris had found in the original *United States v. Maine* proceedings, and Judge Hoffman acknowledged, "with the fall of James II in 1688, English law returned to the pre-Stuart pattern of full sovereignty co-extensive with county boundaries . . . ." Report at 30.[142] Because the Stuarts' pretensions of proprietary rights in the high seas had been long abandoned by the American independence, they could provide no foundation for Massachusetts' claim to waters beyond the boundaries of an English county.

That fact prompted the question, what were the limits of an English county under the common law of the day?[143] The easy answer is that counties included uplands to the coast and waters that were *inter fauces*

142. By 1667 Sir Mathew Hale had published *De Jure Maris [Of the Law of the Sea]* which, while purporting to support the Stuart claims, clearly retreated from their more extreme positions. Report at 30.

143. Waters under county jurisdiction, where common law was applied, had not expanded during the Stuarts' reign. Their novel high seas proprietary claims extended beyond the counties and fell within the jurisdiction of the Admiralty courts. Report at 30.

terrae.[144] But what waters met that requirement? Two eminent English authorities considered the question and two tests evolved. Both considered the distance between the two headlands that form the indentation.

Lord Coke took the more restrictive view. He understood that waters lay within the county if a person "standing on one side of the land may see what is done on the other." Coke, Fourth Institute, cap. 22, 140; quoted at Report at 44. The test is said to be supported by the logic that to perform his job the sheriff or coroner must be able to distinguish human activity.

Lord Hale, on the other hand, interpreted the requirement more liberally. He wrote that "that arm of the sea, which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." M. Hale, *De Jure Maris* C.4; quoted at Report at 45.

If Vineyard and Nantucket Sounds met the appropriate test, reasoned Massachusetts, they would have been included in the 1664 and 1691 Charter grants and eventually devolved to the state at independence. But which test should be adopted for our purposes? Nantucket and Vineyard Sounds have mouths just wide enough that the choice of tests might make a difference. Massachusetts supported the more expansive Hale description, requiring only that one be able to see the opposing shore. That, it argued, was the accepted English rule when the charters were written.[145] The federal government urged the Coke interpretation because it had been adopted by American courts.[146]

The master opted for Hale's more expansive version for purposes of interpreting the English charters, but recommended Coke's test for non-charter-based claims. Whether the distinction made any difference in the end is difficult to tell. It certainly did not for Vineyard Sound. With a mouth of less than 6 nautical miles the special master found that it qualified under either test. There is no doubt that anyone can see the land forms from Gay Head on Martha's Vineyard to the northern headland on Cuttyhunk Island. Report at 47. More questionable is the ability to recognize individuals and their activities. Neither of the state's witnesses would go that far. *Id*. at 48. Nevertheless, the master concluded that the Coke test may have been slightly liberalized by Justice Story, when he emphasized the requirement to discern "objects" on the opposite shore,

144. The term, "within the jaws of the land," continues to have application today as a requirement of landlocked status for juridical bays under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. The tests about to be discussed have, however, no modern relevance.

145. See, for example, *The King v. Bruce*, [1812] 2 Leach 1094, 168 E.R. 643.

146. Most notable was the Supreme Judicial Court of Massachusetts' holding that "all creeks, havens, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county." *Commonwealth v. Peters*, 53 Mass. 387, 392 (1847).

rather than individuals and their actions. *United States v. Grush*, 26 Fed.Cas. 48, 52 (C.C. D.Mass. 1829) (No. 15,268). Together with evidence that the air would have been clearer in the 17th century and that Gay Head has eroded since then, the master determined that "an individual looking across the sound in 1664 or 1691 would have seen more and in greater detail than an individual of today." Report at 49. And he concluded that "Massachusetts has established its claim to Vineyard Sound by ancient title." *Id.*

The entrance to Nantucket Sound is 9.2 nautical miles across and may have been even wider in the 17th century. Massachusetts did not claim that the Coke test would be met, but did produce evidence that at one time people could see from Cape Cod to Nantucket Island. From this the master concluded that the Hale test had been met but "because of the ambiguity of the evidence concerning the size of the eastern entrance to the sound during the colonial period, the Special Master cannot conclude that Massachusetts has proven this part of its case under the 'clear beyond doubt' standard of proof." Report at 51. Only if the Court altered that standard would Nantucket Sound be inland water through "ancient title."

Next, the master turned to the extensive evidence of colonial reliance on the Sounds for economic development. Interests included fishing, whaling, shell fisheries, salt making, seaweed harvesting, and the production of energy from the tides. Report at 53-56. He concluded that "the basis of a historic claim may therefore be established by evidence of an effective and long-term exploitation of relatively small, shallow, and at least partially land-locked bodies of water. Nantucket Sound and Vineyard Sound meet these criteria. The Special Master therefore concludes that Massachusetts has introduced sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them." Report at 58.

But the master's determinations on the first two of the state's contentions did not end the matter. Federal and state legislation affected his ultimate recommendations.

In 1859 Massachusetts set its maritime boundary at 1 marine league (3 nautical miles) from its coast. Acts of 1859, Ch. 289. It also closed arms of the sea that had mouths of no more than 2 marine leagues. In 1881 the state legislature directed the Harbor and Land Commissioners to draw the 1859 boundaries. Acts of 1881, Ch. 196. That was done. The Commissioners closed Vineyard Sound with a line similar to that urged by the state before the master.[147] The parties stipulated that foreign powers

147. Buzzards Bay was likewise closed. A Supreme Court decision, upholding Massachusetts' right to regulate fishing in that bay, was cited by Massachusetts as ratification of the state's similar claim to Vineyard Sound. Both closing lines were depicted on exhibits in the early case. *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

would have known of the state claim to Vineyard Sound, and none protested. Report at 60. The master concluded that the 1881 legislation "operated as an effective assertion of Massachusetts sovereignty over Vineyard Sound and therefore created an independent basis for the present Massachusetts claim to the sound as historic inland waters." *Id.* Nantucket Sound was not enclosed by the Commissioners.

The master recommended that Massachusetts had established historic title to Vineyard Sound. He pointed to federal legislation that included "all of the waters and shores within the county of Duke's" as part of a Customs District as early as 1789, 1 Stat. 29, and noted that Attorney General Randolph relied upon similar language in support of his claim to Delaware Bay. Report at 62. Sovereignty had been exercised continuously since 1789, both by the federal and state governments. *Id.* at 63. And, the international community had known of the assertion, and acquiesced, since 1789. *Id.*

Nantucket Sound, he concluded, must be treated differently. The evidence, he said, showed that Nantucket Sound is the kind of water body that might have been treated as *inter fauces terrae*, but that alone was insufficient to prove an intent to do so. The legislation upon which he relied in recommending inland water status for Vineyard Sound worked against Massachusetts here. The federal customs district did not include the waters of Nantucket Sound. Nor was it claimed by the state itself in 1859 or 1881. Thus, according to the master, "although Massachusetts could have asserted a claim to Nantucket Sound, it failed to do so. Therefore, whatever rights it may have had over Nantucket Sound during the colonial period lapsed . . . ." Report at 65.

Although the United States disagreed with the special master's findings as to Vineyard Sound, the 1,000 acres at issue there were considered *de minimis* and it did not take exception to the master's recommendation. Massachusetts did take exception to the adverse recommendation in Nantucket Sound, but dropped its historic waters claim, choosing to rely solely on the "ancient title" theory.

The Court thoroughly reviewed the evidence and arguments. It acknowledged that "ancient title" will only arise with discovery and occupation, fortified by long usage, prior to the emergence of the doctrine of freedom of the seas. *United States v. Maine, (Massachusetts Boundary Case)*, 475 U.S. 89, 96 (1986). That is, the title "must have been perfected no later than the latter half of the 18th century." *Id.*[148]

But the Court could not find the necessary "occupation." "Our independent review leads us to conclude that the Commonwealth did not

148. According to the Court, "we find it unnecessary to select a 'critical date' upon which the community of states would have rejected a British claim to Nantucket Sound. Because the colonists' activities changed gradually in character and intensity over time, we need say only that effective 'occupation' must have ripened into 'clear original title,' 'fortified by long usage,' no later than the latter half of the 1700's." *Id.* at 97 n.11.

effectively 'occupy' Nantucket Sound so as to obtain 'clear original title' and fortify that title 'by long usage' before the seas were recognized to be free." *Id.* Massachusetts' evidence of occupation lay in the colonists' reliance on its resources. Yet when the Court looked to international precedent it found significant distinctions.

In the *Fisheries Case (U.K. v. Nor.)*, [1951] I.C.J. 116, the International Court of Justice emphasized the Norwegian government's exclusion of foreign fishermen from its inshore waters from at least 1618 until 1906. *Id.* at 99. *Annakumaru Pillai v. Muthupayal* presented similar facts. The Indian High Court ruled that chank beds, 5 miles offshore, "have always been taken to be the exclusive property of the sovereign, . . . the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the exchequer." 27 Indian L. R. 551 (Madras 1903). The Chief Judge concluded that the practice, dating from the 6th century B.C., demonstrated "exclusive occupation."[149] *Id.* at 100.

From these examples the Supreme Court concluded that occupation, for ancient title purposes, involves "not merely a right to exploit its resources, we believe that occupation requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed." *United States v. Maine. Id.* at 98.[150]

The Court found the Massachusetts evidence to fall short in two particulars. First, it "does not prove occupation of the entirety of Nantucket Sound." *Id.* at 101. In fact, most of the evidence was related to activities that "undoubtedly took place either within territorial waters or on dry land." *Id.* Nor did it indicate a claim of "exclusive" rights to the Sound. Second, the evidence was not of a governmental claim. The Court commented that "even if Massachusetts had introduced evidence of intensive and exclusive exploitation of the entirety of Nantucket Sound, we would still be troubled by the lack of any linkage between these activities and the English Crown." *Id.* at 102, citing *United States v. Alaska*, 422 U.S. 184, 190-191, 203 (1975).

The Court went on to explain the importance of that "linkage," saying, "unless we are to believe that the self-interested endeavors of every seafaring community suffices to establish 'ancient title' to the waters containing the fisheries and resources it exploits, without regard to continuity of usage or international acquiescence necessary to establish 'historic title,' solely because exploitation predated the freedom of the seas, then the

149. The controversy arose when the defendant was accused of stealing chanks (a mollusk) from offshore beds leased to the plaintiff by the sovereign. See: Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, 16 (1927).

150. The Court offered additional examples of "claims to title based on exploitation of marine resources," including "the pearl fisheries in Australia, Mexico, and Columbia, the oyster beds in the Bay of Granville and off the Irish Coast, and coral beds off the coasts of Algeria, Sardinia, and Sicily, and various grounds in which herring, among other fishes, are found." *Id.* at 100, citing Fulton, *supra*, at 696-698. Each example involved "long standing state regulation."

Commonwealth's claim cannot be recognized. Accordingly, we find that the colonists of Nantucket Sound did not effectively occupy that body of water; as a consequence, Great Britain did not obtain title which could devolve upon Massachusetts." *Id.* at 103.

Finally, the Court explained that its conclusion "is corroborated by the Commonwealth's consistent failure to assert dominion over Nantucket Sound since that time." *Id.* It was referring to the Supreme Judicial Court of Massachusetts' opinion adopting Lord Coke's test for county waters, which would not have included Nantucket Sound, *Commonwealth v. Peters*, 53 Mass. 387, 392 (1847); the 1859 legislation claiming a 3-mile maritime belt and inland waters with mouths of 6 miles or less; and the 1881 legislation that led to official charts depicting Nantucket Sound as territorial sea and high seas, not inland water.[151]

"It was not until 1971 that Massachusetts first asserted its claim to jurisdiction over Nantucket Sound. There is simply no evidence that the English Crown or its colonists had obtained 'clear original title' to the Sound in the 17th century, or that such title was 'fortified by long usage.' Without such evidence, we are surely not prepared to enlarge the exception in Article 7(6) of the Convention for historic bays to embrace a claim of 'ancient title' like that advanced in this case." *Id.* at 105. To that statement the Court appended a footnote that reads in part, "the validity of and any limits to the 'ancient title' theory are accordingly reserved for an appropriate case." *Id.* at n.20.

Although ancient title may remain a viable theory in tidelands cases, no other state has made the claim.

The Rhode Island and New York Boundary Case

Unlike any other tidelands action, the *Rhode Island and New York Boundary Case* was prompted by a judicial proceeding to which the federal government was not even a party. The State of Rhode Island required that every foreign vessel and every American vessel registered for foreign trade take on a Rhode Island pilot before crossing Block Island Sound. Rhode Island found its authority in a federal statute that gives the states power to regulate pilots in "bays, inlets, rivers, harbors, and ports of the United States." 46 U.S.C. 211. Pilots licensed in Connecticut challenged Rhode Island's requirement in federal district court. That court determined that the case turned on whether Block Island Sound is a "bay, inlet, river, harbor or port." *Warner v. Replinger*, 397 F. Supp. 350, 351 (D.R.I. 1975). To make

151. The Court quoted Sir Gerald Fitzmaurice's separate opinion in *Temple of Preah Vihear,* saying "[i]t is a general principle of law . . . that a *party's* attitude, state of mind or intentions at a later date can be regarded as good evidence – in relation to the same or a closely connected matter – of his attitude, state of mind or intentions at an earlier date also . . . ." [1961] I.C.J. Rep. 6, 61.

that determination it followed the process set out by the Supreme Court and its special masters in the tidelands cases, looking to the definitions in the Convention on the Territorial Sea and the Contiguous Zone. It concluded that Block Island Sound is a bay and, therefore, internal waters within Rhode Island. *Id*. at 355-356. The Connecticut pilots appealed but the federal appellate court upheld the decision. *Warner v. Dunlap*, 532 F. 2d 767 (1st Cir. 1976).

A petition for *certiorari* was filed with the United States Supreme Court but before it could be acted upon the federal government entered the fray. If the *Warner* case were allowed to proceed without federal participation national interests would be affected without federal involvement. First, the status of Block Island Sound would be determined and, second, Article 7 of the Convention would be interpreted in ways that would surely affect other coastal areas.

The government had two options. It could participate in the existing suit at the Supreme Court level, probably as *amicus curiae*, or it could play a more substantive role by asserting its interests in a separate action.[152]

The United States took the latter, and more affirmative, route. Rhode Island had been a party to *United States v. Maine et al.*, Number 35 Original, in which the Atlantic states had sought, and been denied, rights well beyond the territorial sea. 420 U.S. 515 (1975). The Court made no determinations as to the limits of inland waters in that decision but retained jurisdiction to enter further decrees as appropriate. *United States v. Maine, et al.*, 421 U.S. 958 (1975). As the Supreme Court properly surmised "obviously in response to the ruling in the Rhode Island Pilotage Commission suit, and apparently in the thought that coastline determinations would best be made in this then-existing original action, the United States filed a motion for supplemental proceedings to determine the exact legal coastlines of Massachusetts and Rhode Island." *Rhode Island and New York Boundary Case*, 469 U.S. 504, 508 (1985).[153]

Long Island and Block Island Sounds provided the battleground. The Sounds are formed on the north by the mainland of New York, Connecticut, and Rhode Island and on the south by Long Island and Block Island. (Figure 14) The states claimed that all waters landward of Long Island, a closing line connecting it to Block Island, and a closing line connecting

152. Even if the government had done nothing, the Supreme Court would likely have invited its comments in the *Rhode Island* case (known as *Ball v. Dunlap* in the Supreme Court) as has been its tradition when it anticipates a federal interest in actions brought to it.

153. The Honorable Walter E. Hoffman was appointed special master. Differences in the Rhode Island and Massachusetts issues caused him to sever the cases for trial. The *Massachusetts* case is discussed immediately above. Judge Hoffman notified each of the other parties to the original *Maine* case of his proceedings and invited them to express interests in participation, if any. Only New York opted to participate in the *Rhode Island* case.

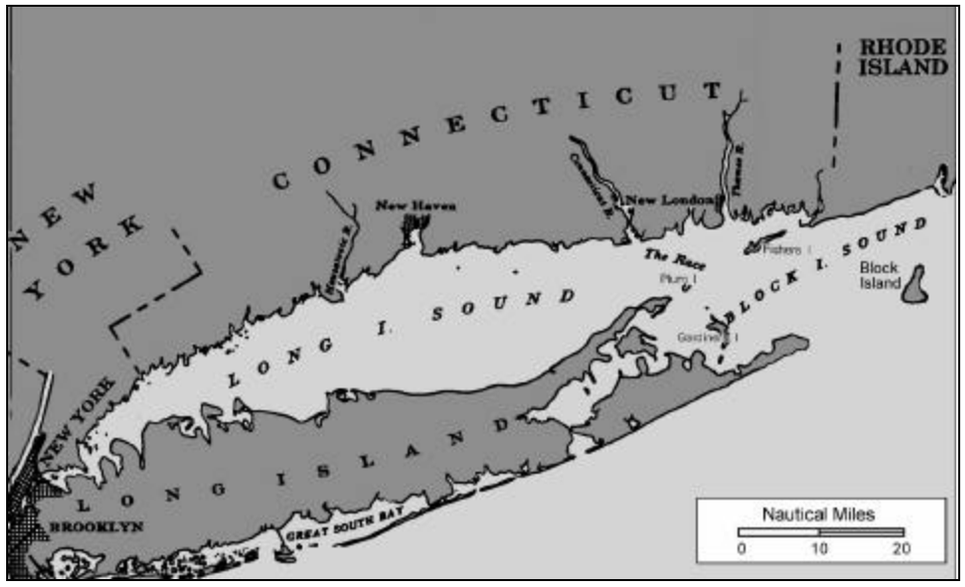

Figure 14. Long Island and Block Island Sounds. (*Based on NOAA Chart 13003*)

Block Island to the Rhode Island mainland are inland. The federal government acknowledged that Long Island Sound is historic inland water but contended that Block Island Sound is territorial and high seas.[154]

In proceedings before the special master the states based their inland water claims on two theories. First, they contended that the already recognized historic waters of Long Island Sound extended eastward to include Block Island Sound. Alternatively, they urged that the entire area qualified as a juridical bay.

The historic waters claim was supported by three assertions of jurisdiction. The first involved fisheries enforcement. New York officials testified that they enforced state lobster regulations in Block Island Sound against residents and nonresidents. *Rhode Island and New York Boundary Case*, Report of the Special October Term 1983, at 12. The special master reviewed the Supreme Court's consideration of fisheries evidence in *United States v. Alaska*, concerning a historic waters claim to Cook Inlet, and concluded that "with respect to the fishing regulations which treat residents and non-residents alike, since they afford foreign nationals the same rights as are enjoyed by Americans, their enforcement fails to establish the states' historic claim as a matter of law. With respect to the regulations which

154. Although the United States accepted Long Island Sound as inland, the states urged a more seaward limit of those inland waters than the government recognized.

discriminate between Americans and foreign nationals, the Special Master concludes that the evidence of enforcement fails to establish acquiescence by foreign states and thus does not support any historic claim. The evidence did not include a single incident involving a foreign vessel and thus there is no evidence that any foreign government was ever informed of the States' claim of dominion." *Id*. at 14.

Next the states pointed to the pilotage statutes that prompted this phase of the litigation. New York and Rhode Island had legislation that required the use of their pilots within their respective corners of Block Island Sound. The requirement is clearly applicable to foreign vessels. Here the master turned to the Court's language in *United States v. Louisiana* where, in response to that state's reliance on the Coast Guard's "inland rules" line, it said "it is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea." *Louisiana Boundary Case*, 394 U.S. 11, 24-26 (1969) (citing Article 17 of the Convention).

Applying this reasoning to the situation before him the master determined that "the Rhode Island and New York pilotage statutes and their enforcement does not support a claim that Block Island Sound should be considered historic internal waters." Report at 16-17.[155]

Finally, the states relied upon a boundary agreement that divided the waters of Block Island Sound between them and, on July 1, 1944, was approved by Congress. H.R.J. Res. 138, 58 Stat. 672 (1944). A map, depicting the boundary through the Sound, was also provided. Report, Appendix D. In addition, they introduced a letter from the legal adviser of the Department of State to the solicitor general that cited a similar agreement establishing the boundary between New York and Connecticut in Long Island Sound as evidence of a historic waters claim there.

The master was not convinced. He emphasized that Congress approved the Rhode Island/New York boundary as "solely between two states . . . and not to be construed so as to impair or affect any rights of the United States." Report at 19. What is more, he went on, the agreement alone "is insufficient to establish a historic claim as to Block Island Sound. The states presented no evidence of the exercise of any authority under this agreement." And further, "even if the States' evidence is accepted as demonstrating a proper exercise of authority, the evidence is still far from establishing clearly beyond doubt that the States exercised sovereignty over the waters of Block

155. The terms "internal waters" and "inland waters" are used interchangeably in law of the sea contexts.

Island Sound. Additionally, it cannot be inferred from any of the evidence that any foreign nation has ever had the opportunity to acquiesce to such an exercise of authority over Block Island Sound." Report at 19.[156]

As to the State Department comment on Long Island Sound, he noted that the letter did not say that the boundary agreement there was enough to establish historic title, only that historic title there had never been disputed, as evidenced, in part, by the boundary agreement. "The letter does not conclude the issue in this proceeding, nor does it significantly support the claim that Block Island Sound is a historic bay." Report at 18 n.11. In sum, historic title, beyond that acknowledged by the United States, had not been proven. The states did not take exception to that finding. 469 U.S. at 504 n.5. Thereafter, the states' fortunes lay in their juridical bay contentions.

Rhode Island and New York had three separate approaches for enclosing Long Island and Block Island Sounds under Article 7 and were successful on their primary theory that Long Island is legally part of the mainland under principles first announced in the *Louisiana Boundary Case*, 394 U.S. 11 (1969).[157] The Court had established that under the Convention, Article 7 bays are indentations into the mainland and may not be formed by offshore islands that may not, realistically, be considered part of that "mainland." However, the Court concluded that much of the marshland of the Mississippi River delta is "realistically" mainland, even though its uplands are often divided by a system of natural and man-made waterways.[158]

The federal government argued that any exception to the Convention's literal application should be limited to the highly unusual circumstances of the Louisiana coast, for which it had originally been adopted. The states argued to the contrary, contending that the criteria set out by the Court in the *Louisiana* decision should be applied to Long Island to determine whether it too is assimilated to the mainland. The master agreed that Long Island should at least be tested against the Court's criteria and did so.[159]

156. The requirement that evidence of historic title be "clear beyond doubt" is triggered by a federal disclaimer of historic title. See: *United States v. California*, 381 U.S. 139, 175 (1965). The master here noted that the federal Baseline (or Coastline) Committee had published a set of charts in 1971 which were consistent with its position here; that is they depicted Block Island Sound as territorial and high seas. This, he concluded, constituted a federal disclaimer of historic inland water title. Report at 11.

157. The other options assumed that Long Island is an island but that it and Block Island "screen" indentations into the mainland. State Department geographers Robert Hodgson and Robert Smith testified that the mainland coastline in the area included no "well marked indentation." Report at 25-26. The states' witnesses generally agreed and the master rejected those alternative theories, saying "when Long Island is viewed strictly as an island there is no indentation into the coast that will satisfy the requirement of Article 7(2). The coast in this area is only a mere curvature. This conclusion eliminates two of the juridical bay theories offered by the States . . . ." *Id.* at 28.

158. Technically these uplands would be islands under the Convention, Article 10(1) of which provides that "an island is a naturally formed area of land, surrounded by water, which is above water at high tide."

159. The Court had said that "while there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, and the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." 394 U.S. at 66.

The federal government took the position that the proper focus of the assimilation issue is the area of water that separates Long Island from the actual mainland, the East River. Its witnesses emphasized that although narrow, the river is deep and has been a significant channel for commercial navigation since the early 1600s. Report at 40.[160] The Supreme Court had included "the depth and utility of the intervening waters" as a criterion for island assimilation and the United States argued that the navigational importance of the East River precluded its being treated as land.[161] What is more, they testified, the East River is not a "river" at all, but a tidal strait "fed by the tidal flow between Long Island and lower New York harbor." *Id.*[162]

The states argued that navigable capacity today is irrelevant. Their evidence showed that prior to artificial improvements the East River was shallower, had a much faster current, and was considered to be extremely dangerous. Report at 43. They also pointed out that the river is not a route of international navigation. It does not provide a route of passage between areas of open sea.

In addition, and over the federal government's objections of relevance, the states emphasized the social, economic, political, and historic connections between Long Island and the conceded mainland.[163] The facts can hardly be contested.[164] Only their relevance to the matter at hand was open to question.

The special master was convinced by the states' position. He noted that the western end of Long Island "is separated from the mainland by only a narrow stretch of water. The island is closely related to the mainland geographically and physically, as well as socially and economically. After taking all of the factors into consideration, the Special Master concluded that Long Island can be treated as part of the mainland." Report at 46. In emphasizing the narrow channel that separates the island from the mainland at their closest point, the master appears to track the Supreme

160. For example, the channel was shown to have accommodated more than 77,000 commercial movements and 52 million tons of cargo in 1972 alone. Report at 40.

161. The consequence of determining that an island is assimilated to the mainland is, of course, that the intervening waterway is mainland also.

162. Drs. Hodgson and Smith, and Administrative Law Judge Hugh Dolan, all members of the federal government's Baseline Committee when it considered these same questions, testified as to the significance of this factor in the Committee's determination that Long Island should not be considered part of the mainland. Report at 40-43.

163. For these purposes Manhattan is acknowledged to be part of the mainland, being separated from other portions of the mainland only by the Harlem River which is clearly a river. No one argued that Manhattan is legally an island.

164. As the master summarized, "the western end of Long Island is part of New York City and the majority of New York City residents live on Long Island. On a daily basis there is an enormous movement of people from Long Island to the mainland and from the mainland to Long Island. Additionally, the western end of Long Island is physically connected to the mainland, either directly or indirectly through Manhattan or Staten Island, by twenty-six bridges and tunnels." Report at 45.

Court's criteria for island assimilation. He reasoned that "Long Island Sound, without question, would be a juridical bay if the East River did not separate Long Island and the mainland. The fact that the East River is navigable and is a tidal strait, however, does not destroy the otherwise close relationship between Long Island and the mainland when all the factors are considered." Report at 47.[165]

But the master went on to explain his conclusion on bases that the federal government believed to go beyond the Court's guidelines. Their essence was a concentration on the nature of Long Island Sound, the body that becomes a bay if assimilation is accepted, rather than on the East River, whose nature either joins or separates Long Island from the mainland.

The master said that "two factors are of utmost importance to this conclusion. Long Island's geographic alignment with the coast is first. Long Island and the coast are situated and shaped such that they enclose a large pocket of water, which closely resembles a bay. By viewing charts of the area, the bay-like appearance of the area is obvious and it becomes readily apparent that the enclosed water has many of the characteristics of a bay." Report at 46. Although looking at a geographic relationship, the master was not limiting himself to the water body where a connection, if any, would be found, but was considering the body that might be a bay as a consequence of that linkage. The federal government understood the Court to suggest in the Louisiana decision that it was the point of assimilation that was to be tested by its criteria.

And the master went another step in his consideration of the nature of Long Island Sound, rather than the East River. He said that "the geographic configuration of Long Island and the mainland forces the enclosed water to be used as one would expect a bay to be used. Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound." Report at 46. Again the master focused on the Sound rather than the river in making his assimilation determination.

In taking this approach the master was clearly considering the nature of Long Island Sound in determining whether Long Island is part of the mainland. The United States felt that the process improperly combined two questions in one. It contended that one first asks whether an offshore feature is properly assimilated to the mainland. That inquiry involves only an analysis of the waterway that may be treated legally as land (the East River in this case). If assimilation is found, the legal consequences are

165. The master had previously explained that assuming Long Island's assimilation to the mainland Article 7's other criteria would be met. For example, Long Island Sound is then clearly a well-marked indentation whose water area meets the semicircle test. Those points were not contested.

considered; in this case the criteria of Article 7 would be applied and Long Island Sound would be determined to qualify as a juridical bay on its geographic criteria.

Although the master's analysis of the East River connection would seem to adequately justify his conclusion that Long Island may be assimilated to the mainland, his additional explanation leaves interesting questions as to how future controversies may be evaluated.

Having made the assimilation determination, the special master was left to locate the mouth of the juridical bay. The federal government took the position that if Long Island is part of the mainland, a juridical bay exists whose closing line runs between Montauk Point on the island and Watch Hill Point, Rhode Island. This line would enclose all of Long Island Sound and the western reach of Block Island Sound. The United States argued that more seaward waters are not landlocked.[166] The states, by contrast, urged a closing line that included all of Block Island Sound as inland water. It would have run from Montauk Point to Block Island and back to Point Judith, Rhode Island.

Substantial evidence was introduced through experts for both sides on the proper means of determining what waters are landlocked and identifying proper headlands for juridical bays.[167] After carefully considering all that was offered, including an extensive explanation of the basis for the Baseline Committee's resolution of the issue, the master adopted the federal position. He concluded that "the waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea. Upon viewing charts of the area, there is no perception that these waters are part of the land rather than open sea. Conversely, the waters west of Montauk Point and Watch Hill Point satisfy all the criteria for being landlocked." Report at 59-60. With particular regard to the states' proposal to anchor closing lines on Block Island, he reasoned that "Block Island cannot be included in the closing line of the bay for several reasons. First, Block Island is located well outside the indentation which begins at the Montauk Point to Watch Hill Point line. Second, if the closing line included Block Island, there would be waters inside the closing line which are not landlocked. Third, the natural entrance or mouth to the indentation is along the Montauk Point to Watch Hill Point line and Block Island does not form the mouth to the bay or

166. The United States had, of course, long recognized that Long Island Sound is historic inland water within the states' jurisdiction. The juridical bay closing line proposed by the government was slightly seaward of the acknowledged limits of historic waters.

167. The master provides a thorough summary and analysis of this evidence at pages 51-60 of his Report.

cause the bay to have multiple mouths. Last, Block Island is too far seaward of any mainland-to-mainland closing line to consider altering the closing line to include Block Island." *Id.* at 60.

The United States took exception to the master's decision that Long Island is assimilated to the mainland and the states took exception to the master's recommended closing line. The Supreme Court adopted all of the master's recommendations. In so doing it seems to have gone farther than it sometimes has in endorsing the master's reasoning. The following are some examples of the Court's comments that may have particular relevance to future litigation.

First the Court reaffirmed its general rule that "islands may not normally be considered extensions of the mainland for purposes of creating the headlands of juridical bays." *Rhode Island and New York Boundary Case*, 469 U.S. 504, 519-520 (1985). But it rejected the federal position that any exception should be limited to the deltaic circumstances found in the *Louisiana Boundary Case*, saying that "given the variety of possible geographic configurations, we feel that the proper approach is to consider each case individually in determining whether an island should be assimilated to the mainland. Applying the 'realistic approach,' . . . we agree with the Special Master that Long Island, which indeed is unusual, presents the exceptional case of an island which should be treated as an extension of the mainland." *Id*. at 517.

The Court went on to analyze the relationship between Long Island and the mainland at the East River. Comparing that narrow and shallow opening to the enormity of Long Island, and Long Island Sound, it concluded that "the existence of one narrow opening to the sea does not make Long Island Sound or Block Island Sound any less a bay than it otherwise would be. Both the proximity of Long Island to the mainland, the shallowness and inutility of the intervening waters as they were constituted originally, and the fact that the East River is not an opening to the sea, suggest that Long Island be treated as an extension of the mainland." *Id.* at 519. It then discussed the use of Long Island Sound, but rather than giving that factor the significance to which it seems to have been allocated in the master's reasoning, the Court described it as "buttressing" its earlier reasoning. *Id.* In all, the Court's basis for adopting the master's recommendation seems more closely tied to the federal understanding of its Louisiana criteria. That is, island assimilation issues will turn on the nature of the waterway that will have to be treated as mainland.

The Court also adopted the master's recommendation that Block Island does not form multiple mouths to a juridical bay. In so doing it made a number of determinations that will help in future controversies. First its reasoning makes clear that the first step in the process is to locate the

mainland headlands of the indentation in question. It concluded that but for Block Island the Montauk to Watch Hill line "clearly would be the closing line of the bay." *Id.* at 521. Block Island, on the other hand, "is too removed from what would otherwise be the closing line of the bay to affect that line." *Id.* at 524. Rejecting a state argument, it ruled that just because ocean traffic entering a bay has to avoid an offshore island, that island does not create multiple mouths to the bay. *Id.* at 525. It agreed with Commander Beazley that to be landlocked "there shall be land in all but one direction and also that it should be close enough at all points to provide [a seaman] shelter from all but that one direction." *Id.*[168]

The Court also cited, apparently with approval, objective tests endorsed by Beazley, Hodgson, and Alexander for locating headlands to juridical bays. *Id.* at 522 n.14. And it provided a useful description of how the 45-degree test is applied. *Id.*[169]

The Court understood that "the States appear to be arguing not that an island near the mouth of a bay creates multiple mouths, but that an island well beyond what would otherwise be the mouth of the bay can cause the bay to have an entirely different mouth." *Id.* at 524. And it reasoned that "as the Special Master and the members of the Baseline Committee concluded, the waters in the outer reaches of Block Island Sound in any practical sense are not usefully sheltered and isolated from the sea so as to constitute a bay or bay-like formation." *Id.* at 526.[170]

So the master's recommendations were adopted. Long Island is assimilated to the mainland. As a result, Long Island Sound and a portion of Block Island Sound qualify as a juridical bay under Article 7 of the Convention. The inland waters of that bay extend to a line between Montauk Point on Long Island and Watch Hill Point in Rhode Island. Block Island is an island under Article 10. It is surrounded by a 3-mile belt of state submerged lands but has no effect on inland waters closing lines.

168. Quoting Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation*, The Hydrographic Society, Special Publication No. 2, p. 13 (1978) and citing to Hodgson & Alexander, *Towards an Objective Analysis of Special Circumstances*, Law of the Sea Institute, Occasional Paper No. 13, pp. 6 and 8 (1972).

169. As the Court explained, "a number of objective tests have been formulated to assist in selecting the natural entrance points to a bay. The primary one is the 45-degree test. It requires that two opposing mainland-headland points be selected and a closing line be drawn between them. Another line is then drawn from each selected headland to the next landward headland on the same side. If the resulting angle between the initially selected closing line and the line drawn to the inland headland is less than 45 degrees, a new inner headland is selected and the measurement is repeated until both mainland-headlands pass the test." 469 U.S. at 522 n.14. See Part II for full explanation of the 45-degree test.

170. Both the master and the Court make a number of positive references to the work of the Baseline Committee. The foregoing statement is the most direct recognition of the Committee's expertise.

United States v. Florida

The federal government had included Florida as a defendant in *United States v. Maine, et al.*, Number 35 Original, the action against all states bordering on the Atlantic, and in *United States v. Louisiana, et al.*, Number 9 Original, involving all Gulf Coast states. Florida's interests were severed from the Maine case early in those proceedings, largely because its claims were not based on European charters but on a congressionally approved state constitution. *United States v. Maine et al.*, 403 U.S. 949 (1971). Unresolved issues also remained from its participation in the Gulf coast litigation. All remaining Florida questions were consolidated in this new Original action. The Honorable Albert B. Maris was appointed as special master.[171]

With coasts on both the Atlantic Ocean and the Gulf of Mexico, the Florida litigation raised questions not previously confronted in tidelands litigation. First, the parties contested the proper means for determining Florida's Submerged Lands Act boundary in the Atlantic. Second, they argued about the location of the state's constitutional boundary in the Gulf of Mexico. And finally, they could not agree on the point at which the Atlantic and the Gulf come together.[172]

Following the Civil War, Congress provided procedures by which secessionist states would be readmitted to representation in Congress.[173] Pursuant to those procedures Florida adopted a new constitution in 1868. That constitution contained, among other things, a state boundary description. By Act of June 25, 1868, 15 Stat. 73, Congress approved that constitution.[174]

The parties agreed that the constitutional boundary lay, at least for some stretches, more than 3 miles offshore. Florida argued that its approval, in 1868, amounted to an express or implied congressional grant that remained operative to the present. The United States contended that boundaries in

171. Judge Maris was also special master in *United States v. Maine, et al.*, Number 35 Original.

172. The Florida action also raised two procedural issues not previously encountered in tidelands cases. First, the state filed a Counterclaim, contending that the Submerged Lands Act constituted an unconstitutional "taking" of preexisting state rights seaward of the 3-mile grant in the Atlantic. The federal government responded that the Act was simply a grant and if Florida had preexisting rights seaward the Act did not detract from them. The state also sought a jury trial on the issue. The special master recommended dismissal of the Counterclaim and denial of the jury demand. The Supreme Court adopted those recommendations. *United States v. Florida*, 404 U.S. 998 (1971).

173. Acts of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2.

174. The boundary along Florida's Atlantic coast ran from the mouth of the St. Mary's river "thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands . . . ."

the Atlantic had no relevance to the question before the master. The Court had considered state boundaries of California, Texas, and Louisiana and had determined in each instance that they did not encompass offshore seabed rights.

The special master agreed with the federal position. He found no express or implied grant in congressional approval of the 1868 Florida constitution. Report at 8 and 11. Such boundaries, he concluded, are relevant only to determining the limits of the more expansive grant in the Gulf.[175]

That determination brought the parties to their second point of disagreement, the constitutional boundary in the Gulf of Mexico. Here they agreed that the boundary has relevance to delimiting Florida's Submerged Lands Act grant. Depending on its location, it might qualify the state for 9 miles of submerged lands in the Gulf. But the parties did not agree on the location of that boundary.

The 1868 constitutional boundary north of the Keys ran from the Dry Tortugas Islands "northeastwardly to a point three leagues from the mainland" and then followed the mainland, 3 leagues offshore, to the Alabama boundary. The state read this provision to describe a line running 45 degrees east of north until it came within 9 miles of the mainland, in the vicinity of Cape Romano. The United States argued that the term "northeastwardly" does not necessarily refer to a constant bearing but might describe any line whose terminus lies to the north and east of its beginning point. (Figure 15) The government put on evidence of historic use of waters north of the Keys and contended that only the shallow waters paralleling the Keys, sometimes less than 9 miles offshore, were of interest to Floridians in the mid-1800s and were intended to be included in the constitutional boundary.

But the master rejected both contentions. He concluded that the "northeastwardly" call described a line that follows the Keys at a distance of 3 marine leagues. He said, "in the absence of anything to the contrary in the phrase 'thence northeastwardly to a point three leagues from the mainland,' I think it is permissible to infer that the northeastwardly line was

175. Despite this conclusion the master, at the request of the parties, determined where the 1868 Atlantic boundary is located. Report at 21-24. The master pointed out that recent actions by the State of Florida buttress any conclusion that the state's Submerged Lands Act grant is limited to 3 miles in the Atlantic. In 1955 the state adopted legislation "fixing and establishing the boundary of the State of Florida along the Atlantic Ocean and the Florida Straits." That statute was prompted by the Submerged Lands Act's invitation for states to "extend" their seaward boundaries to 3 nautical miles, and Florida specifically did so. Act of May 31, 1955, Laws of Florida, 1955, chap. 29744. On November 6, 1962, the state amended its constitutional boundary in a similar manner. As the master pointed out, even if he were wrong and Florida had had a more extensive boundary in 1868, "the effect of the 1955 Act and the 1962 Constitutional amendment was to abandon the jurisdiction of the State" beyond the 3-mile line. Report at 17.

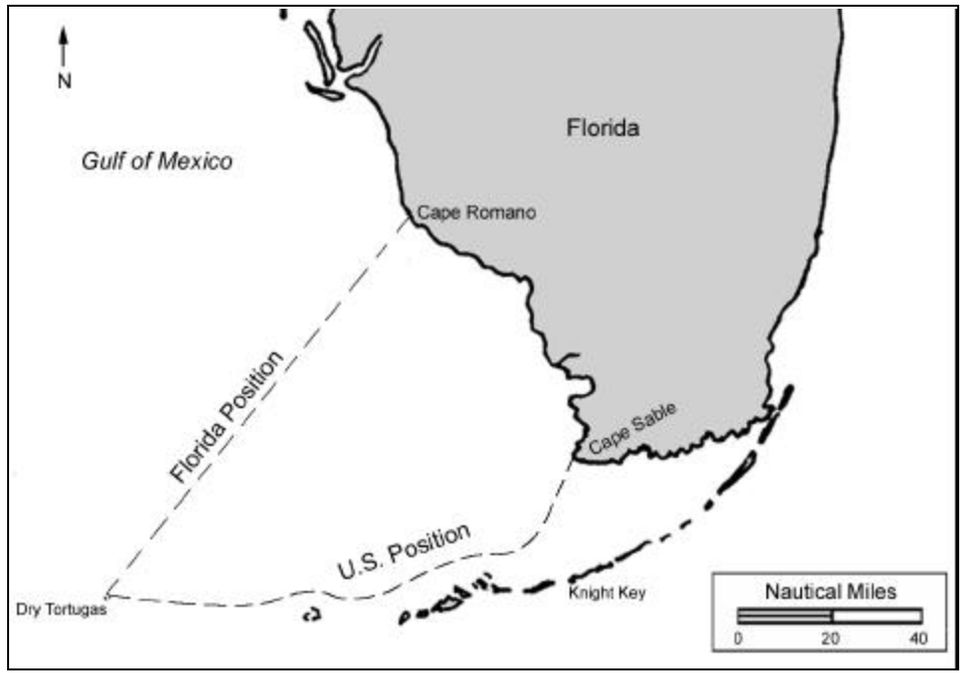

Figure 15. Florida Bay. The state and federal positions differed as to the location of Florida's 1868 constitutional boundary.

itself intended to run three leagues from the Dry Tortugas and the coast of the Keys . . . to a point three leagues from the mainland." Report at 28.[176]

The master had selected a line more closely aligned to that urged by the United States than by the state. But that does not mean that the federal side got the better of a compromise. The special master recommended a line that was at all times 9 miles offshore. Although the state's proposal was significantly seaward of that line, the maximum grant available to it under the Submerged Lands Act was 9 nautical miles. Thus the state's litigation position was overkill. It got the maximum possible grant throughout the Gulf of Mexico.

Then came what was probably the most interesting point in contention – one that is unique to Florida's situation. That is, where does the Atlantic end and the Gulf of Mexico begin? The question was critical, of course, because Florida would get three times as much submerged land in the Gulf as it did in the Atlantic.

176. Again the state's 1962 constitutional boundary amendment supported the master's interpretation. In that action the 1868 language was amended to read "thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland." The state clearly was not, in 1962, claiming a line which ran 45 degrees, on a constant bearing, from the Dry Tortugas to Cape Romano.

Again the parties had differing views. They agreed that waters west of Cuba lay in the Gulf and that those north of the Bahamas are part of the Atlantic, but the Straits of Florida, which separate the Keys from islands of the Caribbean, formed the battleground.

The state argued that the Florida Straits are part of the Gulf of Mexico and supported that argument with a theory that was new to tidelands litigation. Florida put on evidence that the three-dimensional "basin" that is identified with the Gulf of Mexico extends through the Straits of Florida to a line that runs east from Miami to the Bahamas. (Figure 16) State experts testified that if a marble were dropped on the seabed south of this line it would roll southwestward to the Gulf, but another dropped north of the line would roll to the Atlantic. Those experts believed that "it is the configuration of the sea bottom which determines the question." Report at 19.

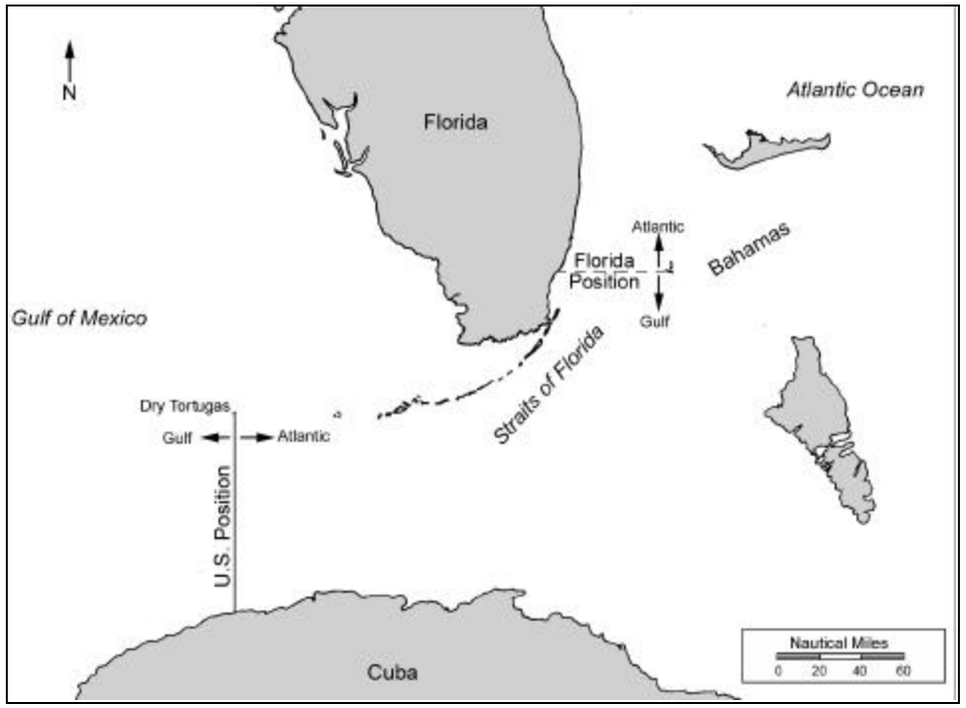

Figure 16. Straits of Florida. Note the positions taken by the U.S. and Florida as to the limits of the Gulf of Mexico.

The United States considered the Straits to be part of the Atlantic and emphasized the two-dimensional. The government proposed a line that follows the 83rd meridian of longitude from Cuba to the Dry Tortugas. This line, federal experts testified, represented the general view of geographers,

cartographers, and historians. Seamen plying the straits from east to west were said to have considered themselves to be entering the Gulf when they crossed the 83rd meridian. What is more, that line had been adopted by the International Hydrographic Bureau as the entrance to the Gulf. Although not of legally binding significance, that organization's position certainly gave weight to the federal argument. As the master acknowledged, the Bureau's determinations are made "for the convenience of national hydrographic offices when compiling their sailing directions, notices to mariners, etc., so as to insure that all such publications headed with the name of an ocean or sea will deal with the same area." Report at 19.[177]

The master explained that, as presented to him, "the question seems to turn on whether we accept the views of geographers, cartographers, historians, and explorers who are primarily concerned with the surface of the sea, as the United States urges, or those of marine geologists who are primarily concerned with the topography of the sea floor, as Florida urges." Report at 18. In the end he concluded that Congress would have been suggesting the federal approach when it referred to the Gulf and Atlantic in the Submerged Lands Act. *Id.* at 20. He recommended the 83rd meridian as the entrance to the Gulf of Mexico. *Id*.

Having resolved these issues unique to Florida the master turned to three more traditional coast line questions. First was Florida's allegation that "Florida Bay," the immense water area east of the line from the Dry Tortugas to Cape Romano, is a juridical bay under Article 7. The master noted that Article 7 contains two criteria: the waters must be landlocked, and the closing line may not exceed 24 nautical miles. Report at 38. The waters of Florida Bay, as claimed by the state, are not landlocked, but open to the Straits of Florida through numerous channels that separate the Keys. Nor does Florida Bay conform to the Convention's size requirement, having a mouth of approximately 100 miles. The master concluded that the area claimed by Florida is not an Article 7 bay.[178] Report at 38.

Next, the master considered the state's contention that Article 4 straight baselines should be adopted for its coast. Citing the Supreme Court's decisions in *California* and *Louisiana*, holding that "the choice under the Convention to use the straight-base-line method for determining inland

177. And here again, the federal position was supported by the action of Florida's legislature. In its boundary Act of May 31, 1955 – drafted in specific response to the federal Submerged Lands Act – Florida described the Straits of Florida as "an arm of the Atlantic Ocean." Although later repealed, Chapter 71-348, the master concluded that the 1955 description stood as "an expression of the understanding of the State at about the time of the enactment of the Submerged Lands Act." Report at 20.

178. Interestingly, and completely without any suggestion by the parties, the master viewed the very eastern end of Florida Bay separately, and concluded that it met the requirements of Article 7. That conclusion is discussed below.

waters . . . is one that rests with the Federal Government, and not with the individual States," *United States v. California*, 381 U.S. 139, 168 (1965), as affirmed in *United States v. Louisiana*, 394 U.S. 11, 72-73 (1969), the master concluded that "the evidence in this case conclusively establishes that the United States has not adopted the straight baseline method with respect to the determination of the coastline of the State of Florida." Report at 49. The low-water line and other inland water closing principles would be used.

Finally, the master considered Florida's claim that Florida Bay is historic inland water. The master reviewed the Supreme Court's historic bay decisions in *California* and *Louisiana* and applied the criteria that the Court had employed from the United Nations' *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. Int'l L. Comm'n 1, to the evidence offered by the state. As he described the criteria, "there must be an open notorious and effective exercise of sovereign authority over the area not merely with respect to local citizens but as against foreign nationals as well; second, this authority must have been exercised for a considerable period of time; and, third, foreign states must have acquiesced in the exercise of this authority as against their nationals." Report at 41.

He then noted that the federal government had disclaimed historic title, both through its litigation position here and the publication and distribution of its position on the Baseline Committee charts. This, he concluded, compelled Florida to prove its case with evidence that is "clear beyond doubt." *Id.* at 42.

Florida offered its 1868 boundary, with the 45-degree line closing Florida Bay as evidence of a claim. But the master noted that he had already concluded that the boundary paralleled the Keys rather than enclosing Florida Bay. *Id.* Next, the state introduced evidence of historic fisheries enforcement in the "bay," to which the federal government was said to have acquiesced. But the evidence did not establish exercises of authority beyond the already recognized territorial sea, and fell short of supporting a claim to the bay as a whole. Nor was there any evidence of enforcement action against a foreign national, or that a foreign government had reason to know of a claim so as to establish acquiescence.

Mineral leases lying beyond the territorial sea were offered as evidence but they were entered from 1944 to 1951 and the master concluded that the shortness of time precluded the finding of a "usage sufficiently remote in time to meet the second criterion for historic inland waters." *Id.* at 46. What is more, the master reasoned, by the mid-1940s the international community had accepted national claims to the continental shelf and such leases would not, by then, constitute "use adverse to foreign nations." *Id.*

The state's evidence of historic title was found not to be "clear beyond doubt" and its claim was rejected. *Id.*

Having dealt with all of the issues raised by the parties, the master made two recommendations on matters upon which no evidence or argument had been offered. He returned to the question of Florida Bay and concluded that its eastern reaches do meet the requirements of Article 7. As to the area between the mainland of the Florida peninsula and the upper Florida Keys he concluded that a juridical bay exists, with a closing line from East Cape on Cape Sable to Knight Key. As he explained, "this area comprises for the most part very shallow water which is not readily navigable and nearly all of which is dotted with small islands and low-tide elevations. I find that this area is sufficiently enclosed by the mainland and the upper Florida Keys, which constitute realistically an extension of the mainland, to be regarded as a bay which constitutes inland waters of the State within the test applied in *United States v. Louisiana* . . . ." Report at 39.

The recommendation came as a surprise to the federal side (as it presumably did to the state). Its boundary consequences were *de minimis*. As the master noted, the water area so enclosed is filled with islands and low-tide elevations. Many of these are so near the closing line proposed by the master that 3-league arcs swung from them envelop nearly all of the area that would have gone to the state under this finding. Nevertheless, Florida had made no such contention, and the federal government had not, of course, offered evidence or argument to rebut it. The question of what islands may be "assimilated to the mainland" under the principle announced by the Supreme Court in the *Louisiana Boundary Case*, 394 U.S. 11 (1969), is particularly contentious and is bound to depend upon the particular facts of a case. The federal government was concerned that if this recommendation were adopted by the Court the upper Florida Keys would be thereafter put forward as an example of island assimilation.

In addition, the United States was concerned about the master's apparent reliance on the non-navigability of the area to be enclosed. Nowhere does Article 7 suggest that criterion as relevant to juridical bay analysis.[179] Here again, the United States was concerned that the Court's adoption of this recommendation would provide an adverse precedent without adequate consideration.

The master made another recommendation on an issue that had never been raised in the proceedings. He concluded that as to "the Florida Keys from Money Key to Key West, the Marquesas Keys and the Dry Tortugas Islands . . . . the narrow waters within the group are inland waters of the State of Florida." Report at 52. (Figure 17) Again, the state had not requested the determination nor had either party addressed that possibility in evidence or argument.

179. Article 7 has always been applied through a two-dimensional review. The height of surrounding uplands, and the depth of enclosed waters, have been irrelevant to the analysis. Nothing in Article 7 suggests a different approach.

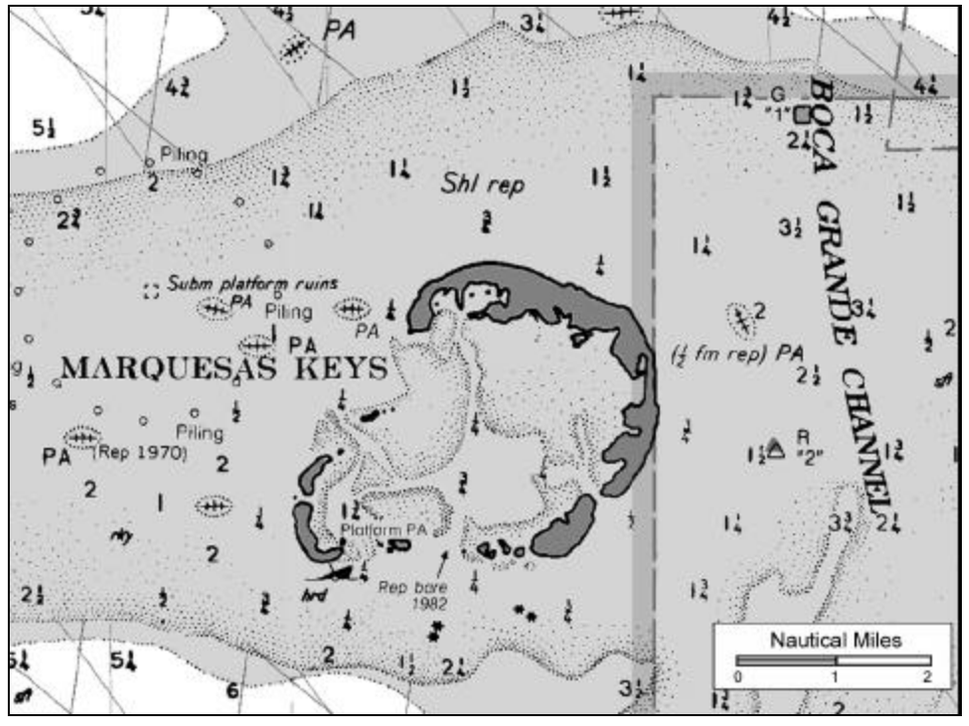

Figure 17. Marquesas Keys, west of Key West, Florida. The special master recommended that the "narrow waters" within the Marquesas, and other island groups, are inland. (*Based on NOAA Chart 11434*)

Clearly the waters being described are closely associated with the surrounding land forms and in that sense might be thought to have more in common with inland waters than they do with territorial seas. However, the Convention provides no basis for considering them inland, with the possible exception of Article 4 straight baselines. The master had already decisively concluded that no such baselines had been drawn for Florida.

Again, the consequence of the recommendation was more as an adverse straight baseline precedent than a loss of federal submerged lands. Little or no boundary effect could be imagined. Yet the federal government was concerned about its application to future tidelands actions.

The special master had recommended against the United States on other issues in the proceeding but the government took exception only to these two unanticipated findings. The state took exception to other recommendations upon which its positions were rejected. The Court accepted briefs, heard arguments, and, in a two-page *per curiam* opinion, adopted the master's recommendations on all of the litigated issues. *United States v. Florida*, 420 U.S. 531 (1975).

It rejected each of the state's exceptions. *Id.* at 533. Responding to the federal concern on the untried issues, the Court said "it appears that these recommendations of the Special Master were made without benefit of the contentions now advanced by the United States and the opposing contentions now presented by the State of Florida. The exceptions of the United States are therefore referred to the Special Master for his prompt consideration." *Id*.

Although the state may have gained small areas of submerged lands had it ultimately prevailed on the issues referred back, it elected not to pursue the matter and a decree was agreed to that does not recognize the closing line recommended by the master for eastern Florida Bay nor inland waters within island groups. *United States v. Florida,* 425 U.S. 791 (1976).[180]

The Alaska Cases

The United States and Alaska have, in three separate cases, litigated questions of that state's coast line. The three cases involved entirely different tidelands questions. They are grouped together here because the same parties were involved but we discuss them individually.

The Cook Inlet Case

First in time was litigation over the status of Cook Inlet. Cook Inlet is a large bay extending 150 miles from its mouth to and beyond the city of Anchorage inland. As the Supreme Court noted, it is "larger than the Great Salt Lake and Lake Ontario. It is about the same size as Lake Erie. It dwarfs Chesapeake Bay, Delaware Bay, and Long Island Sound . . . ." *United States v. Alaska*, 422 U.S. 184, 185 n.1 (1975). (Figure 18)

By 1959, at the time of Alaskan statehood, the early tidelands questions had been resolved. The Court had ruled that the federal government, not the states, held paramount rights beyond the coast. *United States v. California*, 332 U.S. 19 (1947). Congress, in 1953, had made a general grant to the states of federal rights within 3 miles of the coast line, putting them in the position that they believed themselves to have held prior to the *California* decision. Submerged Lands Act, 43 U.S.C. 1301 *et seq*. The

180. Surprisingly, and despite years of federal prodding, at this writing a decree has not yet been entered which describes the boundary between federal and state submerged lands. For most states, and assuming an equal likelihood of accretion and erosion, neither party would be expected to gain or lose from a delay in establishing that line. However, Florida's reliance on a historic boundary in the Gulf of Mexico puts it in an unusual position. The Supreme Court has already ruled that the 3-league grant is the lesser of 3 leagues from the modern or historic coast line. *Texas Boundary Case*, 389 U.S. 155 (1967). Because the Submerged Lands Act provides that the federal/state boundary will be fixed by a Supreme Court decree, 43 U.S.C. 1301(b), Florida only stands to lose with future coast line changes. Erosion can move the boundary landward until there is a decree. Accretion can move it seaward only to the 1868 boundary.

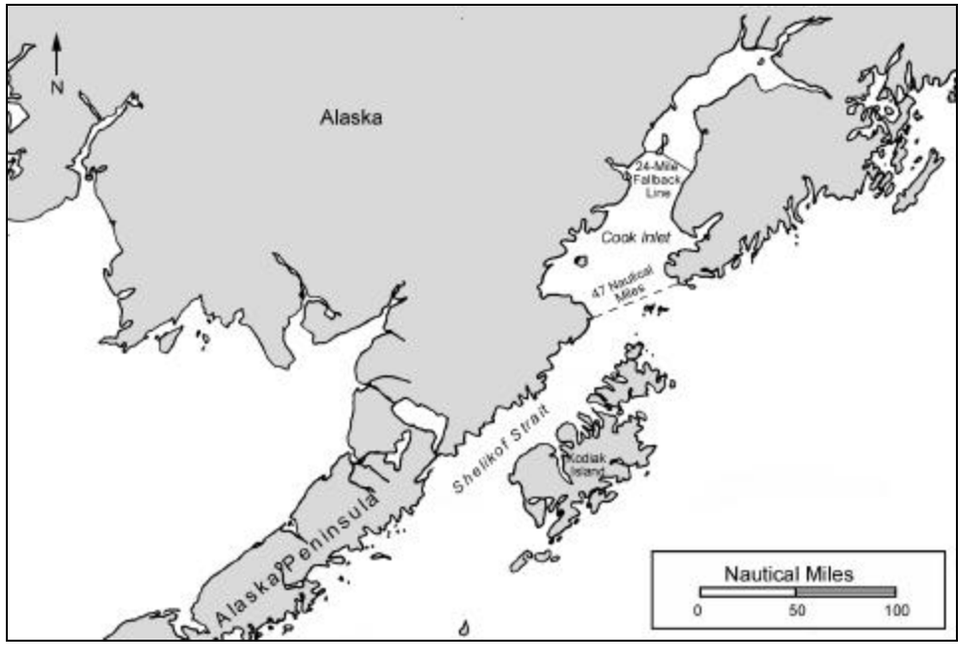

Figure 18. Cook Inlet and Shelikof Strait, Alaska.

Supreme Court had ruled that the "coast line" is to be determined using principles found in the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606 (1958). *United States v. California*, 381 U.S. 139 (1965). The Submerged Lands Act was made applicable to Alaska by its Statehood Act of July 7, 1958, 72 Stat. 343, note following 48 U.S.C. ch.2.

Cook Inlet meets all of the requirements for Article 7 juridical bay status save one. It is too large. The inlet is clearly a well-marked indentation into the mainland that contains landlocked waters. Its waters meet the semicircle test of Article 7(2). However, its 47-mile mouth far exceeds the Convention's 24-mile maximum. Article 7(4).

For that reason the federal government did not recognize the whole of Cook Inlet as inland waters. Rather it insisted that its inland waters were limited by Article 7(5), which provides that "where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight line shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." That line, according to the United States, lay well up the inlet in the area of Kalgin Island. There the government would draw a line from the mainland, to Kalgin Island and from the other side of that island to the

opposite mainland. Together the line segments total 24 nautical miles and enclose a maximum water area in upper Cook Inlet.[181]

Alaska admitted that Cook Inlet is too large to qualify as a juridical bay at its natural entrance points but contended that it is a historic bay and is, under Article 7(6), excused from meeting the juridical bay requirements. In 1967 Alaska offered oil and gas leases to 2,500 acres of submerged lands lying more than 3 miles from shore in lower Cook Inlet. The federal government sued in the United States District Court for the District of Alaska to quiet its title to the lands being offered.

This is the only instance, among what we refer to herein as the "tidelands cases," in which legal proceedings were initiated by the government outside the Supreme Court. In its subsequent opinion the Court noted 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 the Court." *United States v. Alaska*, 422 U.S. at 186 n.2.

In fact consideration was given to that course. But the Department of Justice was concerned that a tidelands issue that affected only a small portion of a single state's coast line might not justify an Original action. Since the Supreme Court's comment in the Cook Inlet decision, the government has gone directly to that Court in similar cases.

But as to Cook Inlet it was a federal District Court judge who heard evidence in the first instance. He applied the criteria for historic bay status, already set out by the Supreme Court in *United States v. California*, 381 U.S. at 172 and *United States v. Louisiana*, 394 U.S. at 75 and 23-24 n.27, and concluded that Cook Inlet is indeed historic inland water and subject to the jurisdiction of the state. *United States v. Alaska*, 352 F.Supp. 815 (D.Ak. 1972). The federal government appealed but the Ninth Circuit affirmed the trial court's determination. *United States v. Alaska*, 497 F.2d 1155 (1974). The United States sought, and was granted, *certiorari*[182] because, the Supreme Court said, "of the importance of the litigation and because the case presented a substantial question concerning the proof necessary to establish a body of water as a historic bay." 422 U.S. at 187.

The Supreme Court discussed the evidence in the case much as the District Court had, dividing it into three historic periods. First came the era of Russian sovereignty over Alaska. Here the District Court determined that

181. Although the Convention speaks of "a straight baseline of twenty-four miles," the Baseline Committee adopted the 2-segment line without explanation. Minutes of August 31, 1970. Clearly the federal position is neither "a line" nor is it "straight." Nevertheless it does not appear to be inconsistent with the intent of the Convention's drafters. We know of no international objection to the U.S. adaptation. A single, straight line would have given Alaska less inland water.

182. *Certiorari* is, generally, the procedure by which the United States Supreme Court asserts its discretionary authority to review lower court decisions.

"Russia exercised sovereignty over the disputed area of Cook Inlet." *Id.* at 190.[183] It based that conclusion on three findings: the existence of four Russian settlements on the shores of the inlet in the early 1800s; a Russian fur trader's attempt to run off an English vessel with cannon fire from shore in 1786; and a ukase of Tsar Alexander I in 1821 that "purported to exclude all foreign vessels from the waters within 100 miles of the Alaska coast." *Id.*

None of these examples convinced the Supreme Court that Russia had exercised the necessary authority to acquire historic title. The settlements, it said, may indicate a claim to the land but say little about Russia's authority over the vast water area of the inlet. *Id.* The fur trader's cannon fire was apparently an act of a private citizen and as such, according to the Court, "is entitled to little legal significance." *Id.* at 191.[184] Finally, the Court noted that the imperial ukase of 1821 was vigorously protested by the United States and England and was quickly withdrawn. *Id.* at 191-192. According to the Supreme Court, the Russian period provided no evidence to support a historic water claim.

Next the District Court had reviewed evidence of purported exercises of jurisdiction over Cook Inlet while Alaska was a United States territory. All involved fish and wildlife management. Two statutes, one prohibiting killing sea otters and the other prohibiting aliens from commercial fishing, applied in the waters of Alaska. Revised Statutes Sec. 1956 (1878) and the Alien Fishing Act, 34 Stat. 263 (1906). An Executive Order, No. 3752, was issued by President Harding in 1922 and regulated all commercial fisheries in southern Alaska, specifically including Cook Inlet. A third statute regulated commercial fisheries "in any of the waters of Alaska over which the United States has jurisdiction" and was implemented through regulations that also named Cook Inlet as falling within their reach. The

183. Here the Court quoted from the District Court's unpublished "findings and conclusions" (which were reproduced in the federal petition for *certiorari* at pages 21a-55a).

184. In this context the Court noted that in later years "semiprivate corporations" were allowed to govern Alaska under the Tsars. However, these organizations had not reached their zenith at the time of the incident relied upon and no evidence was produced in the litigation to suggest that the fur trader involved was acting under governmental authority. For that reason the Court had "no occasion to consider whether the acts of a semi-private colonial corporation are to be given the same weight as the direct acts of a national government for purposes of establishing a claim to historic waters." 422 U.S. at 191 n.10.

The Court then seemed to reason that because the incident was consistent with the then accepted policy of claiming *territorial waters* within a cannon shot of the coast it was not evidence of an inland water claim. That, of course, would seem to be true and relevant to the issue. But what the Court actually said is that "the firing of cannon from shore was wholly consistent with the present position of the United States that the *inland* waters of Alaska near Port Graham are to be measured by the three-mile limit." 422 U.S. at 191 [emphasis supplied]. Of course the "cannon shot rule" is understood to have been the basis for delimiting the territorial sea, not inland waters. See: 4 Whiteman, *Digest of International Law* (1965) at 60. In fact it was the United States which is thought to have first "translated" the range of a cannon shot into 1 marine league. Letter from Mr. Jefferson, Sec. of State, to Mr. Genet, the French minister, I American State Papers, For. Rel., 183. The authorities cited by the Court also discuss territorial water, not inland, claims. It seems most likely that the Court referred to inland waters inadvertently. The apparent misstatement does not affect the Court's reasoning or conclusion.

White Act, 43 Stat. 664 (1924). Finally, the areas regulated under that Act were charted as part of an agreement with Canada governing salmon fishing with nets by the citizens of both countries. This became known as the Gharrett-Scudder Line.

The District Court found each of these actions to be evidence of an inland water claim to Cook Inlet. The Supreme Court began its review with a discussion of the threefold division of the sea. "Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside of the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation." 422 U.S. at 196-197, quoting from *United States v. Louisiana*, 394 U.S. 11, 22-23 (1969).

The Court then noted that "the exercise of authority necessary to establish historic title must be commensurate in scope with the nature of the title claimed." *Id.* at 197. That principle, it would seem, holds the key to all historic waters adjudications yet has probably not been sufficiently emphasized by subsequent litigators. Here the Court returned to its Louisiana precedent, reminding the reader that navigation regulations that allow innocent passage did not support an inland water claim because innocent passage is "a characteristic of territorial seas rather than inland waters . . . ." *Id*. With these guidelines at hand it turned to the state's evidence.

The Alien Fishing Act, it noted, was the only statute that treated foreign vessels differently than it did American vessels. It did not, however, include any language putting aliens on notice that lower Cook Inlet was included within its reach, nor was there any evidence of enforcement there more than 3 miles offshore. As to the other fish and wildlife regulations, the Court found that they had been enforced in lower Cook Inlet but only against American vessels. "These incidents prove very little for the United States can and does enforce fish and wildlife regulations against its own nationals, even on the high seas." *Id*. at 198.[185]

The Gharrett-Scudder Line, which was adopted in an international agreement and governed the activities of both American and Canadian fishermen, was forwarded to the Canadian government "with express

185. Citing 16 U.S.C. 781 (commercial sponging in the Gulf of Mexico); 16 U.S.C 1151 (fur sealing in the North Pacific); 16 U.S.C. 1372 (taking marine mammals on the high seas); and *Skiriotes v. Florida*, 313 U.S. 69 (1941).

disclaimers that the line was intended to bear any relationship to the territorial waters of the United States . . . ." *Id.* at 196.[186]

What is more, the Court said, coastal states often assert fisheries jurisdiction beyond their inland, or even territorial waters. *Id.* at 198-199. Citing Presidential Proclamation No. 2668, 59 Stat. 885 (1945) and Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6, 17 U.S.T. 138, 141 (1966).

In sum, the Court concluded that "the enforcement of fish and wildlife regulations, as found and relied upon by the District Court, was patently insufficient in scope to establish historic title to Cook Inlet as inland waters." 422 U.S. at 197. "The routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any claim of dominion." *Id.* at 200.

Finally the Court reviewed evidence of Alaska's alleged exercises of sovereignty over lower Cook Inlet since statehood. First the state argued that it had continued to enforce fisheries regulations as the federal government had during the territorial period. The Court disposed of that contention in one sentence, saying "since we have concluded that the general enforcement of fishing regulations by the United States in the territorial period was insufficient to demonstrate sovereignty over Cook Inlet as inland waters, we also must conclude that Alaska's following the same basic pattern of enforcement is insufficient to give rise to the historic title now claimed." *Id.* at 201.

However, Alaska's final evidence required more consideration. In 1962 the state had arrested two Japanese vessels found fishing in Shelikof Strait. At least one of these was operating more than 3 miles from shore.[187] They were charged with violating state fisheries regulations. *Id.* at 202.

Interactions between the governments and the Japanese defendants were interesting. First, when Alaska learned in 1962 that the Japanese vessels were on the way to North America it asked the federal government to intervene and prevent their entry into Cook Inlet and Shelikof Strait. The United States took no action.[188] The vessels and three captains were arrested

186. The Court even pointed out that "the very method of drawing the fishery boundaries by use of straight baselines conflicted with this country's traditional policy of measuring its territorial waters by the sinuosity of the coast." 422 U.S. at 199, citing *United States v. California*, 381 U.S. at 167-169.

187. Shelikof Strait is formed by the Alaska Peninsula on the north and Kodiak and Afognak Islands on the south (Figure 18, *supra*). It lies 75 miles to the southwest of Cook Inlet. According to the District Court the vessels "had apparently intruded into the southernmost portion of lower Cook Inlet near the Barren Islands for a few hours and then proceeded into the Shelikof Strait," *United States v. Alaska*, 352 F.Supp. at 820, but neither it nor the Supreme Court indicated that they had been fishing in Cook Inlet. They were certainly not interfered with there by Alaskan officials.

188. It should be noted that the United States Congress first imposed criminal penalties for fishing in our 3-mile territorial sea in 1964, 16 U.S.C. 1801 *et seq.*, and extended that prohibition to an additional 9-mile fisheries zone in 1966, 16 U.S.C. 1891 *et seq*.

by the state and within four days released in return for a promise from their company that it "would not fish in the inlet or in the strait pending judicial resolution of the State's jurisdiction to enforce fishing regulations therein." *Id.* at 202. The Japanese government was not party to that agreement and formally protested the arrest. The court proceedings were dismissed with no determination as to the limit of state jurisdiction. The federal government took no position on that issue.

The United States District Court, in the Cook Inlet case, seems to have placed great weight on the Shelikof Strait incident as an assertion of jurisdiction supporting historic inland water title. Again the Supreme Court was unconvinced. It noted that if the arrests were an exercise of sovereignty at all it was sovereignty over Shelikof Strait, not Cook Inlet 75 miles away. But the Court went on to test its adequacy even there. It concluded that the exercise of authority was not sufficiently unambiguous to serve as the basis of historic title to inland waters given the fact that the United States neither supported nor disclaimed the state claim. What is more, the Japanese government specifically rejected it. *Id.* at 203.[189]

The Court reversed and remanded saying "in sum, we hold that the District Court's conclusion that Cook Inlet is a historic bay was based on an erroneous assessment of the legal significance of the facts it had found." *Id*.

Yet the Court's treatment of the Shelikof Strait incident is troubling. It seemed to accept the arrests as evidence of an inland water claim, at least by the state, saying that "to the extent that the Shelikof Strait incident reveals a determination on the part of Alaska to exclude all foreign vessels, it must be viewed, to be sure, as an exercise of authority over the waters in question as inland waters." 422 U.S. at 202. And later, "Alaska clearly claimed the waters in question as inland waters, but . . . given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters." *Id.* at 203.

Earlier in the opinion the Court had emphasized that "the exercise of authority necessary to establish historic title must be commensurate in scope with the nature of the title claimed." 422 U.S. at 197. It had then clearly distinguished between assertions of fisheries jurisdiction and assertions of sovereignty over inland waters and concluded that fisheries jurisdiction "frequently differs in geographic extent from boundaries claimed as inland or even territorial waters." Id. at 198-199. Following that reasoning it concluded that historic inland water title to Cook Inlet could not be founded upon fish and game enforcement.

189. The Court refused to acknowledge the Japanese defendants' tentative agreement to stay out of the Strait as the acquiescence required by international law, saying "as we have already noted, the acts of a private citizen cannot be considered representative of a government's position in the absence of some official license or other governmental authority." *Id.* at 203.

The Shelikof Strait incident is legally indistinguishable. It may have been an indication of a fisheries claim in the territorial sea or beyond but, using the Court's prior reasoning, it was not evidence of an inland water claim. The Court seems to give the state the benefit of the doubt when it states "to the extent that the Shelikof Strait incident reveals a determination . . . to exclude all foreign vessels" it must be viewed as an exercise of authority over inland waters. *Id.* at 202. But Alaska did not ever allege a "determination to exclude all foreign vessels," as it clearly would have to do to support an inland water claim. It was concerned only with fishing. It asked for federal intervention when it learned that they were coming to fish and, getting no support, it arrested them itself – for fishing – not for passing through Shelikof Strait.[190] If the Court was correct earlier in its opinion, that fisheries jurisdiction is not tantamount to an assertion of sovereignty, the Shelikof incident could have been dealt with as summarily as the state's evidence of fisheries regulation during the territorial period had been.[191]

Applying the United Nations' criteria, as it has consistently done, the Court could have said: (1) neither the United States nor Alaska had exercised authority over lower Cook Inlet (or Shelikof Strait) commensurate in scope with the title claimed; (2) the Shelikof arrests, on a single day, April 15, 1962, did not constitute a "continuous" exercise that could, by any stretch, amount to a "usage," having occurred only five years before the litigation commenced; and (3) no foreign state acquiesced in the action, indeed the only state affected by it filed an immediate diplomatic protest. The Court's failure to follow that course may provide grist for future historic water mills.

Having lost its more extensive claim, Alaska agreed with the federal government's 24-mile fallback line closing the inland waters of upper Cook Inlet at Kalgin Island.

The Nome Pier Case

The single issue before the Court in Number 118 Original, which was decided in 1992, had its genesis exactly 45 years earlier in *United States v. California*. In 1947 the Supreme Court had determined that the federal

190. In its analysis of the territorial evidence the Court had said that "even a casual examination of the facts relied upon by the District Court in this case reveals that the geographic scope of the fish and wildlife enforcement efforts was determined primarily, if not exclusively, by the needs of effective management of the fish and game population involved." There is nothing in the opinion to distinguish the regulations being enforced in Shelikof Strait.

191. It would not be enough to say that the Shelikof incidents involved assertions of jurisdiction over foreign vessels while the territorial period provided no such example. As the Court had already said, a coastal nation is understood to have extraterritorial jurisdiction over fisheries with respect to both nationals and foreigners. 422 U.S. at 198-199.

government, and not California, held paramount interests to the resources of the seabed seaward of the "coast line" of that state. That did not, however, resolve all controversy over the boundary that divided the parties' interests. Special Master William H. Davis was appointed by the Supreme Court to recommend solutions to a number of questions regarding the location of that "coast line." Among those was a disagreement as to whether artificial structures built seaward from the shore affect title to submerged lands.

The federal government argued, before the master and the Court, that they are not. It contended that the United States held title to the submerged lands upon which such structures are built and does not lose that title merely because of their imposition upon its lands.[192] California took the position that the Supreme Court's pro-government decisions in *California*, *Texas*, and *Louisiana* rested on the national interest and responsibilities in the waters of the actual territorial sea, not the geographic area that may have once been territorial sea but is now upland.[193]

The special master recommended adoption of the California position, justifying his conclusion with reasoning that eventually led to the Nome Pier controversy. He explained that "I have been fortified in this conclusion by two ancillary considerations: The first of these is that the United States has full control of the erection of any such artificial accretions, because of its control of navigable waters. I think it may be assumed that in the past the question of ownership of the lands, minerals and other things underlying these artificial accretions has not been taken into consideration by the United States in passing judgment upon whether the accretions will be permitted; but it seems clear that in the future that aspect of the matter can be, and probably will be, taken into account. I do not share the view of counsel for the United States . . . that this would be an undesirable situation. On the contrary, I think it would give opportunity for appropriate negotiations and agreement between the State and the United States at the time the artificial change is approved." *United States v. California*, Report of the Special Master of October 14, 1952, at 45-46.[194]

Of course the Submerged Lands Act was passed the following year. Having been granted the entire 3-mile belt, the exact location of California's

192. This action, we must remember, preceded the Submerged Lands Act so at the time the federal government held paramount rights to the seabed up to the coast. Structures built in the territorial sea were built on federal property. In that context the controversy was over lands "beneath" the artificial structures. Subsequent to passage of the Submerged Lands Act the same structures became base points from which the 3-mile grant is measured. But the fundamental question is the same – do they constitute part of the coast line?

193. The United States did not dispute that the territorial sea is measured from the artificial structures.

194. The special master referred to the United States Corps of Engineers' authority, under chapter 425, Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, to prohibit construction in the navigable waters.

coast line was suddenly unimportant.[195] Consequently Mr. Davis's Report lay dormant for a decade. Eventually technology allowed deep water oil and gas exploration, the coast line controversy was revived, and the Court reviewed Mr. Davis's Report. It adopted the master's recommendation on artificial structures and referred to his reasoning with approval, noting that "the effect of any future changes could thus be the subject of agreement between the parties." *United States v. California*, 381 U.S. 139, 176 (1965). The Court specifically concluded that "arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters." *Id*. at 177.

It was such an agreement that gave rise to the Nome jetty litigation. Nome is a municipality of some 3,500 people on the Bering Sea, accessible only by sea, air, and dogsled. It has no natural harbor. In the 1980s it began planning for a substantial artificial port, including a jetty to extend seaward from the natural coast. Principles from the Convention on the Territorial Sea and the Contiguous Zone, adopted by the Supreme Court for purposes of the Submerged Lands Act, would recognize this jetty as part of the coast line. Thus, absent some basis for an exception to that general rule, a substantial area of federal submerged lands on the outer continental shelf would pass into state hands merely through construction of this state project. (Figure 19) But the jetty would be in the navigable waters and the project required Corps of Engineers approval. Alaska applied for a Corps permit.

By this time the federal government had accepted the Court's invitation in the *California* decision and adapted its permit review regulations to assure that coastal construction would not be approved without consideration of submerged lands consequences.[196] Under those regulations the Alaska application was forwarded to the Department of the Interior and it objected to the issuance of a permit unless Alaska agreed that the existing offshore boundary would not be affected.

The Corps adopted that recommendation and Alaska submitted a "conditional waiver" of submerged lands consequences, reserving its right

195. The continental shelf off California is sufficiently steep that technology of the day did not permit exploration as far as 3 miles offshore. For that reason minor differences of opinion as to the location of the coast line had no practical significance.

196. The specific regulation provides "(f) Effects on limits of the territorial sea. Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law . . . . Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken." 33 C.F.R. Sec. 320.4.

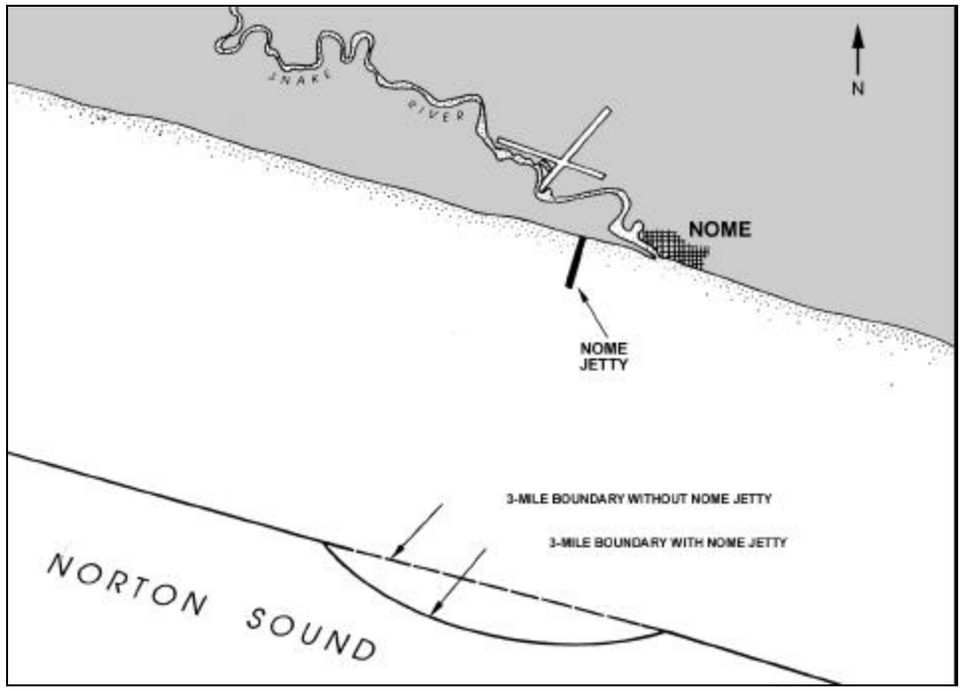

Figure 19. Nome jetty, Alaska. The potential effect of the Nome jetty on Alaska's Submerged Lands Act boundary is illustrated. (*After Joint Stipulation of Facts, U.S. v. Alaska, Number 118 Original, Appendix O*)

to challenge the Corps' authority to condition its permits on such grounds. The permit was granted and the facility built. The parties understood that the waiver merely set the stage for judicial resolution of their differences when an actual boundary controversy arose.

That opportunity presented itself within four years when the Department of the Interior announced plans to hold a lease sale offering exclusive rights to dredge for gold on submerged lands off the coast of Nome. Seven hundred and thirty acres of the offering were within 3 miles of the Nome jetty. Alaska protested that portion of the sale, on the basis of its conditional waiver, and the United States sought leave of the Supreme Court to initiate an Original action for resolution of the dispute. The request was granted.

It was agreed that a single legal issue separated the parties and that issue could be resolved on agreed facts. Consequently no special master was required. The parties stipulated as to relevant facts and each submitted a summary judgment motion to the Court.[197]

197. Interestingly, the sale brought no bids but the parties agreed that a controversy remained between them. The Court concluded that the matter was not moot. *United States v. Alaska*, 503 U.S. 569, 575 n.4 (1992).

Alaska argued, in the first instance, that the Rivers and Harbors Act authorizes the Corps to consider only a project's effects on navigation in determining whether to issue a permit. Alternatively, it contended that federal-state boundary interests are clearly not relevant. The Court rejected both positions.

It began its analysis by highlighting the breadth of the statute itself. Section 10 of the Rivers and Harbors Act (RHA) begins by prohibiting obstructions to navigation not authorized by Congress. It then prohibits the construction of any structure in waters of the United States except as authorized by the secretary of the army. 33 U.S.C. 403. This, the Court described as apparent "unlimited discretion to grant or deny a permit for construction of a structure such as the one at issue in this case." *United States v. Alaska*, 503 U.S. 567, 576 (1992). It discussed a number of decisions in which it had read the Corps' authority broadly, authorizing it to deny permits for reasons other than interference with navigability. *Id*. at 577-580.[198]

It also reviewed the Corps' interpretation of its own authority. That history actually reflects a hesitation on the part of the Corps to regulate to the full extent of its authority as recognized by the Courts.[199] But after substantial prodding from Congress the Corps, in 1968, officially amended its policy guidance on permit review to include consideration of "the effects of permitted activities on the public interest including effects upon water quality, recreation, fish and wildlife, pollution, our natural resources, as well as the effects on navigation." 33 C.F.R. 209.330(a). Quoted at *id*. at 580-581. Still, Congress urged the Corps to consider *"all aspects of the public interest*." *Id.* at 581 [emphasis in original].

But the real turnaround in Corps thinking followed a decision in which the Fifth Circuit Court of Appeals concluded that the Corps had properly considered environmental factors in a permit application even though the project would not have adversely affected navigation. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970). Soon thereafter the Corps issued even more expansive criteria for permit consideration. The regulations in effect when the Nome jetty application was processed provide for a broad range of public interest considerations including: "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality,

198. Among these were: *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933), *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), and *United States v. Pennsylvania Industrial Chemical Corp*., 411 U.S. 655 (1973).

199. That hesitation appears to have been founded on an attorney general's opinion which concluded that the Rivers and Harbors Act permitted the Corps to consider only navigation interests in its permit process. 503 U.S. at 580, citing 27 Op. Atty. Gen. 284, 288 (1909).

energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people." 33 C.F.R. 320.4(a)(1)(1991).

Given the breadth of the Rivers and Harbors Act itself and subsequent congressional and judicial interpretations, the Supreme Court held that the Corps had properly adopted these "public interest" factors in its permit process. 503 U.S. at 583.

Nevertheless, the state contended, the regulatory provision that authorizes consideration of federal-state boundary consequences goes too far. First it argued that even if the Rivers and Harbors Act would countenance this result, the later Submerged Lands Act (SLA) had withdrawn the authority. Congress gave Alaska 3 miles of submerged lands measured from its coast line. The Supreme Court had said that harborworks are part of the coast line. The Corps of Engineers cannot override that result – or so the state reasoned. *Id*. at 584-587.

But the Court concluded otherwise. The Corps, it answered, was not usurping authority by freezing the state's SLA boundary. "What the Corps is doing, and what we find a reasonable exercise of agency authority, is to determine whether an artificial addition to the coastline will increase the State's control over submerged lands to the detriment of the United States' legitimate interests. If the Secretary so finds, nothing in the SLA [Submerged Lands Act] prohibits this fact from consideration as part of the 'public interest' review process under RHA Sec. 10. Were we to accept Alaska's position, the Federal Government's interests in submerged lands outside the State's zone of control would conceivably become hostage to state plans to add artificial additions to its coastline." *Id.* at 585-586.

The Court then noted that the result would be the same adverse consequence with which the United States had expressed concern in the *California* case. "If Alaska's reading of the applicable law were followed to its logical extreme, the United States would be powerless to protect *its* interests in submerged lands if a State were to build an artificial addition to the coastline for the sole purpose of gaining sovereignty over submerged lands within the United States' zone, so long as the project did not affect navigability or cause pollution." *Id.* at 586. The Court then quoted its own language from the *California* decision in which it had said "'arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.' 381 U.S., at 177." It then concluded that "such 'power over navigable waters' would be meaningless indeed if we were to accept Alaska's view that RHA Sec. 10 permitted the United States to exercise it only when the State's project affected navigability or caused pollution." 503 U.S. at 587. "[O]ur opinion in *California* sanctioned the mechanism exercised by the Secretary in this case." *Id.* at 587. The Submerged Lands Act did not reduce the Corps' Rivers and Harbors Act authority.

Alaska next argued that adoption of the federal position would result in two offshore boundaries, one for international purposes and another for domestic, in violation of the Court's articulated goal of establishing a single line for both purposes. *United States v. California*, 381 U.S. at 165. The Court explained that its goal had been to give "definiteness and stability" to the Submerged Lands Act, which can be done without a single boundary. *Id*. at 588-590. What is more, as the Court pointed out, "variations between the international and federal-state boundaries are not uncommon." *Id*. at 589 n.11. Good examples are the Submerged Lands Act amendment that provides that its boundaries will be fixed upon their adoption in a Supreme Court decree, and the United States' 1988 claim of a 12-mile territorial sea. *Id.* The state's argument did not persuade.

Finally, the state contended that federal rights in the outer continental shelf are not a proper component of the term "public interest." "It is untenable," wrote the Court, "to maintain that the legitimate property interests of the United States fall outside the relevant criteria for a decision that requires the Secretary to determine whether the issuance of a permit would affect the 'public interest'." *Id.* at 590. What is more, the Court reasoned, "[i]t would make little sense, and be inconsistent with Congress' intent, to hold that the Corps legitimately may *prohibit* construction of a port facility, and yet to deny it the authority to seek the less drastic alternative of conditioning issuance of a permit on the State's disclaimer of rights to accreted submerged lands." *Id.* at 591.

The Supreme Court was unanimous in its opinion. The solution to which it had alluded in the *California* opinion had been employed and found appropriate. The federal government could consider its own property interests in the outer continental shelf in evaluating a proposal for coast line modification.[200]

The Dinkum Sands Case

The most recent of the tidelands cases resolved state-federal boundaries along 500 miles of Alaskan shoreline on the Arctic Ocean. The controversy

200. Some have contended that by refusing to issue a construction permit without a waiver of submerged lands rights the federal government engages in something akin to extortion. That contention ignores the fact that the state is seeking the benefits of a federal permit and a consequent increase in its land area at the expense of the national citizenry. The United States, in contrast, seeks to accommodate the state's interests in the construction project while retaining the status quo with respect to property lines. The equities would seem to favor the federal position.

began when Dr. Erk Reimnitz, an Interior Department expert on the Arctic, was perusing maps of an upcoming offshore oil and gas sale. The maps depicted an island, labeled "Dinkum Sands," with a 3-mile belt of state waters surrounding it. If such an island existed, the state could properly claim those waters. But Dr. Reimnitz, who spent most summers in the area, questioned its existence.

State and federal officials discussed the matter but could not agree. On May 30, 1979, the United States filed a Motion for Leave to File Complaint in the Supreme Court. Alaska did not object and Number 84 Original began. The Court appointed J. Keith Mann, Academic Dean at Stanford Law School, as its special master. What started as a controversy over the status of Dinkum Sands expanded to include 14 additional issues which, when decided, would resolve all anticipated Arctic tidelands questions between the two sovereigns from Icy Cape on the west to the Canadian border on the east.

The issues were divided for trial. Dean Mann conducted evidentiary hearings in 1980, 1984, and 1985. Extensive briefing followed each hearing. In 1996, the special master submitted his exhaustive Report to the Court. *United States v. Alaska*, Number 84 Original, Report of the Special Master of March 1996. The Report, consisting of 565 pages, is believed to be the longest in any Supreme Court Original action. The controversy included an array of coastal boundary issues, including the location of the low-water line on both natural and artificial coasts, the seaward limit of inland waters, and the boundaries of federal reserves that created exceptions to Alaska's Submerged Lands Act grant. For purposes of this discussion we will divide the issues as the master did.

THE "COAST LINE" ISSUES. The Submerged Lands Act's "coast line" is made up of two components – the low-water line along the shore and the seaward limit of inland waters, such as bays, rivers, and harbors. Number 84 Original included questions in both categories, and subsets of each. We deal first with the low-water line issues.

Dinkum Sands. Although it eventually encompassed numerous and varied legal issues, Number 84 Original continues to be known as "the *Dinkum Sands* case." The Dinkum Sands issue, which prompted the litigation, presented what were probably the most interesting and novel questions for resolution.

Article 10 of the Convention defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide." It then provides that "the territorial sea of an island is measured in accordance with the provisions of these articles." Thus, under Article 3, the territorial sea is measured from the low-water line of islands and, pursuant to *United States v. California*, 381 U.S. 139 (1965), so are Submerged Lands Act grants.

But the parties could not agree whether Dinkum Sands fit the Convention's definition of an "island."[201]

Dinkum Sands is part of a chain of barrier islands and shoals that parallel the Arctic coast of Alaska. The chain is mostly made up of full-fledged islands, like Cross Island to the west and Narwhal Island to the east of Dinkum Sands.[202] But Dinkum Sands itself is often underwater, with small areas that occasionally arise above the sea. The parties could not agree whether Alaska's submerged lands should be measured from these features. Alaska set out to prove that they are islands and should be included in its coast line. The federal government argued the contrary, contending that Dinkum Sands is merely part of its outer continental shelf.

The evidence took a number of directions. The United States offered a cartographic history of the area. Its expert historic geographer, Dr. Louis DeVorsey, assembled charts and maps going back to 1823, interpreted them for the special master, and concluded that until 1949 "no geographic feature corresponding to Dinkum Sands appeared on any map . . . ." Report at 240. Dr. DeVorsey emphasized a 1919 survey by Arctic geologist Ernest de K. Leffingwell in which Leffingwell mapped the island chain and, in the area of Dinkum Sands, noted not an island but a minimum depth of 13.5 feet. Report at 241. Alaska's witnesses contended that certain of the early maps show a "feature" in the area of Dinkum Sands but they could not say for certain whether an island, low-tide elevation, or submerged shoal was being depicted. As to Leffingwell's survey, they argued that poor visibility may have hampered his observations. In any event, the Leffingwell maps formed the basis for official federal nautical charts until 1950.

The first uncontested evidence of Dinkum Sands' existence above water came in 1949 when a United States Coast and Geodetic Survey team happened on the feature while doing a hydrographic survey of the area. A member of that team, (then Ensign, later Admiral) Harley Nygren, testified for Alaska. Admiral Nygren introduced a picture of the formation and described it as "hundreds of yards long and hundreds of feet wide" and at least 3 feet above mean high water. Report at 231. Ensign Nygren's survey led to the depiction of Dinkum Sands as an island on official charts published in the early 1950s.[203]

201. Low-tide elevations, that is features which appear above water at low-tide but not high-tide, may also have territorial seas and Submerged Lands Act significance but "where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own." Convention, Art. 11(2). The parties agreed that Dinkum Sands lies more than 3 nautical miles from the mainland or nearest island. Thus, to have relevance here it had to meet the "island" definition.

202. Dinkum Sands itself is centered at 70 degrees, 25.5 minutes north latitude and 147 degrees, 46 minutes west longitude, just northeast of Prudhoe Bay, Alaska.

203. The survey team also had the honor of naming the feature after its smallboat, the *Fair Dinkum*.

However, subsequent visits evidence the fickle nature of the feature. In 1955 the *USS Merrick* traversed the area and reported that the island, and its survey target, were "not there." Report at 242. In 1976 a joint Coast Guard/National Ocean Service team sent to investigate all charted landmarks along the Arctic coast reported, with respect to Dinkum Sands, "Couldn't find island." Report at 243. The 1955 and 1976 "non-sightings" led to changes in the official charts. Thereafter, Dinkum Sands was depicted as a low-tide elevation and not as an island.

Despite that correction, when the federal government began publishing charts of its marine boundaries in 1970, Dinkum Sands was treated as an island and a 3-mile belt was constructed around it. That occurred through an unusual combination of circumstances. The federal Coastline Committee charged with depicting our maritime boundaries works from official Coast and Geodetic Survey (now NOAA) charts and assumes that they accurately reflect the facts. However, acknowledging that the charts may be wrong or simply outdated, the group will accept other information when it is thought to be more accurate. It happens that when the boundary was being delimited along the Arctic coast, Admiral Nygren was on the Committee. He recounted his experience at Dinkum Sands and convinced the group that it was an island, and not a low-tide elevation as shown on the most recent edition of the chart. Hence the construction of its 3-mile belt.

When the Department of the Interior first published leasing maps of the area in 1979, it properly adopted the Committee's interpretation and treated Dinkum Sands as an island, conceding its 3-mile belt to the state. Only then was Dr. Reimnitz made aware of the federal position, which he believed from his own observations to be incorrect. He too testified before the master.

In addition to the extensive map history, numerous witnesses testified as to their personal knowledge of Dinkum Sands. These included Admiral Nygren and Dr. Reimnitz, as previously noted, along with an array of lay and expert witnesses. Most interesting were Inupiat natives who live and work along the north slope. Some testified in their native tongue, through an interpreter. The eye witness testimony can be fairly summarized by saying that the formation is sometimes observed above the water level and sometimes not. With the exception of the 1949-1950 survey, observations were generally not tide controlled, that is, one cannot say with confidence that even when submerged the feature may not have been above the mean high water datum and even when visible it may not have been below that datum. In an effort to provide a more up-to-date scientific conclusion, the parties agreed to conduct a joint survey of the formation.

The joint monitoring project, conducted in 1981, consisted of two independent parts. The parties contracted with a private engineering firm to survey Dinkum Sands and prepare topographic profiles of the feature. At the same time they employed the National Ocean Survey (now the National Ocean Service) to determine the mean high-water datum in the area.[204] Only when both parts were completed and combined could one determine whether or not Dinkum Sands stood above mean high water.

The engineering contractor measured the high points on Dinkum Sands (relative to an assumed elevation of a benchmark) in March, June, and August of 1981. The Arctic Ocean is typically iced over nine months of the year; 1981 was no exception. The March survey was conducted by laying out a grid over the location of the formation, drilling through 10 feet of pack ice until reaching gravel, and measuring the elevation of the top of the gravel.[205] In June the ice was beginning to melt and there were visible areas of gravel. Measurements were taken from the five highest of those areas. In August there was nothing visible above water level but the apparent highest point was located beneath the water and a measurement taken. Report at 253-254. The highest point located in the three surveys measured 51.82 feet relative to the assumed elevation of the benchmark placed on Dinkum Sands. Report at 254.

Ordinarily the National Ocean Service would only have used accepted mean values determined over a specific 19-year period from local tidal observations and calculate a high-water datum for Dinkum Sands. Unfortunately, there are no tide stations in the American Arctic that have been in operation that long. As an alternative, the participants in the joint monitoring project put in tide stations at Dinkum Sands and the adjacent Cross and Narwhal Islands. A year of data was collected at Cross Island, four months from Dinkum Sands, and one month from Narwhal. The National Ocean Service computed the monthly averages at Cross Island, averaged them to derive a first reduction mean high water for the year, then adopted that value as the best available data at that time. It then calculated a corresponding value for Dinkum Sands by comparing the four months of simultaneous readings from those two stations. Members of the joint monitoring project requested that the National Ocean Service determine how closely this value might approximate a full 19 years of observations. The Service conducted similar statistical analyses using other Alaskan and Canadian tide stations with long-term histories. It concluded that its estimates were accurate to plus or minus 2.47 inches, with 95 percent probability. Report at 250. Mean high tide at Dinkum Sands was computed to be 51.84 feet with respect to the benchmark on Dinkum Sands having an assumed elevation of 50 feet. Report at 251.

204. The parties contributed equally to the $2.5 million cost of the project which, although expensive, amounted to less than one percent of the proceeds accumulated during the litigation from the belt surrounding Dinkum Sands.

205. The gravel was also excavated and examined to determine the ratio of its soil/ice content. Report at 253.

When results of the topographic survey and tidal analysis were combined, the joint survey indicated that during none of the three observations did the highest point on Dinkum Sands rise above mean high water. But, the highest point in the June survey was only .02 feet below, and within the National Ocean Service's error band for mean high water. (Figure 20)

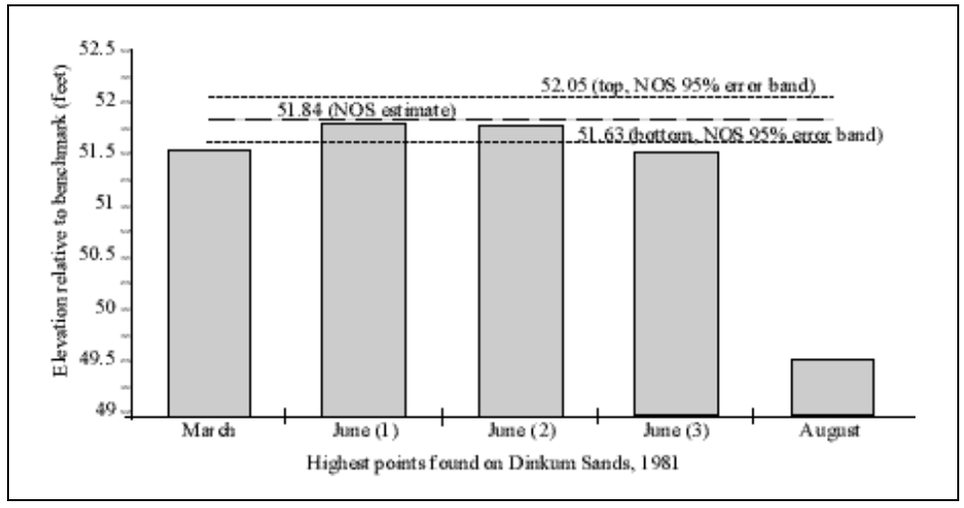

Figure 20. Estimated mean high-water datum superimposed on the observed high points of Dinkum Sands. (*From the Report of Special Master J. Keith Mann, Figure 5.2*)

The parties had not stipulated that the results of the joint survey would be accepted for purposes of resolving the Dinkum Sands issue and each questioned it on different bases.

Alaska attacked the accuracy of the mean high-water calculation. An impressive array of expert witnesses was offered by the state. Alaska contended, first, that the National Ocean Service failed to take account of "trend" in sea level change. Its witnesses from Scripps Oceanographic Institute explained that globally there is known to be an upward "trend" in sea level. If that is the case at Dinkum Sands, it might have to be taken into consideration. Federal witnesses from the National Ocean Service responded that although there is a global trend, local trends may be in the opposite direction, which is often the case in Alaska. The master could find no basis for concluding that there is a trend at Dinkum Sands in either direction and determined that the mean high-water calculation should not be amended on that basis.[206]

206. This simplification of the scientific evidence and the master's analysis does a grave injustice to both. A more thorough discussion is found at pages 248 through 274 of Dean Mann's Report.

Next, Alaska contended that the National Ocean Service should have accounted for abnormal weather conditions at the time of the study, resulting in unusually high water levels. The state's experts offered an elaborate statistical model through which differences in air pressure between the study period and a 30-year average dictated a reduction in the mean high-water value of .06 foot. The special master concluded that because such an adjustment would still not put Dinkum Sands above the datum he need not decide whether it should be adopted. Report at 264.

Finally, Alaska attacked the error band calculated by the National Ocean Service, arguing that it should extend farther above and below the calculated value for mean high water. The master pointed out that it is the datum itself that is critical, not the error band, and this proposed alteration would have no effect on that datum. Report at 266.

For its part, the United States questioned the topographic survey, in effect arguing that the high points as measured should be discounted to properly reflect the elevation of the "naturally formed area of land." The parties agreed that the elevation of Dinkum Sands changed throughout the ice-free season and from year to year. The federal side relied on Dr. Reimnitz's observation that Dinkum Sands is not composed entirely of "land" but includes up to 50 percent ice that melts through the summer, causing the typical collapse of Dinkum Sands below water level by the fall. Report at 253. The United States argued that the observed heights of Dinkum Sands should be discounted to account for this "non-land" attribute. In addition, it contended that the highest observations recorded in the survey, in June of 1981, did not represent the surface of the feature at all, but were merely debris excavated during the March 1981 survey and left on top of the ice pack.

The special master determined that under the circumstances, subsurface ice should be treated as land, rejecting part of the federal position. However, he acknowledged the typical downward movement of the feature during open water, noting one example of a 2.1-foot drop during a single season. Report at 281. From that he emphasized that late summer observations are "an essential step in obtaining a fair picture of the height of Dinkum Sands." Report at 275.

Finally, the United States made a legal argument that Dinkum Sands does not qualify for island status under Article 10. It is undisputed that the Dinkum Sands is, at minimum, a relatively large shoal, portions of which sometimes appear above water level. Equally uncontested is the fact that its "high points" migrate horizontally around the shoal. Thus, if Dinkum Sands is an island, it is an island that moves both vertically and horizontally. The United States contended that Article 10 does not include such fickle features within the definition of islands.

The government put on Dr. Clive Symmons, an international expert in the law of islands, to support its position.[207] Dr. Symmons surveyed the history of Article 10 and concluded that international law does not countenance an "ambulatory island." Report at 290. The special master agreed, concluding that Article 10 requires that a feature be "at least 'generally,' 'normally,' or 'usually'" above water at high tide to qualify as an island. Report at 309. He found that "Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island." *Id*.

In sum, the master determined that Dinkum Sands is not an island under Article 10. It would not, therefore, be surrounded by a 3-mile belt of state submerged lands.

Alaska took exception and the Supreme Court reviewed the issue. It agreed with the master's conclusion but seems to have gone farther in emphasizing that the drafters of the Convention intended to include as islands only those features that are permanently above high tide except in abnormal circumstances. *United States v. Alaska*, 521 U.S. 1, 27 (1997). The Court pointed out that the problem of "abnormal circumstances" is resolved here by our definition of "high tide" as mean high water, a calculation that already accounts for anomalies in water levels. *Id*. It concluded that "[e]ven if Article 10(1)'s drafting history could support insular status for a feature that slumps below mean high water because of an abnormal change in elevation, it does not support insular status for a feature that exhibits a pattern of slumping below mean high water because of *seasonal* changes in elevation." *Id*. [emphasis in original]. Dinkum Sands is not an island.

A second low-water line issue centered on a man-made structure on Alaska's Arctic coast.

ARCO Pier. ARCO pier is a substantial jetty extending seaward from the mainland near the northwestern headland of Prudhoe Bay. It was constructed in three phases. The second phase, at issue here, was built in the late fall of 1975. The Alaska pipeline was under construction when barges carrying equipment needed to begin petroleum production became trapped in the ice and could not be unloaded. ARCO asked the Corps of Engineers for permission to extend its existing dock to the stranded barges. A permit was granted and the controversial addition was completed. But the parties could not agree on whether the structure extends Alaska's offshore rights.

The Submerged Lands Act grant is measured, in part, from "the low water line along that portion of the coast which is in direct contact with the

207. Hours before Dr. Symmons was to leave England to appear at the trial in Palo Alto, Alaska moved to exclude his testimony on the ground that he would be giving evidence on law, not facts, a proposition generally not allowed in American courts. The special master noted the precedents for permitting testimony on international law in the tidelands cases, and permitted his appearance.

open sea . . . ." 43 U.S.C. 1301(c). Congress did not indicate whether it intended the use of artificial as well as natural features. However, the Court has long since adopted the principles of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, for purposes of filling definitional gaps in the Act. *United States v. California*, 381 U.S. 139, 165 (1965).

The Convention provides guidance on this issue. Its Article 8 reads: "for the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." What is more, the Court had considered the issue in its decision in *United States v. California*, 381 U.S. at 176. There the Court adopted its special master's recommendation that artificial extensions should be treated as part of the coast line. The Court rejected the government's argument that federal interests would then be at the mercy of the states, who might extend their coastlines with impunity. The Court reasoned that any such fear was unfounded because of the United States' ability "to protect itself through its power over the navigable waters." *Id.* at 177.

That "power" devolves from the prohibition against construction in navigable waters without a permit from the Corps of Engineers. As a result of the *California* decision, the Corps amended its regulations to provide that before the issuance of a permit for any structure that might modify the coast line, the army must coordinate with the Department of the Interior and the attorney general. 33 C.F.R. Sec. 320.4(f)(1998). That coordination provides an opportunity for recommendations that a permit that would result in a reduction of federal lands be denied, or that the state involved be asked for a waiver of Submerged Lands Act consequences before the permit is granted.[208]

The Corps typically follows its regulation, notifies the Interior Department, and awaits state waivers before issuing such permits. With the ARCO pier extension it did not, probably through oversight in a rush to rescue the icebound machinery before the Arctic winter set in.

The United States contended that the ARCO pier should not be considered part of the coast line for two reasons — because the Convention recognized only "permanent harbour works," and because the Corps' own regulation was violated in its issuance. The government pointed out that the permit itself reserved to the Corps the right to require its removal. No one disputed the fact that the obligation to coordinate with the Departments of the Interior and Justice had been ignored.

208. Alaska attacked the legality of such waivers in *United States v. Alaska*, 503 U.S. 569 (1992). There the Supreme Court held that the potential loss of federal outer continental shelf lands was a matter of public interest and properly considered by the Corps in reviewing a permit application.

The special master was not convinced. He pointed out that standard definitions of "permanent" meant something other than "temporary" but did not necessarily mean "forever" or "perpetual." Report at 321, citing, *inter alia*, *Black's Law Dictionary.* He noted that ARCO intended that its use be long-range or indefinite. As to the failure to follow the regulatory requirement for coordination, the master concluded that there was no necessary violation. He cited provisions of the Trans-Alaska Pipeline Authorization Act (TAPS), which compelled the issuance of federal permits "necessary for or related to" the operation of the pipeline system and authorized the waiver of "procedural requirements . . . ." 43 U.S.C. 1652(b)-(c). And, although he could find no evidence that the Corps relied upon TAPS as authority for bypassing the Department of the Interior, he noted that the agency action was entitled to a presumption of legality.[209] Finally, the master recounted the Supreme Court's acceptance of an unauthorized spoil bank along the Louisiana coast as part of the coast line. *United States v. Louisiana*, 394 U.S. 11, 41 n.48 (1969).

The master recommended a finding that the ARCO pier is part of the coast line of Alaska from which the Submerged Lands Act grant is measured. The United States took no exception.

INLAND WATER CLOSING LINES. The "coast line" is, of course, made up of closing lines across the mouths of inland water bodies as well as the low-water line along the open coast. The parties disagreed on the existence or location of a number of such closing lines.

Southern Harrison Bay. Southern Harrison Bay is a water body that extends, roughly, from 151 to 152 degrees west longitude on the Arctic coast of Alaska. See Figure 21 *infra*. In its entirety the feature is too large to qualify as inland waters.[210] It happens that the feature is divided, almost in half, by a peninsula known as Atigaru Point. The parties agreed that the portion of Harrison Bay that lies northwest of Atigaru Point forms a separate juridical bay and is, therefore, inland water and subject to state jurisdiction.[211]

The issue here involved the southern portion of Harrison Bay. Alaska contended that it, like the northwestern portion, qualifies separately as a juridical bay and is inland water belonging to the state. The United States disagreed, arguing that a bulge in the mainland in the middle of the southern area prevents the waters seaward from being "landlocked."

209. Citing *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415 (1971).

210. Article 7(4) of the Convention limits the length of bay closing lines to 24 nautical miles. A closing line between the natural entrance points for all of Harrison Bay would measure approximately 33 nautical miles.

211. A "juridical bay" is a water body which qualifies, under Article 7 of the Convention, as inland water solely because of its geography.

Although the Convention is quite specific in describing juridical bays, no two geographic areas are identical and each controversy over juridical bay status raises questions never before litigated.[212] The Convention defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Article 7(2).

Two issues arose. Although the parties agreed that southern Harrison Bay meets the semicircle test, they did not agree on whether the initial provision in the Convention's definition provides another element that must be separately met. Nor did they agree on the proper means of determining the ratio between the width of mouth and depth of penetration.

On the first question, Alaska contended that any indentation that meets the semicircle test is, *ipso facto*, a juridical bay. The United States took the position, as it had in prior litigation, that Article 7(2) provides two distinct criteria that must be separately met for juridical bay status.

Alaska conceded that the Supreme Court had considered, and rejected, its position in two previous Original actions.[213] But the state contended that in those cases the parties had not brought the full history of Article 7(2) before the Court. The parties here remedied any such deficiency. A substantial history was put before Special Master Mann through the testimony of experts and documentary evidence. He thoroughly reviewed it all, Report at 186-199, and concluded that the history of Article 7(2) supports the Court's earlier conclusions.

The first sentence of Article 7(2) imposes requirements in addition to those of the semicircle test. That is, "a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters . . . ."

As noted earlier, and readily apparent on charts of the area, the mainland coast in the center of the area is convex, approaching the closing line advocated by the state, not receding from it to create obviously landlocked waters. On either side of that coast are subsidiary indentations that the parties agree would separately qualify as Article 7 bays. The United

212. Other tidelands cases in which juridical bay status has been contested are: *United States v. Maine* (*Massachusetts Boundary Case*) 475 U.S. 89 (1981); *United States v. Maine* (*Rhode Island and New York Boundary Case*) 469 U.S. 504 (1985); *United States v. Florida*, 425 U.S. 791 (1976); *United States v. Louisiana* (*Alabama and Mississippi Boundary Cases*) 470 U.S. 93 (1985); *United States v. Louisiana*, 394 U.S. 11 (1969); and *United States v. California*, 447 U.S. 1 (1980).

213. *United States v. Louisiana*, 394 U.S. 11 (1969) (East Bay and Ascension Bay) and *United States v. Maine* (*Rhode Island and New York Boundary Case*), 469 U.S. 504 (1985) (Long Island Sound).

States argued that these subsidiary bays should be disregarded in evaluating whether the greater area is more than a "mere indentation" into the coast. The special master recommended otherwise. He noted that both parties had included the subsidiary bays for purposes of their semicircle test measurements and reasoned that "[s]urely all of the tests should be applied to the same area." Report at 203.

Having made that determination, the master turned to analyzing the ratio of penetration to width of mouth. The parties agreed on the length of Alaska's proposed closing line, the "width of mouth" factor. They did not agree on how penetration should be measured.

Four possible methods were suggested. First, a perpendicular might be constructed from the midpoint of the agreed-upon closing line to the mainland coast. Second, a perpendicular could be drawn from any point on the closing line to the point of deepest penetration within the indentation. Next, one might construct the longest possible straight line from any point on the closing line to the head of the bay.[214] Finally, a segmented line could be constructed from the point of deepest penetration to the closing line. Report at 205-206. (Figure 21)

Article 7's reference to a semicircle provides a beginning point for any analysis of penetration ratios. Because a semicircle is understood to be the minimum indentation to qualify as a bay, we can assume that a ratio of 1:2 (radius/diameter) is acceptable. The special master applied ratios calculated by the expert witnesses to various other indentations that have been accepted by the Court and the federal government, including other "double-headed bays."[215] He also calculated angles of internal coastline exposure to the open sea and compared other recognized bays. Following his usual thorough review, the master concluded that southern Harrison Bay meets all of the tests for juridical bay status. As a consequence, Alaska gains approximately 6 square miles of inland water and 20 square miles of offshore submerged lands. The United States did not take exception to his recommendations.[216]

The Effect of Islands on the Coastline. The geography of Alaska's Arctic coast created one of the most difficult questions before the special master.

214. The latter is described as "the most logical method" for "determining true penetration of the water into the land." Hodgson & Alexander, *Towards an Objective Analysis of Special Circumstances.* Dr. Hodgson was geographer of the Department of State and served as expert witness to the United States in a number of tidelands cases.

215. The term "double-headed bay" refers to an indentation, such as southern Harrison Bay, which has a prominent headland protruding into the middle of the indentation and forming two subsidiary bays. Although the term does not come from the Convention, it has been used to describe a number of indentations like Harrison Bay.

216. On December 17, 1997, the Committee on the Delimitation of the United States Coastline reviewed the special master's recommendation and determined to alter the official international position of the United States to conform. That Committee was formed in 1970 as a committee of the Inter-Agency Task Force on the Law of the Sea to coordinate federal activities involving the limits of the United States' maritime jurisdiction.

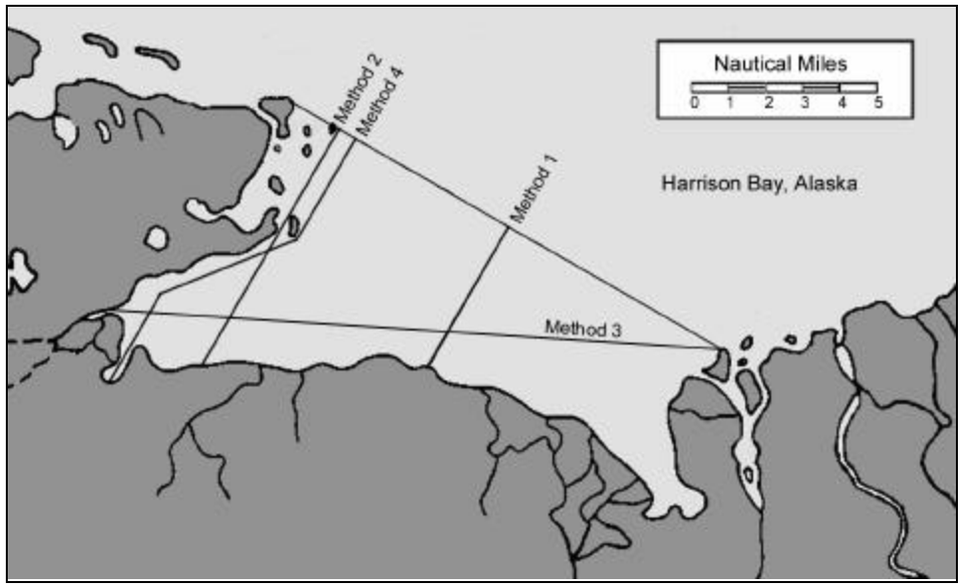

Figure 21. Alternative methods for measuring penetration.

Much of that coast is protected by chains of barrier islands that lie from as little as a few hundred yards to as much as 10 miles offshore. (Figure 22) Alaska argued that the submerged lands between these islands and the mainland belong to it, grounding its contention on three separate theories. The United States took the contrary view, arguing that any areas more than 3 nautical miles from the mainland and any island are federal.

The state's alternative legal theories are discussed separately.

THE "IMPERMISSIBLE CONTRACTION" ARGUMENT. Article 4 of the Convention provides that in geographic circumstances such as those along the north slope, the coastal nation may connect islands with a series of "straight baselines," enclosing all waters to the landward as inland.[217] The operative provision, for our purposes, is "may." Because the Supreme Court first adopted the Convention for implementing the Submerged Lands Act, a number of states have argued that Article 4 straight baselines should be used. Report at 46. The Court has consistently held that the federal government could not be forced by the states to adopt this optional method of coast line delimitation. At the same time, it has left the door slightly ajar for the states to continue the contention. In *United States v. California* the Court ruled that "California may not use such baselines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States . . . ." *United States v.*

217. This method of coastline delimitation was approved by the International Court of Justice in the *Fisheries Case*. (*U.K. v. Nor.*), [1951] I.C.J. Rep. 116. It was first codified in Article 4 and has since been adopted by more than 60 countries. Roach and Smith, *United States Responses to Excessive Maritime Claims*, 2d ed., 1994 at 75.

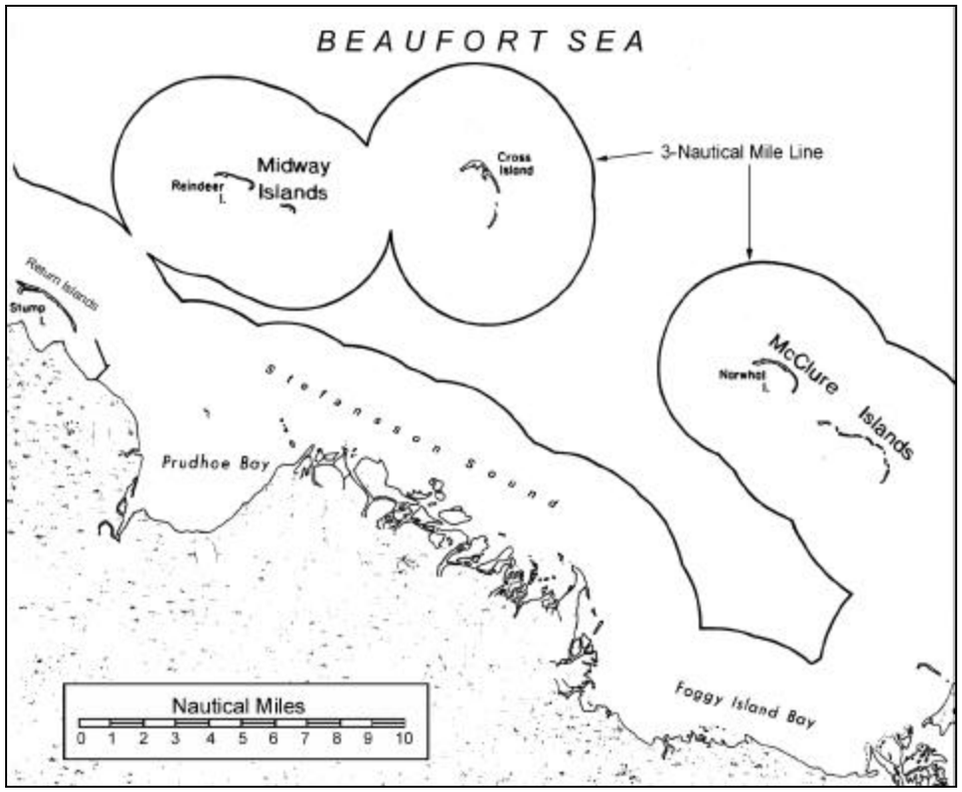

Figure 22. North coast of Alaska. Barrier islands off the north coast of Alaska, such as those illustrated here, were said by the state to enclose inland waters. (*After the Report of Special Master J. Keith Mann, Figure 3.2*)

California, 381 U.S. 139, 167 (1965). But, the Court went on to suggest that a federal effort to alter its international position to gain advantage in tidelands litigation would, likewise, be "highly questionable." *Id*. at 168.

The issue arose again in *United States v. Louisiana* where the Court allowed Louisiana an opportunity to prove that the federal government had maintained a "consistent official international stance" in its use of straight baselines and, if proven, "it arguably could not abandon that stance solely to gain advantage" in the litigation. *Louisiana Boundary Case*, 394 U.S. 11, 74 n.97 (1969).[218]

Alaska accepted the Court's invitation in the *California* and *Louisiana* decisions and set out to establish that the United States had employed a consistent international policy of enclosing waters landward of certain

218. Neither California nor Louisiana was able to make the necessary showing and neither state has its Submerged Lands Act grant measured from straight baselines.

island chains from 1903 through its adoption of the Convention, and beyond. The state amassed volumes of official federal documents that indicated American positions on how inland waters were being delimited and how the United States was reacting to foreign claims. It also called expert witnesses who testified on the subject. In the end it argued that this evidence reflected the "consistent official international stance" referred to by the Court in *United States v. Louisiana*.

In the middle of this litigation Alaska's contention received a significant boost. The federal government was, at the same time, arguing the title to submerged lands within Mississippi Sound with Mississippi and Alabama. That Sound is similar to much of the Arctic coast of Alaska – it is formed by a series of barrier islands. Mississippi and Alabama contended that the Sound is historic inland water of the United States, a status recognized by Article 7 of the Convention. As part of their evidence, the Gulf states relied on much of the same diplomatic history introduced by Alaska here.[219] The special master in *United States v. Louisiana (Alabama and Mississippi Boundary Cases*) recommended that Mississippi Sound be ruled historic inland waters.[220] The Court adopted that recommendation and referred to the history of American claims, saying "[p]rior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands . . . ." *United States v. Louisiana (Alabama and Mississippi Boundary Cases*), 470 U.S. 93, 106 (1985). The Court's statement might be seen as having locked up Alaska's case. However, the United States argued that: the issue had not been completely briefed in the Mississippi Sound case; the two cases are distinguishable in that Mississippi Sound had been found to be historic waters while Alaska made no historic claim to waters of the north slope; the statement was dictum; and most significantly it was incorrect.

It was agreed in the master's proceedings here that the finding was one of fact and the United States was not collaterally estopped from arguing the contrary.[221] Alaska argued from its evidence and the Court's conclusion that the United States had had a consistent and continuing policy of treating waters landward of island chains as inland. That policy, if asserted, compelled finding for the state on two bases.

219. In fact, Alaska contributed its considerable legal talent as *amicus* in the Mississippi Sound case.

220. Report of the Special Master, *supra*, at 408.

221. Alaska did raise the issue on exceptions to the master's recommendations in the Supreme Court. The Court ruled that "[e]ven if the doctrine [collateral estoppel] applied against the Government in an original jurisdiction case, it could only preclude relitigation of issues of fact or law necessary to a court's judgment. [citations omitted] A careful reading of the *Alabama and Mississippi Boundary Cases* makes clear that the Court did not attach controlling legal significance to any general delimitation formula." *United States v. Alaska, supra,* at 13-14.

First, if the United States had the "consistent policy" referred to by the Court in the Mississippi Sound case, then any federal refusal to employ a similar policy for purposes of the Submerged Lands Act would amount to the "impermissible" contraction of state jurisdiction against which the Court warned in *United States v. California*. 381 U.S. at 168. Alaska argued that if the United States claimed such areas as inland waters in 1959, as it interpreted the Court to have said, then they became its property at statehood under the equal footing doctrine as explained in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). Thereafter, the state's property could not be taken by the federal government by a change in its international position.

Second, the state contended that if the "consistent policy" were in effect in 1953, upon passage of the Submerged Lands Act, or 1959, upon its application to Alaska at statehood, then that policy, and not the Convention definitions, should be applied to interpret the Submerged Lands Act grant.

As noted, the United States did not agree that there existed any "consistent policy" from 1903 through Alaskan statehood. To the contrary, it used the state's evidence, and more of its own, to show that there were numerous, and inconsistent, "policies" on the issue during that period.

The special master made an exhaustive review of the historic evidence. His analysis of that history encompasses 127 pages of his Report to the Court. Report at 44-171. He concluded that the United States had no consistent policy in regard to the treatment of waters landward of barrier island chains from 1903 to 1961. Report at 127 and 150. In fact, he pointed to distinctly differing policies and concluded that the one most heavily relied upon by the state might not even have been applicable to the area at issue here. The master also noted that Louisiana had made the same arguments. There the United States had actually employed litigation positions consistent with Alaska's position, on the assumption that pre-Convention rules should be employed for Submerged Lands Act purposes. After its adoption of the Convention principles in *United States v. California*, the Court held that the United States would not be bound by its earlier positions in Louisiana. Ultimately Louisiana failed in its effort to prove inland waters on the same theory pursued by Alaska here. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 9-10.

Special Master Mann recommended that there was no consistent policy and, therefore, Alaska had not acquired more expansive rights at statehood. *United States v. Alaska*, Report of March 1996, at 126-141. Nor, he concluded, was it possible at this late date to argue that Congress intended any particular system of principles for defining inland waters. The Court had considered that possibility in 1965 and ruled to the contrary. *United States v. California*, 381 U.S. 139, 150-160 (1965).

Finding for Alaska on either approach would have created an anomalous result. Defining Alaska's inland waters according to principles

in vogue in 1959, but likely not applicable at the time of other states' admissions, hardly seems to achieve the stated purpose of *Pollard*, admission to the Union on an equal footing with existing states. Other states had already been denied the benefits of the principles advocated by Alaska. The same is true of the Submerged Lands Act argument. Congress made clear in the Alaska Statehood Act that Alaska was to have submerged lands rights equal to those of existing states. Yet other states had already been denied areas similar to those sought by Alaska here.

The Supreme Court agreed with its special master. First, it contrasted the Mississippi Sound case with the situation here. It pointed out that Mississippi and Alabama were making a historic bay claim, which Alaska was not, and that in the historic bay context the many variations in federal policy over the years are less critical, saying, "[b]ut variation and imprecision in general boundary delimitation principles become relevant where, as here, a State relies solely on such principles for its claim that certain waters were inland at statehood." *United States v. Alaska*, *supra*, at 15. It pointed particularly to United States proposals to the League of Nations Conference for Codification of International Law in 1930. There the federal government offered two proposals that were inconsistent with the principles offered by Alaska as the "consistent official international stance" of this country for most of a century. It concluded that "Alaska has not identified a firm and continuing . . . rule that would clearly require treating the waters of Stefansson Sound as inland at the time of Alaska's statehood." *Id.* at 20-21.

THE SUBMERGED LANDS ACT DEFINITION OF "COAST LINE." The Submerged Lands Act grant is measured from "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters . . . ." 43 U.S.C. Sec. 1301(c). Alaska argued before the special master that where fringing islands mask the mainland coast, the mainland is not "in direct contact with the open sea," nor are the shoreward facing sides of the islands. From this, and some occasionally supportive legislative history, the state concluded that Congress intended its grant to be measured from the seaward sides of barrier islands and lines connecting those islands.

The United States pointed out that the issue had already been considered, and resolved, by the Supreme Court in *United States v. California*. There the Court concluded that "open sea" refers to any waters that are not inland; that Congress had no intent as to the definition of inland waters; and that the Convention would be used for purposes of that definition. 381 U.S. 139, 163 n.25 (1965). According to the federal government, because the waters between the mainland and barrier islands are not inland under the Convention, the "coast line" is composed of the low-water line along the mainland and each of the offshore islands.

The master adopted the federal view, noting that Alaska's position would produce two kinds of inland water: "those that qualify as inland water under the Convention (without using Article 4) and those resulting from the interpretation of 'open sea' in the Submerged Lands Act." Report at 43. This, he noted, "would contravene" the Court's holding in *United States v. California* that "the definition of inland waters should conform to the 1958 Convention." Report at 43; *United States v. California*, 381 U.S. 139, 149, 161 (1965). As a consequence, submerged lands more than 3 nautical miles seaward of the mainland and more than 3 nautical miles landward of an island were not granted to the state.

ARTICLE 4 STRAIGHT BASELINES. Finally, Alaska contended that the United States either had constructed straight baselines in conformity with Article 4, and should not be allowed to withdraw that policy to the state's detriment, or in the alternative, the federal government should be required to draw such lines. As evidence, Alaska pointed to a federal concession in *United States v. Louisiana* of submerged lands within Chandeleur and Breton Sounds. As in Alaska, those Sounds are formed by barrier islands, some of which lie more than 6 miles from the mainland. Alaska argued that closing the Louisiana Sounds amounted to "tacit adoption" of Article 4 straight baselines (Report at 158) and that similar baselines should be constructed on the north slope.

In fact, the federal position in Louisiana was developed before the Court announced its adoption of the Convention's definitions of inland waters and during a period when the federal government was contending that the Convention was inappropriate for implementing legislation enacted five years earlier. When the Supreme Court clarified that issue, it ruled that the federal government would not be bound by the prior concession even in Louisiana. The solicitor general determined, nevertheless, that the federal government would continue its concession as to the Louisiana Sounds rather than disrupt activities being conducted in reliance on that concession. Although Louisiana later made the same arguments offered by Alaska here, it was not found to have Article 4 straight baselines in areas that had not been conceded but where they would have been equally appropriate. Report at 161 n.130.

Of course the Convention requires more than just an appropriate geographic situation for straight baselines. Article 4(6) provides that the world must be put on notice of such claims through their publication on official charts. Alaska's witnesses admitted that no such charts had ever been published for the north slope. What is more, as the master noted, Article 4 baselines may be claimed for one portion of a nation's coast and not adopted for another equally qualified stretch. Report at 165. Thus, even if Alaska could have proven federal adoption of this method for Louisiana,

or elsewhere, there was no evidence that it had been employed on the north slope.

Neither, according to the special master, could the federal government be compelled by a state to adopt straight baselines against its will. Both parties agreed that even the Convention makes the Article 4 baseline permissive, not mandatory. The Supreme Court had often ruled that in this country the federal government, not the states, could decide whether to employ Article 4 in lieu of the self-executing baseline articles of the Convention. *United States v. California*, 381 U.S. 139, 167-169 (1965); *United States v. Louisiana*, 394 U.S. 11, 72-73 (1969); *United States v. Louisiana (Alabama and Mississippi Boundary Case*s), 470 U.S. 93, 99 (1985); *United States v. Maine* (Nantucket Sound), 475 U.S. 89, 94 n.9 (1986). As Dean Mann noted, "[t]he United States has chosen not to draw straight baselines under Article 4." Report at 45.

The special master recommended a finding in favor of the United States on the straight baselines issues. Report at 174-175. Alaska took exception. The Supreme Court adopted the master's recommendations. *United States v. Alaska, supra,* at 21.

THE RESERVATION ISSUES. Four of the difficult issues before the special master did not involve identifying the submerged lands acquired by Alaska at statehood, but how to define those reserved by the United States. As a general principle, Alaska took title to the beds of inland navigable waters under the equal footing doctrine of the Constitution as enunciated in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). Likewise, it was granted title to submerged lands beneath offshore waters (to a limit of 3 nautical miles) by the Submerged Lands Act, as applied to Alaska by the Statehood Act. However, the Submerged Lands Act contains exceptions to its grant for, *inter alia,* lands "expressly retained by . . . the United States when the State entered the Union." 43 U.S.C. 1313(a). The Supreme Court has long held that equal footing lands could also be withheld from the states by pre-statehood federal action. *Shively v. Bowlby*, 152 U.S. 58 (1894). Prior to Alaskan statehood, the United States had designated substantial areas along the north slope as federal reserves, now known as National Petroleum Reserve–Alaska and the Arctic National Wildlife Refuge. The "reservation" issues involve these properties.

The parties agreed that the uplands within each of these reservations are the property of the federal government. They could not agree on the location of the coastal boundary of either reservation, nor the status of certain waters within those boundaries. Understandably, the federal government pursued a more expansive interpretation of the boundary language and Alaska a more conservative construction. Likewise, Alaska argued that lands beneath tidally influenced waters, even within the

reservation boundaries, had passed to the state under the equal footing doctrine or Submerged Lands Act grant. The United States contended that those submerged lands had been retained in federal ownership through exceptions to those authorities. There are enough differences between the applicable facts and law that the two reservations should be discussed separately.

National Petroleum Reserve–Alaska. National Petroleum Reserve–Alaska (NPR-A) is a 23-million-acre tract on the western end of Alaska's Arctic coast. Oil seeps had been observed in the area and the United States determined that it should be set aside as a potential supply for future naval needs. It was created as a petroleum reserve by President Harding in 1923. Executive Order 3797-A (Feb. 27, 1923).

THE BOUNDARY. The coastal boundary of the Reserve was described as running from the western bank of the Colville River "following the highest highwater mark westward" to Icy Cape. The Executive Order went on to provide that "[t]he coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore, except in the case of the Plover Islands . . ." [which lie more than 3 miles from the mainland].

Alaska took the position that although the boundary, and therefore the area of federal jurisdiction, included some lands beneath navigable waters, which could not be denied given the explicit inclusion of areas landward of the Plover Islands, other coastal water bodies were not intended to be included. These, the state argued, were not "small lagoons," nor did they always have the described "sandspits and islands" referred to in the boundary description. The United States took the opposite position.

The primary features in dispute were: Harrison, Smith, and Peard Bays; Wainwright Inlet and the Kuk River; and Kugrua Bay and River. Both parties introduced early map evidence, and related expert testimony, in an effort to prove that the drafters of the Executive Order intended these areas to fall either within or without the Reserve. In that process the federal government determined that Smith and Harrison Bays were not intended to be included and dropped its claims to them. Report at 349-352. Otherwise, the master concluded, the map evidence was inconsistent and inconclusive. Report at 354. He then turned to an application of the boundary language to the coastal geography.

The status of Peard Bay was enthusiastically contested. The United States contended that it meets the criteria for a "small lagoon" with barrier reefs. Alaska took the position that Peard Bay is not a "lagoon," nor does its barrier reef, the Seahorse Islands, lie within 3 miles of the coast. The parties offered a substantial body of evidence as to the proper definition of "lagoon" and the nature of lagoons around the world. Ultimately, the

master concluded that "[t]aking into account the location and nature of the barrier reefs, the size of Peard Bay, and the meaning of 'lagoon,'" the Executive Order should be constructed to include Peard Bay. Report at 364.

The remaining water bodies at issue created a different problem. They were not claimed by the United States as lagoons, but rather as falling landward of the "coast" as that term was used in the executive order and the significance of its admonition to follow "the high water mark."

The United States argued that the term "coast" is applicable throughout the boundary construction, and it is understood to include short-water crossings as well as the high-water mark. On that interpretation each of the contested indentations would be closed by a short line across its mouth, encompassing it within the Reserve. Alaska disagreed, arguing that the Executive Order envisions a boundary with water crossings only in the area of offshore reefs (paragraph 2) but that otherwise the high-water mark is to be followed into coastal indentations, excluding at least some of their waters from the Reserve.

The special master carefully considered all of the contentions and the logic of their consequences. He concluded that "[i]t is unlikely that the drafters of the boundary description would reach out beyond the mainland to embrace lagoons formed by islands but would define the boundary elsewhere as going inside of water bodies that are even more cut off from the ocean." Report at 380. What is more, he concluded, a boundary that includes the inland waters better meets the drafters' intention to preserve subsurface petroleum deposits. *Id.*

The master recommended that each of these minor indentations be included within the Reserve's boundary. Report at 380-381. Alaska did not take exception to that recommendation. *United States v. Alaska, supra,* at 33.

THE LEGAL ISSUE. When Original No. 84 began, there was no controversy over rights within NPR-A's boundaries, only where those boundaries lay. During the special master proceedings the Supreme Court issued its opinion in *Montana v. United States,* 450 U.S. 544 (1981), holding that lands beneath inland navigable waters within the boundaries of the Crow Indian Reservation went to Montana at statehood under the equal footing clause. Alaska was encouraged and with the consent of the United States withdrew its prior concession. *United States v. Alaska, supra,* at 32. Thereafter the case included the question whether submerged lands within the bounds of the reservation might nevertheless have passed to Alaska at statehood. *Id.*

It is now clear that being within the bounds of a federal reservation is not enough to protect submerged lands from passing to a state, and Alaska was justified in altering its litigation position to assert a claim. The question was simply how the criteria for reservation enunciated by the Court in *Montana* and *Utah* (482 U.S. 193 [1987]) applied to the Alaska circumstances.

To begin, those criteria are considered against a strong presumption that lands beneath inland navigable waters will pass to a new state at statehood. *Montana, supra,* at 552; *Utah, supra,* at 197-198. As the Court has long said, an intent to defeat state title will not be inferred "unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926). Before turning to the substantive question, we look at the application of that presumption here.

The presumption has arisen from litigation about inland waters that the federal government had held in trust for future states and that were going to those states as a matter of constitutional law under the equal footing doctrine. As noted previously, the submerged lands at issue here are some inland and some offshore. The United States acknowledged the application of the presumption with respect to the former only. As to offshore submerged lands, it pointed out that they would go to Alaska not as a constitutional right, but as a federal grant pursuant to the Submerged Lands Act. Federal grants, it argued, are to be construed strictly in favor of the United States, as the Supreme Court had recently held in another Original action. *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 287 (1982).

The special master agreed, concluding that "different presumptions apply to submerged lands inside the Reserve boundary, depending on whether the waters are territorial or inland." Report at 394. Nevertheless, he applied the stricter inland water standards in his analysis, finding that even they had been meet. *Id.*

In its review, the Supreme Court revisited the presumption question and reached the opposite conclusion. It reasoned that although the Submerged Lands Act is a grant of federal property, whose scope "must be construed strictly in the United States' favor," the presumption is that there has been a grant unless the lands have been "expressly retained" as provided in 43 U.S.C. 1313. Because the Submerged Lands Act refers to both inland and offshore submerged lands, and Congress was presumably aware of the Court's settled doctrine for inland waters, there was no reason to assume that Congress either intended to upset that doctrine or adopt a separate standard for the offshore area. It therefore read "expressly retained" to apply a presumption equivalent to that traditionally employed for inland waters. *United States v. Alaska, supra,* at 35- 36.

From the Court's decisions in *Montana, Utah,* and earlier cases comes the proposition that lands beneath navigable inland waters will pass to a new state on its admission to the Union unless the federal intention to include the waters within a reservation to the United States is clearly made, there is included an affirmative intent to defeat state title, and the reservation is in furtherance of a public purpose. Having found that the

NPR-A boundary encompasses submerged lands, the special master concluded that it follows *a fortiori* that they were "intended to be included within the Reserve." Report at 429. He also determined that no particular language is needed to show that intent. Report at 419, citing *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918) where "the Court found a reservation of submerged lands on the basis of exigency alone." Report at 420.

Alaska took exception but the Court concurred in its master's conclusions. It pointed out that "[t]he purpose of reserving all oil and gas deposits within the Reserve's boundaries would have been undermined if those deposits underlying the lagoons and other tidally influenced waters had been excluded. It is simply not plausible that the United States sought to reserve only the upland portions of the area." *United States v. Alaska, supra,* at 39-40. In that way the NPR-A reservation is distinguishable from those in *Montana* and *Utah* and similar to that in *Alaska Pacific Fisheries.*

The special master also found an affirmative intent to defeat state title, as required by the Court's decision in *Utah,* at 202. Section 11(b) of Alaska's Statehood Act specifically provides that Congress's exclusive legislative jurisdiction would continue with respect to certain lands owned by the United States including "naval petroleum reserve numbered 4." The master reasoned that use of the word "owned" clearly contemplates "continued federal ownership." Report at 433. The Supreme Court again agreed with its master, noting that "when the United States exercises its power of 'exclusive legislation' under the Enclave Clause, it necessarily acquires title to the property." *United States v. Alaska, supra,* at 42.

Finally, the Supreme Court had long recognized that federal retention of submerged lands required particular purposes. In *Shively v. Bowlby* the Court referred to these as "an international duty or public exigency." 152 U.S. at 50. Alaska claimed that no such duty or exigency existed here. The special master concluded that the preservation of valuable petroleum deposits amounted to such an exigency. Report at 423. The Court agreed. It pointed out that "[t]he only constitutional limitation on a conveyance or reservation of submerged lands is that it serve an appropriate public purpose." *United States v. Alaska, supra,* at 40, quoting from *Utah, supra,* at 196-197. The Court determined that "the inclusion of submerged lands within the Reserve fulfilled an appropriate public purpose — namely, securing an oil supply for national defense." *Id.*

Two related issues were considered by the master and the Court. First, early decisions had dealt with federal conveyances of submerged lands to third parties prior to statehood, not reservations to the United States. The question of whether a state could be deprived of submerged lands through a federal reservation, as well as conveyance, had been left open by the *Utah* decision. Alaska argued that although state losses through conveyance had

been sanctioned, the United States should not be permitted to retain ownership: "because this ownership is so closely identified with sovereignty, retention by the Federal Government of ownership necessarily would diminish the sovereignty of a newly admitted state, violating the principle underlying the equal footing doctrine . . . ." Report at 396, quoting Alaska's supplemental brief before the special master.

The United States argued, citing Justice White's dissent in *Utah*, that the Property Clause seems to give the federal government as much power to retain lands as to dispose of them. Likewise, the purposes of the Constitution seem better served by retaining submerged lands in the public domain, where they can be later transferred to the states if Congress desires, than by conveying them to a private party, a power that has been clearly recognized. Report at 398; quoting from *Utah* at 482 U.S. at 209-210. The United States also pointed to *Alaska Pacific Fisheries*, in which the Court recognized Congress's power to create a reservation for the Metlakatla Indians that included (by implication) submerged lands, even though there was no conveyance to the Indians. Report at 399.

The special master recommended that the federal government could reserve to itself, as well as convey, submerged lands before statehood, and thereby defeat a subsequent state's title.

Alaska excepted to the recommendation. The Supreme Court agreed with the master, saying that "Congress can also reserve submerged lands under federal control for an appropriate public purpose," acknowledging that it was resolving a question left open in *Utah*. *United States v. Alaska*, *supra*, at 34.

Finally, Alaska questioned whether the executive branch had authority to reserve submerged lands. The Court in *Utah Div. Of State Lands v. United States* referred to the need for "congressional" intent to include submerged lands and to ultimately defeat state title. 482 U.S. at 202. The parties disagreed as to whether this reference introduced a third requirement from *Utah*, i.e., congressional involvement.

The special master turned back to the *Utah* decision. He noted that the Court made a point of the fact that Congress had not ratified an executive branch action, and reasoned that if Congress "could have authorized an unauthorized executive reservation . . . it could have delegated authority to make the reservation in the first instance." Report at 406.

The United States argued that just such a delegation existed here. The Pickett Act, 36 Stat. 847, provided that "the President may . . . withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska . . . and such withdrawals or reservations shall remain in force until revoked by him or by an Act of

Congress." Report at 407.[222] Alaska argued, unsuccessfully, that because submerged lands are not subject to "settlement, location, sale, or entry" only uplands could have been intended to be governed by its provisions. The special master concluded that the Pickett Act provided congressional authorization for the reservation of submerged lands in NPR-A. On review, the Supreme Court avoided that issue, finding that Congress had "ratified the terms of the 1923 Executive Order in Sec. 11(b) of the Statehood Act," and explaining that Congress surely could retain a petroleum reserve, including submerged lands, at statehood by meeting the *Utah* criteria, or achieve the same result by recognizing a similar executive reservation. *United States v. Alaska, supra,* at 44. The master's recommendation was adopted. *Id.* at 45-46.

The Arctic National Wildlife Refuge. The Arctic National Wildlife Refuge (ANWR) is comprised of 18 million acres in the northeastern corner of Alaska, bordered on the east by Canada and on the north by the Arctic Ocean. Like much of the Arctic coast, this portion of the mainland is, for most of its length, shielded by barrier islands. It is the lagoons between those islands and the mainland over which the ANWR issues were fought.

As with NPR-A, the parties could not agree whether the coastal waters along the Arctic were intended to be included within its boundary or whether the United States had effectively retained any tidally influenced submerged lands at the time of statehood. As with NPR-A, the United States had to prevail on both questions to retain title to those lands.

Unlike the situation at NPR-A, the parties here may have been pursuing different resource interests. It is probably fair to say that both sovereigns were primarily interested in petroleum development near NPR-A. At least that was the original purpose of the federal reservation and the state has shown similar interest. The parties' interests along the coastal portion of ANWR differed. Again, the state seems most concerned that the maximum area for petroleum production be made available. The United States, on the other hand, had established ANWR for the protection of wildlife, and sought to retain the lagoons to that end.

THE BOUNDARY. The coastal boundary of ANWR is described as beginning at the point of extreme low water at the United States/Canadian border "thence westerly along the said line of extreme low water, including all bars, reefs, and islands to a point on the Arctic Seacoast known as Brownlow Point . . . ." 23 Fed. Reg. 364 (1958). The parties interpreted this language differently. The United States contended that it described a single line,

222. In fact, this section was repealed by the Federal Land Policy Management Act of 1976, 90 Stat. 2743, 2792. See 43 U.S.C. 1714 (1988) on present withdrawal authority.

running along the extreme low-water line on the mainland coast where there are no islands, then jumping offshore to embrace offshore features — following the extreme low-water line on their northern shores, connecting islands in a chain — and then returning to the mainland.

Alaska argued that although the islands were intended to be part of the refuge, the waters separating them from the mainland were not. The state's position would have resulted in a mainland refuge with satellite segments standing offshore. The state also argued that tidally influenced portions of navigable rivers within the mainland did not fall within the boundary.

As it had with NPR-A, Alaska focused on the boundary description's use of a water level, the line of "extreme low water." It argued that the boundary must, at all times, follow that line. A consequence, of course, is that the boundary could not include cross-water segments joining the mainland and islands, or any two islands, as proposed by the United States.[223] The United States countered that the boundary description contained additional language that belied the state's interpretation. For example, "bars and reefs" were to be included within the refuge, yet either may be entirely submerged and have no extreme low-water line, making the application of Alaska's theory impossible. Both parties offered expert testimony in support of their positions.

Other evidence was also introduced. Pre-statehood maps, early drafts of the boundary description, and evidence of the refuge's purpose were all considered. Two maps were located and each depicted the northern boundary of ANWR as a single line running offshore to include barrier islands. Report at 483. The draft boundary descriptions also indicate that their authors contemplated "a single line." Report at 485. Finally, the justification for the refuge included the protection of habitat for polar bears (which den in the lagoons), seals, and whales.[224] The special master concluded that "the reference to aquatic animals . . . shows that they must have intended the boundary to take in submerged lands." Report at 489.

The special master found that the northern boundary of ANWR was intended to be a single, continuous line encompassing offshore islands and the lagoons. Report at 495. He then evaluated the federal claim according to the requirements of the Supreme Court's decisions in *Montana* and *Utah*.[225] He determined that the federal government had clearly intended to

223. The Alaskan theory seemed not completely consistent when dealing with rivers which empty into the coastal lagoons. There the state proposed going upstream to the limit of tidal effect and then crossing the river, following it downstream to the lagoons, and proceeding again along the extreme low-water line. Report at 481.

224. It is now understood that the lagoons also provide important mosquito protection for migrating caribou.

225. *Montana v. United States*, 450 U.S. 544 (1981) and *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987).

include the submerged lands within the refuge, had likewise intended to retain them beyond Alaskan statehood, and that the retention was in furtherance of a proper public "exigency."

Effectiveness of the Withdrawal. The final issue to be dealt with here is whether federal actions were sufficient to avoid transfer of submerged lands within ANWR to Alaska at statehood. The question arises because of the peculiar timing of those actions.

On November 18, 1957, the Interior Department's Bureau of Sport Fisheries and Wildlife applied to the secretary of the interior for an order withdrawing approximately 9 million acres of land in northeastern Alaska. The lands, then administered by the Department's Bureau of Land Management, would become the Arctic Wildlife Range, under the stewardship of the Bureau of Sport Fisheries.[226] However, the proposal would have, by law, prohibited mining in the range. Then Secretary of the Interior Seaton wanted to avoid that result and tabled the application while he sought legislation to permit mining in the proposed Wildlife Range. The application was still pending when Alaska became a state in January 1959. Nearly two years later, in December of 1960, the secretary gave up his hope for congressional action and issued Public Land Order 2214. 25 Fed. Reg. 12, 598 (1960). That order withdrew the described lands and established them as the Arctic National Wildlife Range.

Section 6(e) of the Alaska Statehood Act transferred certain federal lands to the state but excepted "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." Clearly the lands had not been "withdrawn" at the time of statehood. However, a federal regulation in effect at the time provided that the application alone protected the area from disposal under the public lands law, awaiting a final decision from the secretary. The United States argued that, although not "withdrawn," these lands had been "set apart" for the protection of wildlife and were excepted from the grant of 6(e).

The master disagreed. He emphasized the entire phrase, "set apart as refuges" and pointed out that the area in question was not a "refuge" at statehood. As evidence, he pointed to the fact that it continued to be managed by the Bureau of Land Management and not the federal Fish and Wildlife Service. He reasoned that the language of Section 6(e) was drafted before the regulation existed, making it impossible for Congress to have intended the words "otherwise set apart" to include lands applied for but not yet withdrawn. Report at 466. He concluded that Congress did not

226. The area later became known as the Arctic National Wildlife Refuge and was doubled in size. 94 Stat. 2390. It is referred to herein as the refuge, or ANWR.

intend 6(e) to defeat Alaska's title to submerged lands covered only by an application for withdrawal. Report at 467. The special master found that the application did not effectively withhold tidally affected submerged lands from Alaska at statehood. Report at 477.

The United States took exception to that finding; the only instance in which it asked the Court not to follow the master's recommendations, although the master had ruled against the federal government on other issues.

Returning to its approach in the *Montana* and *Utah* cases, the Supreme Court looked for: (1) an intent to include submerged lands within the refuge, and (2) an intent to permanently defeat state title. *United States v. Alaska*, *supra*, at 51. On the "intent to include" question it followed the master's interpretation of the evidence, concluding that the boundary description and purpose of the refuge indicate a clear intent to include submerged lands. *Id.* at 51-52. The "public purpose" requirement is satisfied by a wildlife refuge. *Id.* at 53. Finally, the Court pointed out that although there was some controversy as to whether the executive branch had authority to divest Alaska of submerged lands, Congress could surely ratify such actions, as the United States contended had been done through 6(e) of the Statehood Act. *Id.* at 54.

The Court also reviewed the evidence of congressional knowledge of the withdrawal process. Notice of the application had been published in the Federal Register, and a press release had been issued. Congress had been shown a map of ANWR with a boundary embracing submerged lands. Congress was told that the secretary of the interior construed his withdrawal authority to include submerged lands.

With that the Court went on to determine whether the "intent to defeat" Alaska's future title to these submerged lands had in fact been accomplished prior to statehood. Here the Court focused on the master's interpretation that lands would have to have been "set apart as a refuge" to fall within the exception of 6(e)'s grant. The Court disagreed. It reasoned that because 6(e) separately included completed withdrawals, the subsequent phrase, "or otherwise set apart," would be rendered meaningless in the master's approach. The Court noted its precedents against statutory interpretations that produce such results. It then concluded that "the phrase aptly describes the administrative segregation of lands designated to become a wildlife refuge." *Id.* at 59. "Accordingly, the application and regulation, taken together, placed the Range squarely within the proviso of Sec. 6(e), preventing a transfer of lands covered by the application to Alaska." *Id*.

The lagoons and tidally influenced rivers of the northeastern Arctic are part of the Arctic National Wildlife Refuge.

CHAPTER 4

LATERAL BOUNDARIES

The discussion of tidelands cases concludes with three Original actions that dealt not with coast lines and the location of marginal belts measured from them, but with lateral boundaries between adjacent coastal states. Most states have long since resolved land boundary questions with their neighbors. But often those agreed boundaries end at the coast. When Congress granted each of the coastal states an offshore belt it specified the seaward reach of each state's jurisdiction but made no effort to determine where, for example, California's submerged lands ended and Oregon's began. The Supreme Court has faced that question on three occasions.

TEXAS V. LOUISIANA

Texas v. Louisiana began as a river boundary case.[227] The states' common boundary runs down the "middle" of the Sabine River and they disagreed as to its exact location. A quirk of boundary descriptions at the time of Texas's admission to the Union created a potential federal interest and the United States was invited to join the proceeding.[228] Thereafter Louisiana, supported by the federal government, moved to expand the proceedings to include an extension of the river boundary offshore.

The federal government has a property interest in the location of the Texas/Louisiana lateral offshore boundary that is unusual. In most cases adjacent states will both have submerged lands rights 3 miles offshore. Although the extension of their mutual land boundary to the 3-mile limit may be important to the states, it has no effect on federal property rights. Texas, in contrast, was given a grant of up to 9 nautical miles. Thus the extension of its 3-mile lateral boundary with Louisiana will affect federal interests for the next 6 miles.[229]

227. The Honorable Robert Van Pelt, Senior United States District Court Judge from Lincoln, Nebraska, heard the case as the Supreme Court's special master.

228. Louisiana's boundary had always run to the middle of the Sabine. Texas, by contrast, had entered the Union in 1845 with an eastern boundary along the western bank of the Sabine. The western half of the River was, at the time, part of the United States but not part of any state. As a consequence, the federal government held title to any island in the western half of the river. In 1848 the boundary hiatus was corrected when Congress permitted Texas to extend its boundary to the middle of the river. No mention was made of islands in the western half of the river. The United States entered the *Texas v. Louisiana* case to claim six islands which it believed to have existed in 1848 and, therefore, still belong to the federal government. That claim was reduced to a single island as evidence was developed. Ultimately the special master recommended that even that island belonged to Texas and not the United States. The federal government did not take exception to that recommendation and it was adopted by the Court. *Texas v. Louisiana*, 431 U.S. 161, 167 (1977).

229. This situation arises only here and at the Alabama/Florida lateral boundary where Alabama has a 3-mile grant and Florida a boundary of up to 9 miles in the Gulf of Mexico.

The parties had substantially divergent views on the proper location of the lateral boundary. Texas approached the question from a historic perspective. The Supreme Court had already acknowledged that Texas had a 3-league offshore boundary when it entered the Union. *Texas Boundary Case*, 363 U.S. 1 (1960). The state reasoned that that boundary must have included some eastern limit in the area of the Sabine. Therefore, it urged, its lateral offshore boundary with Louisiana should be constructed as it would have been at that time. It agreed with the federal government that the line should be at all times equidistant from the coasts of Texas and Louisiana but contended that the 1845 or 1848 coast line should be used, not the modern coast line. Texas argued that it was supported in the latter proposition by the Supreme Court's determination that its Submerged Lands Act grant is to be measured from that historic coast line.[230]

Louisiana and the United States had similar property interests at stake in the litigation. Both would benefit from the westernmost possible line, Louisiana within the first 3 miles of the coast and the federal government thereafter. But they did not entirely agree on how the line should be drawn.

Louisiana and the United States did find common ground in their opposition to Texas's proposal. Both took the position that the offshore boundary should be measured from the present coast line but then parted company. The state advocated a line running due south from the midpoint of the existing river mouth. That line had already been adopted by the Louisiana legislature. (The state also offered a number of alternative lines.) It reasoned that only this line would be equitable because any more eastern alternative would run "beneath" the Louisiana mainland. In response to Texas's reliance on its Submerged Lands Act grant, Louisiana pointed out that its grant is measured from its modern coast line.

The federal government offered a single proposal, a line running from the present mouth of the river and extending offshore so that it would be at all times equidistant from the modern coast line of the two states. Not surprisingly the Texas line was farthest east and the Louisiana line most westerly of the options presented to the master. The federal line lay in between.

The parties' proposals varied greatly for one reason. Subsequent to 1845 jetties had been built more than 3 miles seaward from the original mouth of the Sabine. Texas proposed that the jetties be ignored for lateral boundary purposes because they are not part of its historic coast line. *Texas Boundary Case*, 389 U.S. 155 (1967). Louisiana urged that they must be used, and the east jetty already had been employed for purposes of

230. The state was not technically accurate in this suggestion. Texas's grant is measured from the modern coast line but extends to the more shoreward of its historic 3-league boundary or 3 leagues from the present coast line. *Texas Boundary Case*, 394 U.S. 1 (1969).

delimiting its coast line. *Louisiana Boundary Case*, 394 U.S. 11 (1969). It pointed out that the Texas proposal would sever the eastern jetty, creating the anomaly of having part of the adjudicated Louisiana coast line outside of the state. The United States took the position that the parallel jetties moved the mouth of the river to their seaward limit; that the jetties and river mouth should be treated as the states' coast lines; and that principles of the Convention on the Territorial Sea and the Contiguous Zone should be employed to construct a lateral boundary.

In his analysis of the controversy, the special master began by noting that the Convention on the Territorial Sea contains provisions applicable to the question before him. Article 8 provides that permanent harborworks are part of the coast. Article 12 establishes that, in the absence of an agreement to the contrary, adjacent states may not extend their zones of maritime jurisdiction beyond an equidistant line between them. In addition, Article 12 recognizes that historic title or special circumstances might justify an exception to that principle. Texas had insisted that because this is a purely domestic matter, international law is useful "only as an analogy." But the master pointed out that on at least three occasions the Supreme Court had applied international law to define state boundaries in this country. *Texas v. Louisiana*, Report of the Special Master, October Term, 1974, at 22-23.

The Court had, of course, consistently relied upon the Convention's principles to define the states' coast lines for purposes of the Submerged Lands Act. And, contrary to Texas's contention, its present coast line as determined by Convention principles plays a significant role in delimiting its Submerged Lands Act grant. In fact, Texas's grant is measured from the modern coast line; it simply cannot extend beyond the historic offshore boundary that is measured from a historic coast line. Report at 27-28. As he concluded, "the Geneva Convention will determine any future changes that might limit the Texas grant . . . . Thus, for both Texas and Louisiana the Convention is applicable to any future limitation of their grants." *Id.* at 28.[231]

Judge Van Pelt recommended that "the Geneva Convention should be applied in the determination of this lateral boundary dispute. Article 12 was specifically drafted to provide the most equitable means of determining a lateral boundary. The prior case law indicates the Convention coastline applies to Texas and Louisiana . . . . Texas and Louisiana have modern, ambulatory, Convention coastlines for important Submerged Lands Act

231. In its original decision to adopt the Convention's principles for purposes of the Submerged Lands Act the Supreme Court foresaw its use for future disputes. It said then that "the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." *United States v. California*, 381 U.S. 139, 165 (1965) [footnote omitted]. The Convention's lateral boundary provisions seem to be a good example.

purposes. To introduce an historic coastline for these two states for lateral boundary purposes would not be practical." Report at 28-29.

Having reached that determination, the master concluded that the jetties are to be considered as part of the coasts of both states. He pointed out that state officials had considered their boundary to run between the jetties and that treating the eastern jetty as part of Louisiana, and the western as part of Texas produced an "equitable" lateral boundary while the lines advocated by the states produced an inequitable result. Report at 29.

The master then adopted the equidistant line proffered by the United States. The line had been constructed according to procedures found in 1 Shalowitz, *Shore and Sea Boundaries* (1962) at pages 234-235, and was explained at trial by State Department Geographer Dr. Robert Hodgson. Report at 30. Both jetties were used as base points and the result was found to be equitable.

The master then further explained his rejection of the states' proposals. Louisiana's statutory line, he said, is not binding on its neighbor and, in any event, is not a median line as required by the Convention. Report at 33. Alternative proposals from Louisiana were rejected because one did not begin at the geographic middle of the Sabine, as already approved by the Court as an inland boundary, and the other was founded on a theory that had been rejected in the Convention.[232] *Id.* at 34.

Texas argued that even if the Convention applied, Article 12 provided an exception for historic title and that exception should be employed here. The state reasoned that it clearly had an offshore boundary in 1845. The Supreme Court had already said so. Logically that 3-league boundary had to be connected up to its eastern upland boundary somehow.[233] But the Texas statute provided no connection. The state argued that "in the absence of clear statutory language the boundary must be determined by the reference to standards of domestic and international law extant in 1845/48, and how Congress would have intended that the eastern boundary of Texas be extended gulfward." Report at 36.

But the United States disagreed, urging that until a boundary is described, agreed upon, or adjudicated it has no precise location. *Id.* at 36-37. The master concluded that "given the total lack of relevant language in

232. Louisiana proposed a line equidistant from "the general trend of the coast" a method of lateral boundary delimitation which was rejected by Convention drafters, and the master, as being too subjective to be trustworthy. The master also rejected Louisiana's contention that anything but a "due south" line would deprive the state of lands "beneath" its coast. As the master pointed out, in this regard Louisiana's reasoning was circular, assuming that the proposed line is appropriate and then concluding that lands east of it are "beneath" Louisiana. In fact the line adopted by the master assured that each state got all submerged lands which lay closer to it than its neighbor.

233. The 1836 Texas statutory boundary read "beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from the land, to the mouth of the Rio Grande . . . ."

the statute, there is no indication of how or where a lateral boundary was to be constructed. Statutory interpretation cannot supply missing words of such importance." He concluded that a lateral boundary was not established in 1836.

Judge Van Pelt went on to consider the "special circumstance" exception to the median line rule of Article 12. He pointed out that "the existence of navigation channels in the area of a lateral boundary is an example of what the International Law Commission considered to be a special circumstance." Report at 43. So too was a "water boundary that might intersect a peninsula of land." *Id*. Dr. Hodgson testified that although "special circumstance" is not defined in the Convention, "it is generally considered to be any physical or geographic feature which can result in an inequitable division of the seabed." Quoted at Report at 43.

The master noted that each state proposed a boundary that would sever the other's jetty and that the International Law Commission considered this a special circumstance to be avoided "even at the cost of deviating from the equidistant principle." Report at 43. Happily, in this instance, "extending the lateral boundary through the jetties (which is a navigation channel) not only allows the equidistant principle to be applied without interruption but also prevents the severing of either jetty by a boundary line." *Id.* He concluded that "[t]o the extent the jetties are special circumstances in this case, they are to be included rather than ignored." Report at 45.

Ultimately Judge Van Pelt recommended that the boundary between Texas and Louisiana is an equidistant line running between the Sabine Pass jetties and then offshore measured from the modern coast line, including both the eastern and western jetties. (Figure 23) He found this line to be supported by prior tidelands decisions, testimony that the mouth of the river lay at the southern terminus of the jetties, evidence that a line between the jetties had evolved through prescription and acquiescence, and the equitable division of seabed through that line. Report at 47-48.

Texas filed exceptions to the lateral boundary recommendation. Specifically, the state objected to what it described as the master's finding that despite having a 3-league offshore boundary in 1836 that line was not connected to its land boundary. The Court concluded that that contention "misreads the findings of the Special Master." *Texas v. Louisiana*, 426 U.S. 465, 468 (1976). It explained that "the Special Master does not reject Texas' contention that there was a historic 'inchoate' boundary; what he concludes is that there has never been an *established* offshore boundary between the States." *Id.* And it found "the Special Master correct in his conclusion and conclude[d] that he properly considered how such boundary should be now constructed." *Id*. The Court went on to endorse the master's application of the Geneva Convention's principles to the modern coast lines of Texas and

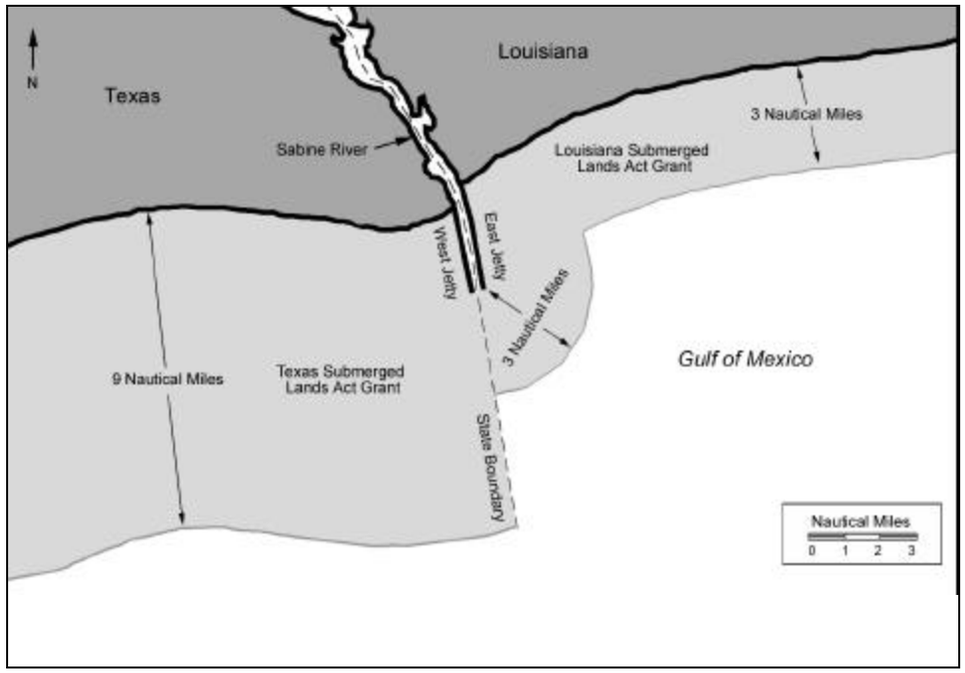

Figure 23. Offshore extension of Texas/Louisiana boundary. Texas's 3-league (9 nautical mile) boundary is measured from the most landward of the modern and historic coast lines; Louisiana's 3-mile boundary is measured from the modern coast line, including jetties.

Louisiana. With respect to the state's contention that 1845 coastlines should have been used, it responded "the short answer to Texas' argument is that no line was drawn by Congress and that the boundary line is being described in this litigation for the first time. The Court should not be called upon to speculate as to what Congress might have done." *Id.* at 469-470. It went on to suggest that this is indeed "one of the lesser" coastline problems, which can be well settled by adopting the Convention's principles and that "the Special Master correctly applied the Convention." *Id*. at 470.

The lateral boundary recommended by the master was adopted and incorporated in a decree of the Court. *Texas v. Louisiana*, 431 U.S. 161, 167 (1977).

Georgia v. South Carolina

Like Texas and Louisiana, Georgia and South Carolina had river boundary disputes which they asked the Supreme Court to resolve. While they were about it, the parties expanded their litigation to include their lateral offshore boundary.

That issue raised two interesting problems. The first was, where should the offshore boundary begin? The states' Savannah River boundary was described in the Treaty of Beaufort and resolved by the master and Court by interpreting that Treaty. However, that boundary ended at the mouth of the Savannah River and the river does not open directly to the sea but into a juridical bay whose mouth is some distance seaward. Thus, the master's first chore was to divide the inland waters of that bay between the states. He recommended a line that "continues down the river's mouth until it intersects . . . [the bay closing line, which runs] from Tybee Island's most northern point to Hilton Head Island's most southern point . . . ." The parties took minor exception to that line but it was adopted by the Court. *Georgia v. South Carolina*, 497 U.S. 376, 406 (1990).

More controversial was the master's course thereafter. He recommended a lateral offshore boundary which continued offshore on a perpendicular to the Baseline Committee's bay closing line to the 3-mile limit.

The coastlines of Georgia and South Carolina come together in such a way that an unusual lateral boundary circumstance is created. The totality of that coast is concave. South Carolina faces more southerly and Georgia faces more easterly. To exacerbate the problem, the bay which includes their coastal boundary happens to face even more easterly than does the general direction of the Georgia coast. For that reason, any line running offshore and perpendicular to the closing line will soon be closer to the South Carolina than the Georgia coast, giving Georgia jurisdiction over waters and submerged lands that are closer to South Carolina.

In reaching his recommendation Special Master Hoffman considered international law principles, specifically noting the Convention on the Territorial Sea and the Contiguous Zone's admonition that in the absence of agreement adjacent states are not to extend their jurisdiction beyond a median line projected from their coasts. Article 12. *Id.* at 407. He also discussed the use of that method by Judge Van Pelt in constructing the Texas/Louisiana lateral boundary. Nevertheless, he pointed out that the overriding principle in lateral boundary delimitation is "equity" and concluded that in these circumstances equity is better accomplished with a perpendicular to the line closing inland waters.

Both states took exception to the recommendation but it was adopted by a majority of the Court. *Id.* at 408. However, Justices Stevens and Scalia dissented on the issue. Justice Stevens agreed that equity is the goal (as clearly it is) but opined that equity would be better served in this case by a different method of delimitation. He proposed running the lateral boundary "at an angle perpendicular to the average angle of the States' coastal fronts." *Id.* at 412 n.* Given the geographic circumstances, such a line more closely approximated an equidistant, or median, line. South Carolina would have gained a significant area of offshore jurisdiction.

Despite the disparity in result, the alternative proposals were actually based on the same internationally recognized option for lateral boundary delimitation, that being a perpendicular to the general direction of the coast. Their different boundaries resulted from a well recognized deficiency in the method, that the outcome may be radically affected by the length of coastline used for establishing the "general direction." The majority and special master ran a perpendicular from the bay closing line alone, a mere 6-mile segment of coast which, it happens, was atypical of the general coastline of either state. Justice Stevens proposed a slight variation of the principle, to account for the change in "general direction" as one passed from one state to the other, but his boundary differs primarily because a much longer segment of coast is being considered to establish a general direction.

Judge Van Pelt pointed out this difficulty in considering the Texas/Louisiana lateral boundary. He opted for the Convention's equidistant line. *Texas v. Louisiana,* Report of the Special Master of October Term, 1974, at 34 and 49.[234] The justices' disparate conclusions in *Georgia v. South Carolina* provide a good example of Judge Van Pelt's concern.

That is not to say that either the majority or dissent's line is necessarily inappropriate. Equity remains the bottom line.

New Hampshire v. Maine

New Hampshire and Maine share a common boundary that reaches the Atlantic Ocean at the mouth of the Piscataqua River. Just seaward of the mainland are valuable lobster grounds. The Supreme Court litigation to resolve this lateral boundary was preceded by what the locals described as "the lobster war." Each state had its own view of where the boundary was located. Those views resulted in conflicting claims to approximately 2,500 acres of seabed. Lobster regulations differed between the two states and when enforcement officers from Maine imposed their more stringent standards on lobstermen from New Hampshire, the governor of New Hampshire opined that war had been declared.

Minor legal skirmishes were fought before the states agreed to halt enforcement and put the question to the United States Supreme Court. Retired Justice Tom C. Clark was appointed as special master.

The issues differed from those in *Texas v. Louisiana* in two significant particulars. The first was geographic. Five miles off the Maine/New Hampshire coast lie the Isles of Shoals, a group of small islands. Some are in Maine and others in New Hampshire. (Figure 24) Strict application of the equidistant principle employed in *Texas v. Louisiana*, would have been a complicated, though feasible, option. The second distinction was historic.

234. In doing so he explained that "[t]he trend of the coast theory was rejected by the Geneva Convention draftsmen in 1958 as too subjective a method of constructing boundaries, and it must be rejected in this case. There are many possible trends in the coastline depending on the surveyor." *Id.*

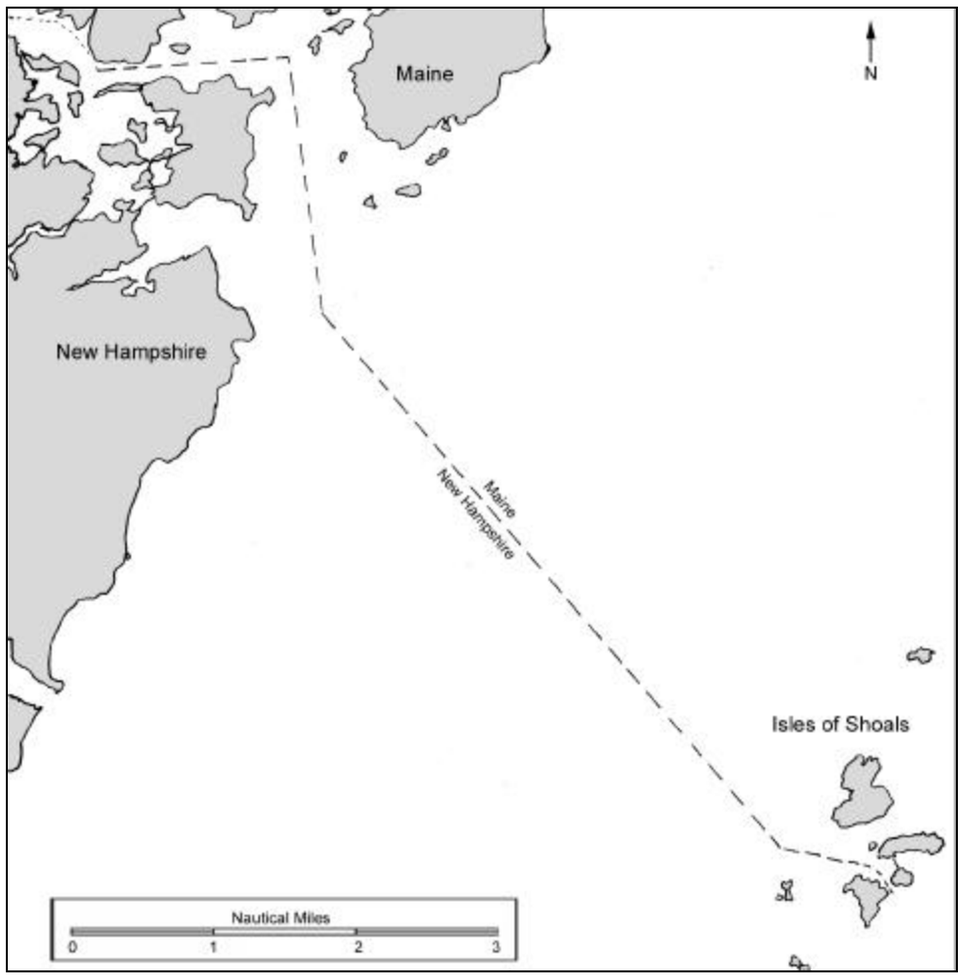

Figure 24. Maine/New Hampshire boundary. The state boundary extends offshore to divide the Isles of Shoals.

The states' conflict over this boundary was nothing new. Following an earlier protracted controversy, King George II had decreed in 1740 that the boundary "shall pass thro the Mouth of Piscataqua Harbour and up the Middle of the River . . . . And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour Between the Islands to the Sea on the Southerly Side . . . ." Quoted at *New Hampshire v. Maine*, 426 U.S. 363, 366 (1976). The states' purpose in Number 64 Original was to implement this language, not to create a boundary in the first instance.

The parties presented their positions to the special master but before trial, and at his urging, they negotiated an agreement on the boundary. That agreement read the 1740 Order's references to "middle of the river" and "middle of the harbour" to mean the middle of the main channel of

navigation. The states then agreed upon specific points at which the middle of each channel intersected the river and harbor mouths and those points became the termini of the lateral boundary. That boundary was agreed to be the arc of a great circle, which appears as a straight line on Mercator projection charts, connecting those termini.

The parties moved the special master for entry of judgment by consent and provided, in the event that the master were disinclined to follow that process, an agreed-upon record by which they believed the matter could be independently decided.[235]

The special master concluded that "under *Vermont v. New York*, 417 U.S. 270 (1974), the proposed decree must be rejected because it constitutes 'mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Article III functions.' *Id.*, at 277." *New Hampshire v. Maine*, Report of the Special Master of October 8, 1975, at 3. Nevertheless, he submitted the proposed consent decree to the Court for its consideration. But, with it, he provided his own recommendation as to the appropriate lateral boundary should the Court reject the parties' negotiated line.

In a nutshell, the Court did not share the master's concern that adoption of the proposed consent decree would be inconsistent with its ruling in *Vermont v. New York*. It said, "the Court may give effect to the States' agreement consistently with performance of our Art. III function and duty." 363 U.S. at 367. It reasoned that the 1740 decree actually fixed the line and the parties merely agreed on the meaning of that decree. *"Vermont v. New York* does not proscribe the acceptance of settlements between the States that merely have the effect, as here, of reasonably investing imprecise terms with definitions that give effect to a decree that permanently fixed the boundary between the States." *Id*. at 369. The agreed upon boundary was described in a final decree of the Court.

Although the special master's recommendation as to a line became moot, some of his work may be applicable to future controversies. To begin, he reasoned that the "thalweg" (or middle of the navigation channel) concept was not in common use in 1740. George II was, therefore, unlikely to have been referring to a navigation channel as the boundary when he described the "middle of the river" and "middle of the harbor." He also found "legislative history" that supported that interpretation. Report at 41. For these reasons, the master recommended that geographic midpoints must have been intended and he used them as termini of his proposed closing line.

He also made much of the fact that the Crown would not have

235. The parties also stipulated that strict application of the equidistant principle, referred to in Article 12 of the Convention and applied in *Texas v. Louisiana*, would produce an "inconvenient and unworkable" boundary. *New Hampshire v. Maine*, Report of the Special Master of October 8, 1975, at 3.

delimited a boundary in the open sea because it claimed no rights there itself. Report at 47-48, citing *United States v. California*, 332 U.S. 19 (1947) and *United States v. Maine*, 420 U.S. 515 (1975).

Finally, Justice Clark reviewed Article 12 of the Convention. His recommended boundary ran from the geographic middle of the entrance of Portsmouth Harbor to the geographic middle of the entrance on Gosport Harbor on the Isles of Shoals. It was not an equidistant line. Article 12 of the Convention favors an equidistant line but recognizes that historic title or special circumstances may dictate another boundary. The master found no historic title. He did conclude that a number of special circumstances supported his line. Among these were: the existence of the Isles of Shoals,[236] the mainland coastline (to which the proposed line is perpendicular), agreement that the 1740 decree controlled the boundary determination, history, usage, ease of enforcement, and an equitable result.

Although the Court had no occasion to comment on these factors, having adopted the parties' negotiated settlement, it did acknowledge a role for the Convention and its special circumstances exception. Paragraph 9 of its final decree in the case provides that "the lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (6) and (8) above has been determined on the basis of the 'special circumstances' exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U.S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two States in their colonial grants and charters." *New Hampshire v. Maine*, 434 U.S. 1, 3 (1977).

His analysis may provide guidance for future litigants.

These then are the tidelands decisions. They tell the story of a half century of controversy between the federal government and the coastal states over rights in submerged lands. But in doing so they do much more. Because the Supreme Court adopted principles of the Convention on the Territorial Sea and the Contiguous Zone for purposes of delimiting Submerged Lands Act grants, these decisions describe boundaries applicable to numerous other state and federal statutes that apply in "waters of the United States," "territorial waters," "navigable waters," or equivalent state references. What is more, they provide much of the limited precedent for international boundary delimitations.

We turn now to Part II in which the boundary principles that have evolved from these decisions are more thoroughly analyzed and organized in a manner more suitable for use by the practitioner.

236. Offshore islands have traditionally been considered a 'special circumstance' that might justify deviation from an equidistant line.

Part Two

DELIMITING MARITIME BOUNDARIES

INTRODUCTORY

Despite the fact that maritime boundaries[1] have always been important to the United States in both its international and domestic affairs, the exact location of those boundaries is only now becoming known. A congressional committee investigating the issue in 1952 concluded that "[a]lthough our country is now 163 years old, no one can say exactly where our seaward boundaries are located. Along much of our coastline, it is impossible to say, even within a few miles, where our territory ends and the high seas begin."

The problem was not one of articulating our claim; the United States has claimed a territorial sea since the first years of the Republic. Rather, it has been one of determining the baseline from which that claim is to be measured. The primary position of the United States has always been, and remains today, that maritime zones are measured from the shore. An alternative method, employing construction lines connecting promontories along the coast, and in some cases offshore islands, was employed by the British during the reign of the Stuarts in the mid-1600s. However, the United States specifically rejected such a system, retaining its "rule of the tide-mark."[2]

The United States has, however, traditionally recognized that minor embayments along the coast may be claimed by the coastal sovereign. Thus, the baseline, or coast line, from which maritime zones are measured is composed of the shoreline itself and the seaward limits of inland water bodies claimed by the United States. Congress has adopted this definition for purposes of the Submerged Lands Act, 43 U.S.C. 1301(c), *United States v. Louisiana*, 364, U.S. 502, 503 (1960), *Louisiana Boundary Case*, 394 U.S. 11, 15 (1969); and the Supreme Court has concluded that the "coast line" in the Act and the "baseline" referred to in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, are one and the same. *United States v. California*, 381 U.S. 139, 164-165 (1965).

1. The term "boundaries," when used in this volume, refers to the extent of zones of national jurisdiction. Political geographers often employ the term "limits" for this purpose and use "boundaries" to describe lines that separate the jurisdiction of adjacent or opposite sovereigns.

2. The United States' rejection of the headland theory is set out in a letter from Secretary of State Bayard to Secretary of the Treasury Manning, dated May 28, 1886, stating that: "We may therefore regard it as settled that so far as concerns the eastern coast of North America, the position of the Department has uniformly been that . . . the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign." 1 Moore, *International Law Digest* 718-721 (1906). That position was reaffirmed by the acting secretary of state in 1951. 1 Shalowitz, *supra,* 354-356.

With that conclusion, we are able to look to the Convention for answers to the many practical questions that arise in delimiting the coast line of the United States. *United States v. California*, 381 U.S. 139, 165 (1965). The remainder of this part is a review of the ways in which each of the coast line provisions of the Convention on the Territorial Sea has been interpreted by the Court, its special masters, and the executive branch in more exactly delimiting our maritime boundaries.

CHAPTER 5
THE NORMAL COASTLINE

To conclude that the "normal" coastline is the shoreline, or the line at which the land meets the water, is merely to frame the issue, not resolve it. Recurring tides guarantee that the "shore" will be a continually moving line. The first step, then, in locating the normal coastline is to define that stage of the tide that will be used as the benchmark.

THE LOW-WATER LINE

Whiteman suggests that as many as six tidal lines may be recognized, ranging from higher high to lower low water. 4 Whiteman, *Digest of International Law* 138 (1965). Hydrographers may even identify more tidal datums. Certain early writers supported the use of the high-water line for purposes of measuring the territorial sea. Such a line has much in its favor. It is, in American jurisprudence, the usual seaward boundary of the upland estate. What is more, it is a conservative choice, in keeping with this country's traditional policy of minimizing encroachments on freedom of the seas. Nevertheless, it did not catch on.

Which Low-Water Line?

United States foreign policy has always employed the "ordinary low-water mark" for delimitation purposes. It is that line that was established as dividing state and federal interests in the pre–Submerged Lands Act tidelands cases. *United States v. California*, 332 U.S. 804 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950).

Likewise, the International Court of Justice concluded in 1951 that it is the low-water mark, not the high-water mark or a mean between them, which has been accepted in international practice for purposes of delimiting the territorial sea. *Fisheries Case*, I.C.J. Reports, [1951], p. 128.

The Submerged Lands Act and 1958 Convention are in accord, albeit through slightly different terminology. The Act refers to the "ordinary low-water" line. The Convention refers to the "low-water line along the coast as marked on large-scale charts."

Thus, the issue is reduced to determining which of a number of alternative low-water lines is to be employed.

The Charted Line

The question was first considered by the Hague Convention on the law of the sea in 1930. However, by that time countries were already publishing official charts using a variety of low-water lines, and no consensus could be reached on a single datum. Although no treaty evolved, a draft article provided simply that the line of ordinary low water would be used, with the proviso that it could not appreciably depart from the line of mean low-water spring tides.[3] Although the proviso was not retained in the 1958 Convention, commentators do not anticipate problems from its absence.

It is clear that the failure to choose a single low-water line in 1958 resulted from the same practical problem that had confronted the conferees in 1930; state practice was already established and there appeared to be no compelling reason to fashion a rule that would require modification of entire charting systems.

Thus, the selection of a particular low-water datum for charting purposes is within the discretion of the state involved.[4] Yet that selection may have a significant effect on the seaward limit of a particular state's jurisdiction. For example, as Prescott points out, the use of extreme low-water datum not only has the immediate effect of pushing the territorial sea to its seaward limit, it also increases the likelihood that a seabed feature will extend above that datum, qualifying as a low-tide elevation and further extending jurisdictional zones. Prescott, *supra*, at 47.

Of course, the contrary may occur when using the line for bay delimitation purposes. The more extreme the low-water line chosen, the smaller the water area within each coastal indentation. In close cases, the difference may be sufficient to prevent the indentation from meeting the semicircle test. If that occurs, waters that might have qualified as inland using a more conservative low-water line will become territorial seas and high seas simply through the selection of a more extreme datum.[5]

The United States Supreme Court has long since resolved the tidal datum issue for purposes of American jurisprudence. In its decree in the

3. This line is obtained by measuring low waters when the maximum declination of the moon is 23 degrees 30 minutes.

4. McDougal and Burke, *The Public Order of the Oceans* at 327 (1962); Prescott, *The Maritime Political Boundaries of the World* at 46 (1985). The United States, for example, altered its charted datum along some coasts in recent years. Pursuant to the National Tidal Datum Convention of 1980, it now uses a single, uniform tidal datum system for all of its marine waters.

5. Prescott suggests that a state may elect to avoid such dilemmas by picking and choosing among potential datums as best suits its purposes along a particular coast, Prescott *supra* at 47, even to the extent of adopting a high-water line as the coastline if necessary to meet the semicircle test, *id*. at 60. Although it is not unusual to find more than one datum employed by a state, because of different tidal characteristics along different coasts, it is doubtful that a court would countenance a blatant abuse of the right to select. The Convention appears clear that it is a low-water line that will be used, and not a high-water line.

first *California* case, it ordered that the federal government has paramount rights in the submerged lands seaward of the "ordinary low-water mark." *United States v. California*, 332 U.S. 804, 805 (1947). It then appointed a special master to, among other things, give specificity to that term.

Unlike the east coast of the United States, California has two low tides a day, of unequal height. The federal government argued that in such circumstances "ordinary low water" should be computed by averaging all low tides. "Ordinary" was acknowledged not to be a term of art and the government contended that it should be equated to "mean," which would then encompass all low tides, not just all lower-low tides. 1 Shalowitz, *supra*, at 163.

California urged the contrary, pointing out that mean lower low water is the datum used for hydrographic surveys and navigation charts of the California coast, is required by the Corps of Engineers, and is used by the State Lands Commission. *United States v. California*, Report of the Special Master of October 14, 1952, at 41.

The special master could find no indication of what the Court intended in its use of the term and opted for the mean of all low tides for the 18.6-year tidal cycle. *Id*. at 39-40. The Court held otherwise. It concluded that "California's position represents the better view of the matter." *United States v. California*, 381 U.S. 175, 176 (1965). The Court ultimately ordered that, for purposes of the California coast, ordinary low water is the average of only the lower of the daily low tides over an 18.6-year period.

The Supreme Court's conclusion appears to have been greatly influenced by the fact that the official federal charting agency depicted the lower low-water line on its charts of the California coast and did not depict the mean of all low tides. The result would appear to be reasonable and conforms to the Court's general position that the same baseline would be used for international and domestic purposes.

The lesson to be derived is that the line chosen by our official charting agency to depict as a low-water line will be used as the "ordinary low-water" line for purposes of the Submerged Lands Act. *United States v. California*, 381 U.S. 175, 176 (1965). (Figure 25)

The Actual Line

That is not to say that the line depicted on a particular chart accurately portrays the baseline. The Convention's reference to "the low-water line along the coast as marked on large-scale charts" refers to the particular datum selected for that purpose, not to the line drawn on the chart. The latter may be incorrect through error in the original or may simply be outdated. Or, because of scale, the low-water line may not even appear on a particular chart. In all such cases, the baseline is the actual low-water line,

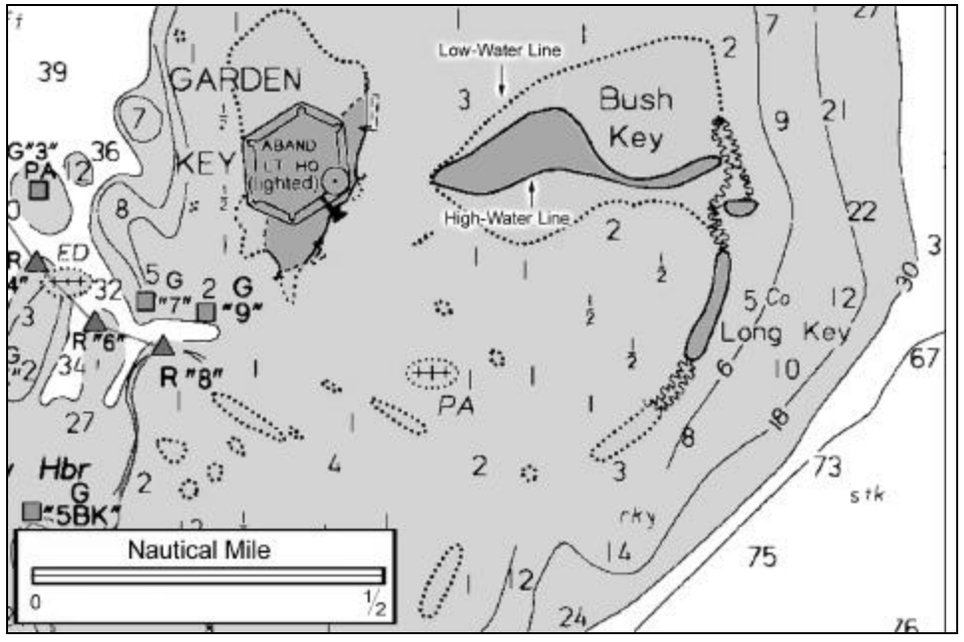

Figure 25. High- and low-water lines. The high-water line is depicted with a solid line and the low-water line is depicted with a dotted line. (*Based on NOAA Chart 11438*)

defined according to the principles that the charting agency purports to employ for that coast.[6]

Comments from members of the International Law Commission, during their preparation of the draft articles that led to the 1958 Convention, make their intent clear; a charted line that departs appreciably from the actual low-water line could be challenged in any legal tribunal.[7]

6. At least one eminent authority may have concluded the opposite, stating that "[i]t is important, too, to note that it is the charted low-water line that is relevant, and not necessarily the low-water line as it actually exists at the particular time an incident occurs." Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation*, The Hydrographic Society, Special Publication No. 2, 1978. However, the intent of the Convention's drafters appears to support American practice discussed below, that is, that the legal coastline is the actual coastline, not a line drawn on a map, and the limits of maritime jurisdiction are measured from that actual coastline. However, Commander Beazley's statement may be reconciled with American practice in that he apparently refers to the coastal state's ability to assert jurisdiction over a vessel whose master, relying upon incorrect charts, unwittingly enters the territorial sea. Although the actual coastline has been employed by American courts rather than outdated or incorrect charts, the litigation has involved the establishment of offshore boundaries between the federal and state governments. It is not so clear that a mariner could be successfully prosecuted for inadvertently sailing into American waters in similar circumstances.

7. Typical summaries of the participants' positions include the following:

"If the low-water mark on official charts departed appreciably from the line of mean low-water spring tides, those charts would not be accurate and their validity would be questioned by any legal tribunal." Mr. Amado, *Yearbook of International Law Commission* 1952, Vol. I, p. 172.

"To accept a line indicated on official charts which, incidentally, frequently omitted to show the low-water mark properly, would be inconsistent with the judgement of the Court." Mr. Hudson, *Id*. at 173.

"If a dispute arose as to whether a chart did or did not 'appreciably' depart from that criterion, it could be referred to an international tribunal." Mr. Yepes, *id*. at 178.

"In order to guard against abuse they had added a proviso that the line indicated on the chart must not depart appreciably from the more scientific criterion." *Id*. at 178.

The question has arisen in two of the tidelands cases. In *United States v. Louisiana* the state argued that the Convention's drafters purposely adopted the charted rather than the actual coast line, knowing that charts would err on the side of safety. Therefore, it said, the federal government should not be permitted to disclaim the coast line as depicted on its own charts to prove erosion and a more landward Submerged Lands Act grant than would result from using the charted line as a baseline.

By the time that the state made this argument to the special master, the Supreme Court had already directed that the master determine, among many other things, the existence or nonexistence of certain islands in dispute off the Mississippi River delta. *Louisiana Boundary Case*, 394 U.S. 11, 40-41 n.48 (1969). From this the master concluded that "the Court must be saying as a general principle, as insisted by the United States, that at least in certain instances the Special Master may look beyond the charts of the area involved to the actual facts." *United States v. Louisiana*, Report of the Special Master, at 25 (July 31, 1974). The master cited a federal concession that "extrinsic evidence is admissible to show significant deviations on such charts from the actual low-water line, in which case the actual low-water line prevails." *Id.* at 43. He then went on to apply the best and most recent evidence to determine the location of extensive areas of the Louisiana coastline, sometimes to the advantage of the state and sometimes to the federal benefit.

California made a similar argument in the phase of its tidelands cases that considered the propriety of using piers as base points from which to measure the state's Submerged Lands Act grant. By then the federal government had published nautical charts that included a line depicting the outer limit of the territorial sea. There was no doubt that in some instances that line had been constructed by swinging 3-mile arcs not only from the natural coast line, but from some of the piers at issue.[8]

California contended that "pursuant to Article 3, the United States is bound by these charts and may not now argue against using the piers for measuring the territorial sea." *United States v. California*, Report of the Special Master, at 25 (August 20, 1979). The United States argued to the contrary and offered witnesses who explained how such errors might have occurred at various stages of the printing process. Dr. Robert Hodgson, then geographer of the Department of State, testified that the charts did not accurately represent the United States' position with respect to the limits of the territorial sea and opined that where charts are incorrect, the actual coast line should be used. *Id.* at 16. The special master adopted that view, *id*. at 25, and noted that a disclaimer included on the charts governed just such circumstances. *Id.* at 25. He recommended against treating the charts as conclusive evidence of the location of the coast line.

8. At trial, the charts were also shown to include a number of unrelated errors in the depiction of the territorial sea line.

The Supreme Court adopted that recommendation, saying "[t]he fact that every National Ocean Survey chart of the California coast 'officially recognized' by the United States displays a black line connoting the coastal low-water mark following the configuration of the seaward edge of the 16 structures, as it does groins, breakwaters, and other structures that extend seaward, is likewise not dispositive. We agree with the master's finding that the charts contain an aggregate of errors and in many places depict the territorial sea without regard to the coast line. And each chart, as the Master found, includes a disclaimer to that effect." *United States v. California*, 447 U.S. 1, 6-7 (1980).

The proposition is, therefore, well settled in American law. It is the actual low-water line and not a charted line that is to be used as the baseline under the Convention.

In practice, the charted line is clearly the starting point in each effort to locate the low-water line. The party that expected that that line erred to its detriment has offered evidence to contradict the chart. Two immediate questions arise under the rules just stated. First, to what extent must the chart be in error to justify departing from its lines? Second, what kind of evidence will be required to justify such departures?

As set out, the rule might be read to require a chart error of some magnitude to justify putting the chart aside and relying on outside evidence to establish the location of the coast line. That has not been the practice. In fact, both the federal government and the states have offered evidence of relatively minor deviations that has been accepted by the special masters without objection, at least on this ground, from the opposition. The approach makes sense in that it results in final decrees that describe a coast line based upon the most recently available information.[9]

More difficult has been the question of the nature of evidence that should be required to disprove a charted coast line. Louisiana argued to the special master that a chart should not be changed with evidence of lesser reliability than that used to produce it in the first place. Specifically, the state contended that features along the Louisiana coast that had been located during a hydrographic survey should not be deleted as base points merely because they did not appear in a subsequent photogrammetric survey.[10] The master did not accept that constraint on either party's right to

9. This procedure is not, of course, an unfavorable reflection on either the charting process or the National Ocean Service, which produces those charts. Because there are practical limitations on how often a particular chart can be updated, and the coastline is constantly changing, it is understood by all that it would be pure coincidence for a given chart to be precisely accurate even by the time it is printed. Indeed, it is routine for the litigants to rely upon the National Ocean Service's methods and experts in proving the actual low-water line locations.

10. Alaska made a similar argument with respect to the feature off Prudhoe Bay known as Dinkum Sands. In fact, the National Ocean Service typically makes such alterations when convinced by any subsequent evidence that a change has occurred since an original survey. To do otherwise would be to perpetuate known errors in a chart, which have resulted from erosion or accretion, simply because resources are not available for regular hydrographic surveys.

offer evidence of the actual location of the low-water line. It would now seem safe to conclude that there is a presumption that the low-water line is as charted but that a preponderance of evidence, of whatever type, may result in a modification of that line.

No Low-Water Line Charted

Some experts have been concerned that a low-water line may not be depicted on a nation's official large-scale charts. Some countries, for example, simply do not publish such a line, while others may do so generally but do not on particular charts either because surveys are incomplete or the chart scale is inadequate.[11]

For example, McDougal and Burke note that the United States itself commented that the draft article was ambiguous for this reason, McDougal and Burke, *The Public Order of the Oceans* 326 (1962); but the authors conclude, properly it would seem, that the provision should not be read to require the publication of a low-water line. *Id.* at 326. Clearly, the Convention did not contemplate that each state would produce a new set of charts upon which the low-water line is specifically delineated as a baseline. Beazley, *supra*, at 5.

The United States, for one, does not publish a low-water line for portions of its coast. Although the policy is to include such a line, it is occasionally missing either because its exact location is unknown, as is sometimes the case on extensive mud flats or in areas of mangrove swamp, or because at the chart's scale the low-water line cannot be depicted separately from the high-water line.[12] (Figure 26)

Commentators have occasionally concerned themselves with the definition of "large-scale" because that term appears in Article 3 and was used by the International Court of Justice in the Anglo-Norwegian *Fisheries*

11. See: Griffin, *The Emerging Law of Ocean Space*, 1 The International Lawyer 548, 559; Churchill and Lowe, *The Law of the Sea* 26 (1983).

12. This will occur, for example, where the line representing the high-water line, because of scale, is actually wider than the distance between mean high water and mean low water. It is easy to understand the likelihood of this event when one realizes that at a map scale of 1:100,000 the high-water line as depicted will actually represent 80 feet on the ground. Griffen, Jones and McAlinden, *Establishing Tidal Datum Lines for Sea Boundaries* (1967). The matter was put at issue by a Cuban fisherman arrested by the United States for operating within the United States' then 12-mile exclusive fisheries zone off the coast of Texas. The nearest point on the coast was sufficiently steep that the low-water line and high-water line could not be depicted separately and only the latter was shown. The defendant contended that he was denied due process because the Convention requires maritime jurisdiction to be measured from the low-water line and he was not put on notice of the location of that datum. His conviction was upheld by the United States Court of Appeals for the Fifth Circuit. *United States v. Sorina*, No. 74-325 (S.D. Tx. Sep. 9, 1974), aff'd. without opinion, 511 F.2d 1401 (1975).

The *Sorina* decision stands only for the proposition that there is no technical requirement for publication of the low-water line. Sorina should have been able to conclude that by being within 10.5 miles of the high-water line he was even closer to the low-water line. A defendant who had in fact been misled by properly using charts that turn out to be inaccurate would, presumably, have a much better case, but not necessarily based upon the language of Article 3. See: McDougal and Burke, *supra*, at 322 and 327.

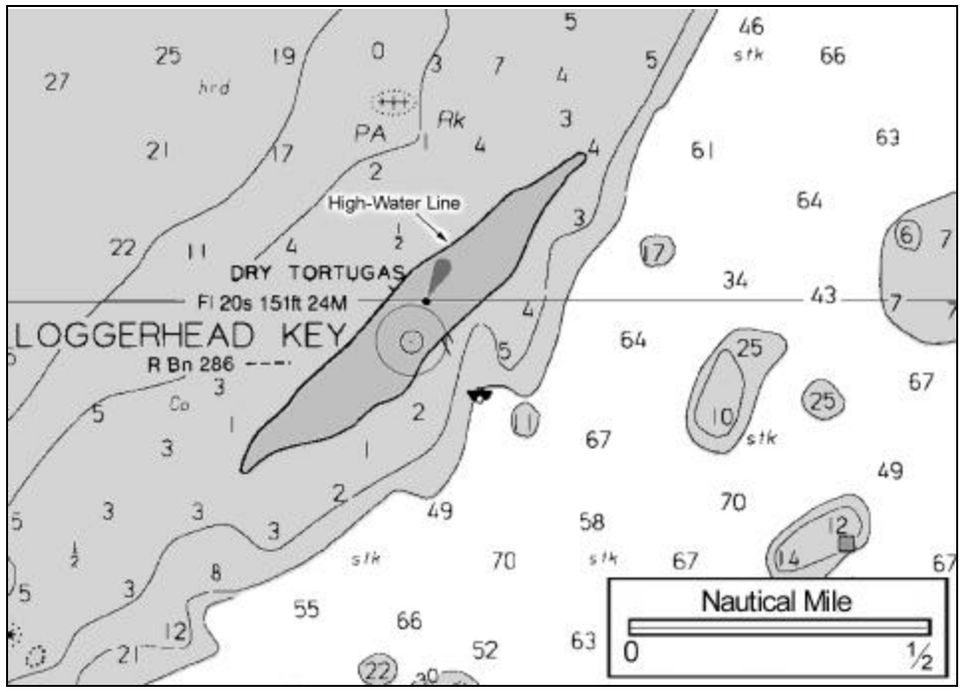

Figure 26. High-water line only. Here the high- and low-water lines are too close to one another to be depicted separately at the chart scale.
(*Based on NOAA Chart 11438*)

Case. One suggests that the Court and the drafters of the Convention intended planning charts of 1:1 million or 1:2 million, rather than navigation charts.[13] Another suggests that large-scale refers to 1:80,000 or larger.[14] A third opines that the Convention must refer to the largest scale available of the particular coastline.[15]

American practice has led to no litigation over this term. The federal government publishes its territorial sea limits on the largest scale series of charts that covers the entire coast. On the Atlantic and Gulf coasts, this is 1:80,000. A smaller scale must be used on the west coast and for Alaska in order to get complete coverage. However, where questions arise, it is the policy of the Baseline Committee to consult the largest scale chart available.

13. 2 O'Connell, *The International Law of the Sea* 646 (1982). Charts at these scales would rarely show both high- and low-water lines.

14. Griffin, *supra*, at 559. This is, in fact, the scale of charts of the east coast of the United States upon which the United States publishes its territorial sea limits and has been described by Special Master Armstrong as within the meaning of the Convention. *United States v. Louisiana*, Report of the Special Master, *supra*, at 24. See: Minutes of the Baseline Committee of July 27, 1970.

15. Beazley, *supra*, at 6.

What is more, as previously discussed, where true contentions arise, outside evidence will be introduced to prove the location of a coast line regardless of the scale of the relevant chart. Because Article 3 has been interpreted to refer to the type of low-water line employed by the particular state, rather than the depiction of that line in a particular place, the definition of "large-scale" becomes meaningless. The low-water line to be used on a given coast is the same regardless of scale.[16]

The Ambulatory Low-Water Line

A final element of the normal low-water line must be mentioned, that being its ambulatory nature. The coast line, or baseline, is the mean low-water line. As that line moves landward and seaward with accretion and erosion, so does the baseline. As the baseline ambulates, so does each of the maritime zones measured from it.[17]

From the foregoing, we can conclude that the "normal" baseline referred to in Article 3 of the Convention is that low-water datum that has been selected by the state for purposes of charting a particular coast. It is not the line as marked on a chart but the actual line defined through methods employed by the charting agency. Although the chart may provide a presumption of that line's location, extrinsic evidence will be permitted to prove its actual location and no particularly oppressive burden of proof seems to be required. Although some language may suggest that charts may be challenged only if they contain significant deviations from the actual low-water line, that has not been the practice. The Convention's reference to "large-scale" charts has not created litigation issues and should not unless a charting agency is found to use different low-water datums for larger scale charts than it does for smaller. Finally, the "normal" coastline is ambulatory.

Man-Made Coast Line

The foregoing applies whether changes occur as a result of natural processes, through the intervention of man-made structures, or entirely by artificial means. As Special Master Arraj noted in *United States v. California*, "[t]he statute [Submerged Lands Act] does not define the term 'coast' and

16. For a more detailed discussion of the importance of chart selection in boundary delimitation see Smith, *A Geographical Primer to Maritime Boundary Making*, 12 Ocean Development and International Law Journal 1 (1982). See also: 2 O'Connell, *supra*, at 636.

17. This rule has traditionally applied to the states' Submerged Lands Act grants as well as the territorial sea, contiguous zones and exclusive economic zone. However, an amendment to the Submerged Lands Act provides that when an offshore boundary has been established by final Supreme Court decree, it will remain fixed in that location regardless of changes in the coast line. 43 U.S.C. 1301(b).

there is no indication in the Act as to whether the term was intended to encompass only the natural shore or the natural shore as modified by manmade structures protruding into the open sea." *United States v. California*, Report of the Special Master of August 20, 1979, at 22.

The question arose early in the *California* litigation. The state took the position that areas of landfill in what used to be sea and areas of natural accretion that had been prompted by a nearby jetty or groin should be used as base points from which to measure its submerged lands rights. (Figure 27) The federal government contended that title should not be affected by changes brought about by artificial causes. 1 Shalowitz, *supra*, at 103. The United States argued that it would be inequitable to permit California to extend its submerged lands jurisdiction, at the expense of the federal government, simply by constructing more and more coastal works or filling along the shore.

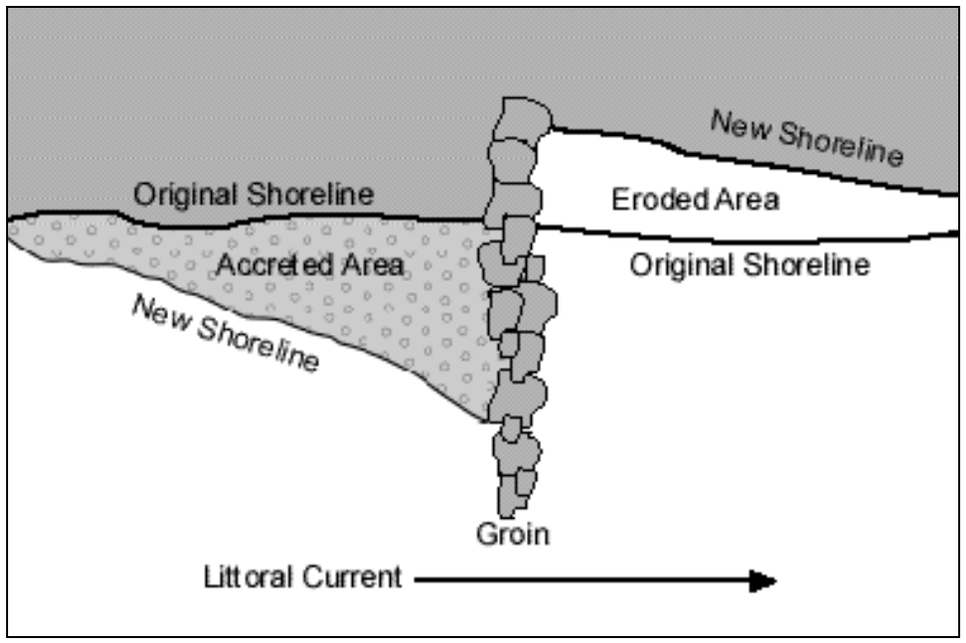

Figure 27. Effects of groin or jetty. Accretion and erosion caused by a groin or jetty result in changes in the legal coast line.

The special master sided with the state, recommending that the artificial accretion be employed, and the Court adopted that position. *United States v. California*, Report of the Special Master of October 14, 1952, at 44-46. *United States v. California*, 381 U.S. 139, 176- 177 (1965). In fact, this conclusion is consistent with the United States' international position that

permits the use of such accretions as base points for measuring the territorial sea. Although the Court had already ruled that future wholesale changes in international legal principles for determining baselines would not be adopted to upset the Submerged Lands Act grants then being delimited, *id.* at 166-167, it concluded that the "relatively slight and sporadic changes which can be brought about artificially" did not present the same concerns. *Id.* at 177.

Nor was the master or the Court particularly concerned over the federal allegation that states could use this device to push their submerged lands jurisdiction ever seaward. He pointed out that the United States, through its power over navigable waters, could prevent these feared consequences. All such construction in the navigable waters must be approved by the federal government. And, the master suggested, "it seems clear that in the future that aspect [the submerged lands consequences] of the matter can be, and probably will be, taken into account." *United States v. California*, Report of the Special Master, *supra*, at 45-46. Both the master and the Court suggested that that consequence would be the proper subject of negotiation between the parties in the consideration of future applications for coastal modification. *Id.* at 46; *United States v. California*, 381 U.S. at 176.

Both clearly anticipated that the federal government might condition approval of such applications on the states' waiver of Submerged Lands Act consequences. The master said, "I think it would give an opportunity for the appropriate negotiations and agreement between the State and the United States at the time the artificial change is approved." Report, *supra*, at 46. The Court noted that, "the effect of future changes could thus be the subject of agreement between the parties." 381 U.S. at 176. A subsequent special master agreed, saying, "the United States retains the ability to control any construction over navigable waters to condition such construction on an agreement not to alter the Submerged Lands Act boundary." *United States v. California*, Report of the Special Master of August 20, 1979, at 26. (Figure 28)

This is the course that has been taken. The U.S. Army Corps of Engineers (Corps) regulations now require that the agency determine whether a proposed project will have submerged lands consequences, and, if so, consult the Departments of the Interior and Justice prior to the issuance of a permit. 33 C.F.R. 320.4(f). That is routinely done, and a number of permits have been issued only after the state involved has agreed to waive any extension of its Submerged Lands Act rights that otherwise accrue.

The legal effect of this process has been twice tested in litigation between the United States and Alaska. The subject of *United States v. Alaska*, Number 118 Original, was a substantial jetty constructed to serve as a

Figure 28. Jetty at the mouth of the San Diego River, California. Such structures, when connected to the upland, form part of the coast line. (*Photo by Donna M. Reed*)

harbor for the community of Nome. The regulatory process was followed. The necessary Corps permit was sought and, after Alaska agreed that its Submerged Lands Act rights would not be extended by the jetty, the permit was issued. However (and despite the history just outlined), the state "reserved" its right to challenge the federal government's authority to so condition the issuance of permits. Soon thereafter, the United States conducted an outer continental shelf lease sale in the vicinity. Relying on the state's waiver, the Department of the Interior included in the sale submerged lands that were more than 3 nautical miles from the natural shoreline but within 3 miles of the jetty. Alaska brought an Original action in the Supreme Court contesting the United States' authority to extract a waiver and claiming title to all submerged lands within 3 miles of the jetty.

The issue was strictly legal and the parties asked that it be considered by the Court without the appointment of a special master. The Court agreed.

Acknowledging that the Corps could properly consider "the public interest" in evaluating a permit application, Alaska nevertheless argued that the federal government's proprietary interest in submerged lands did not

fall within that rubric. The United States pointed to the Court's recognition of just such authority as part of its rationale in accepting artificial structures as part of the coast line in the first place.

The Supreme Court accepted the federal position. "Whether an artificial addition to the coastline will increase the State's control over submerged lands to the detriment of the United States' legitimate interests" was determined to be an appropriate question of "public interest." *United States v. Alaska*, 503 U.S. 569, 585 (1992). The states cannot have it both ways. To enjoy the direct benefits of an artificial extension of their coast lines, they may be required to waive any collateral benefits in the nature of extended title to submerged lands.

The federal government tested the applicability of the Corps' regulation in a slightly different context. An extension to the ARCO Pier, near Prudhoe Bay, Alaska, was constructed in the fall of 1976. It became necessary when unexpected early arctic ice held vessels offshore, preventing them from offloading supplies and equipment needed through the upcoming winter. A permit was sought for the construction but, in the emergency, the Interior and Justice Departments were not notified and no waiver of submerged lands consequences was sought or acquired.

As one of 15 issues in *United States v. Alaska*, Number 84 Original, the United States claimed that because Corps regulations had not been followed in evaluating the permit, the construction was illegal and could not deprive the federal government of title to submerged lands within 3 miles of the extension but more than 3 miles from the original jetty or natural coast line.[18]

Special Master Mann recommended a finding for the state. He pointed out that the Trans-Alaska Pipeline Authorization Act compelled the issuance of federal permits "necessary for or related to" the operation of the pipeline system and authorized the waiver of "procedural requirements . . . ." 43 U.S.C. 1652(b)-(c). Report at 326. In addition, he noted that agency action is entitled to a presumption of legality.[19] Finally, he pointed to the Supreme Court's treatment of a spoil bank along the Louisiana coast. That feature had been constructed without Corps approval at all, yet was determined to be a proper part of the coast line. *United States v. Louisiana*, 394 U.S. 11, 41 n.48 (1969).

The United States did not take exception to the recommendation and the disputed portion of ARCO Pier will be used for measuring Alaska's Submerged Lands Act grant.

18. The original section had been constructed with a permit issued following the proper processes.

19. Citing *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415 (1971).

Harborworks

When the Supreme Court decreed, in *United States v. California*, 382 U.S. 448 (1966), that the coast line encompassed subsequent natural or artificial changes, it specifically included "outermost permanent harbor works that form an integral part of the harbor system . . . ." *Id.* at 449. That concept is not derived directly from the Submerged Lands Act, but from Article 8 of the Convention, which had been adopted by the Court for purposes of implementing the Act.

Article 8 provides that, "[f]or the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." It is apparent from the language that the drafters intended that certain artificial structures along the coast would be treated as part of the baseline, but just which features are to be included is not always clear.

Shalowitz defined harborworks as, "[s]tructures erected along the seacoast at inlets or rivers for protective purposes, or for enclosing sea areas adjacent to the coast to provide anchorage and shelter." 1 Shalowitz, *supra*, at 292. The Supreme Court has quoted that definition with favor in *United States v. Louisiana*. 394 U.S. 11, 37 n.42 (1969).

Clearly, breakwaters that form artificial harbors are included, such as those at the port of San Pedro (Los Angeles's harbor). Similar structures at the mouths of rivers, such as the Sabine between Texas and Louisiana, are equally obvious. But less apparent are jetties of similar construction built out from the coast to discourage the erosion of beaches. Although such structures would not appear to fall within the Shalowitz definition, they were accepted as the base points by the Supreme Court and the Baseline Committee. It would thus appear that beach erosion jetties, which are sufficiently substantial to meet the Convention's requirement of permanence, will be treated as part of the coast line, although they will seldom have a significant effect on the outer limit of the territorial sea.

Commentators suggest that to be an "integral part of the harbor system," a structure must be physically attached to the mainland coast.[20] All American examples meet that requirement, with the proviso that there need not be a continuous low-water line from the mainland coast to the portion of the structure being used as a base point. The Zuniga jetty at San Diego provides an example. The jetty leaves the mainland above water, then dips below mean low water for a stretch before reappearing and continuing to its seawardmost point opposite Point Loma, a parallel natural formation. The federal government has, at least since 1971, treated the seawardmost point

20. McDougal and Burke, *supra,* at 422. See also: Bowett, *The Legal Regime of Islands in International Law* (1979) at 138, whose particular concern with islands leads him to remind us that to conclude otherwise is to chance running afoul of the well accepted principle that artificial islands may not be used as base points.

on the Zuniga jetty as the "outermost permanent harbour work" and part of the coast of California. Coastline Committee Minutes of December 21, 1976.[21] In 1977 the state and federal government proposed, by joint motion, a decree that listed agreed-upon base points, among them "[t]he Zuniga jetty at San Diego (including the southern seaward end of this entire structure)." *United States v. California*, 432 U.S. 40, 42 (1977).[22] A similar agreement has been reached with Florida. *United States v. Florida*, Number 52 Original, Joint Prehearing Statement of September 1971 at 68-69.

Although stretches of the Zuniga jetty may fall below mean low water simply because it has not been maintained to its intended elevation, similar jetties, such as those at the mouth of the Sabine River, have intentional gaps to permit the passage of small boats. That fact has not prevented their acceptance as harborworks to their entire length.[23] The Supreme Court's special master in *Texas v. Louisiana* concluded that "[u]nder Article 8 the 'outermost permanent harbour works' in this case are the jetties at the entrance of the Sabine River into the Gulf of Mexico." *Texas v. Louisiana*, Report of Special Master Van Pelt of October Term 1974, at 29.

It is clear, however, that only that portion of the harborwork that has a low-water line may be treated as part of the coast. Louisiana sought a more expansive interpretation in its tidelands dispute with the United States. The Corps of Engineers maintains dredged channels in the nearshore shallow waters of the Gulf of Mexico to permit oceangoing vessels to enter Louisiana's ports. These channels are marked on navigation charts but are literally holes in the seabed rather than structures either on or above it. (Figure 29) The state contended that such channels "form an integral part of the harbour system," are maintained at substantial public expense, and should, therefore, be considered harborworks.

Louisiana reasoned that Article 3 dictates use of the low-water line "except as otherwise provided" and that Article 8 provides otherwise in the case of harborworks. The United States took the position that Article 8 envisioned only raised structures. The Court accepted that latter interpretation, explaining that Article 8 does not provide an alternative "method" of determining the baseline, as the inland water articles do, but

21. Although Pearcy suggested that the Zuniga jetty did not affect the limit of the territorial sea, that conclusion seems to have been based on the assumption that 3-mile arcs constructed from it would have been shoreward of similar arcs drawn from other coastal features, not because its use would be inappropriate. 4 Whiteman, *Digest of International Law* at 263 (1965).

22. The parties disagreed on whether this feature was also appropriate for use as a headland delimiting the inland waters of San Diego Bay, a question put to Special Master Arraj and, upon his recommendation, resolved in favor of the state in litigation that also involved the issue whether California's piers should be treated as part of the coast line.

23. In the case of intentional gaps, the result might be explained because the jetty itself is typically continuous, whether above or below water, or because the gaps represent a *de minimus* break in the structure as a whole. In either case, the result appears to represent a common sense interpretation of Article 8.

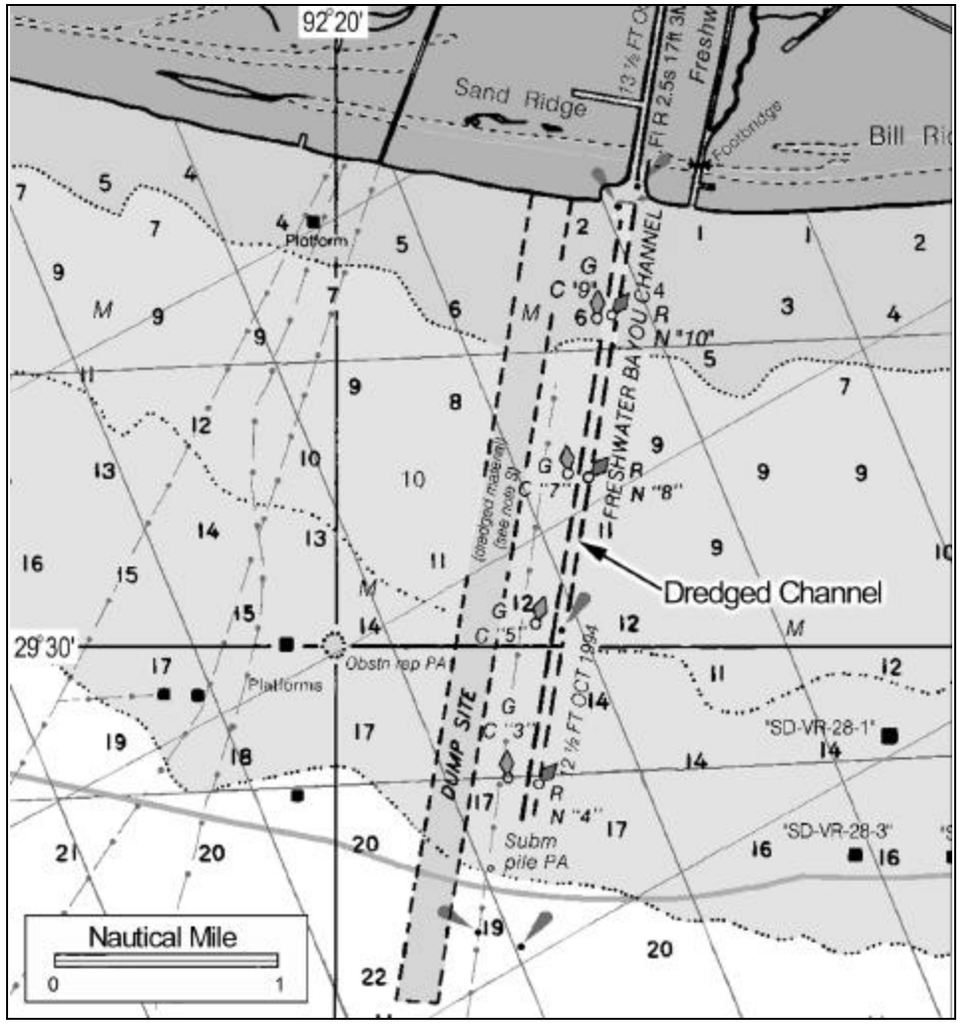

Figure 29. Louisiana coast. This dredged channel off the Louisiana coast is not a harborwork for coast line purposes. (*Based on NOAA Chart 11349*)

merely identifies specific structures, the low-water line on which is to be considered part of the coast. *United States v. Louisiana, supra*, 394 U.S. at 38. According to the Court, "[a]s part of the coast, the breadth of the territorial sea is measured from the harbor works' low-water lines, attributes not possessed by dredged channels." *Id.*[24] The Court reiterated its

24. The logical extension of Louisiana's argument would have required that dredged channels, as part of the coast line, also qualify as headlands to juridical bays, a conclusion that not even the state was willing to assert, but that did not go unnoticed by the Court. *Id.* at 38 n.44.

understanding that the term "harborworks" was meant to include structures and installations that are part of the land and in some sense provide shelter. *Id*. at 36-37.

Other features have also been rejected as potential harborworks. The federal government has taken the position that as a general rule it will not use groins as base points for delimiting the territorial sea but will consider evidence that a particular groin is in fact permanent. Coastline Committee Minutes of December 21, 1976. (Although the accretion that accumulates because of the groins is always used. *Id.*) California has presented such evidence, and eight groins along its shores are now treated as part of the coast. Coastline Committee Minutes of December 17, 1976, and February 25, 1977. Beazley is of the opinion that "structures such as cooling water intakes or sewage outfalls" may not be considered, even though they may lie above mean low water. The United States has not used such structures, or similar pipeline protective works, as part of the coast line. Coastline Committee Minutes of December 1, 1976.

Piers Contrasted

The most intense litigation under Article 8 has concerned the potential use of piers as part of the baseline. California, with few natural harbors but numerous coastal piers that are said to substitute, contended that such piers are in fact harborworks and base points. (Figure 30) The Supreme Court's eventual conclusion was that they do not qualify, but the contention was too significant to dismiss with that conclusion alone.

As usual, the analysis of both parties began with the meaning of the 1958 Convention. California offered the testimony of the distinguished jurist Philip C. Jessup, one-time member of the International Court of Justice. Judge Jessup testified that, but for piers of many miles length, the Convention's drafters intended to include all permanent structures erected on the coast and jutting out to sea as base points for territorial sea delimitation. For the United States, Mr. Elihu Lauterpacht, Queen's Counsel, offered contrary evidence. Following extensive inquiry, which included comparisons of the French and English texts of the "legislative history" and explanatory notes to the Convention, the special master concluded that "[w]hen all is said and done it seems clear that the drafters of the Geneva Convention and the commentators simply did not think of or consider the question of artificial piers erected on the open coast and not directly connected with any conventional harbor." *United States v. California*, Report of the Special Master of August 20, 1979, at 28.

The parties did not, of course, base their cases entirely upon the hope of proving original intent. Each side also offered substantial evidence that

Figure 30. Ocean Beach Pier, San Diego, California. Piers on pilings are not part of the coast line for purposes of delimiting maritime zones. (*Photo by Donna M. Reed*)

piers did, or did not, fit the description contained in Article 8. Their physical construction, use, and effect on the natural coastline were all emphasized.

All 15 piers at issue in the litigation have similar characteristics. All are built on pilings, stand some distance above the water, have a continuous flow of water beneath them, and are relatively permanent structures. All are permanently attached to the mainland. None is closely associated with a natural harbor, or haven for vessels. Because both parties had previously recognized certain artificial structures as appropriate base points, typically jetties and groins, the object here was to prove the similarities and differences between such structures and the piers at issue.

The federal government emphasized the absence of a continuous low-water line that could be used as a baseline. The California piers, as noted, are constructed on pilings. An expert for the United States, Dr. Weggel, estimated that 90 to 98 percent of the space beneath such a pier is water.[25] In its 1969 decision in *United States v. Louisiana*, the Supreme Court had refused to accept dredged channels as harborworks for that very reason.[26]

25. Transcript of Denver hearings at 402-403.

26. 394 U.S. at 36-40.

California countered with the contention that neither the artificial structures already accepted by the Court nor the natural sand beach itself has a completely continuous low-water line.[27]

The United States believed that using the pilings as base points created an unprecedented anomaly. Pilings would have to be considered either individual artificial islands, a conclusion that would seem to prohibit their use under Article 10, or artificial limits to an inland water body, the area beneath the pier. Each seemed, at the time, an equally unlikely conclusion. Nevertheless, the special master recommended that "the discontinuous nature of the low water line does not affect whether or not the structure is to be considered a part of the coast." Report at 24. In so doing he reasoned that "[i]f the structure is part of the coast, then the perimeter of the structure, as delineated by a series of lines drawn tangent to, and connecting, the outer edges of the pilings, constitutes the coast line." *Id*.

Although we are not now faced with the issue, because the master ultimately ruled for the federal government on other grounds and his conclusions were adopted by the Court, there appears to be something wrong with the suggestion that the waters beneath the California piers might be inland waters although no more landlocked or protected than the immediately adjacent open sea.

Alternatively, the United States argued that unlike jetties and groins, the California piers provided no coast protective function. They neither create an artificial harbor that would provide shelter during weather at sea, such as the harborworks at San Pedro, nor do they protect the beach from erosion, as do the groins and jetties considered by the Court along the Louisiana and California coasts.

There was little or no disagreement on this point. The coastal experts concurred that not only did the piers have little or no effect on the natural shoreline, they were specifically designed to avoid such effects. And the master so found, Report at 21, as did the Supreme Court.[28]

Finally, the United States contended that the piers might not meet the permanency requirement of Article 8. In fact, one of the piers originally claimed by the state, at El Segundo, was destroyed during the litigation. Nevertheless, the special master, who had visited most of the piers with counsel for the parties, concluded that they were indeed permanent for purposes of the litigation.[29]

27. William Herron, a coastal engineer, testified that even sand beaches are approximately 20 percent voids. Transcript of Denver hearing at 361.

28. *United States v. California*, 447 U.S. 1, 4 (1980). Judge Jessup testified that the piers might be said to have a coast protective function in that they provided a radar target and might, thereby, prevent vessels from running into the shore. Transcript of New York hearings at 33. The state never seriously pursued that theory.

29. Report at 27. The piers are probably as permanent as the jetties and groins previously accepted as Article 8 harborworks.

California took a different approach to the proof. It emphasized that along the California coast, largely barren of natural embayments, the piers at issue serve as artificial harbors and thereby qualify as harborworks and base points. As might be expected, the evidence on this point differed from pier to pier. Some had been constructed by oil companies for use by vessels supplying offshore rigs. At least one had a davit for launching private pleasure craft. But the majority had been constructed, and continue to be used primarily, as recreation piers for fishing and promenading. They were acknowledged by the state's witness not to provide shelter for vessels.[30] Nor are they listed as harbors in the Coast Pilot.[31] From this the master concluded that the volume of shipping handled by the piers did not justify assimilating them to harborworks. Report at 29.

In sum, the master concluded that the history of the Convention provided no guidance on the pier issue and rejected both parties' theories on whether piers qualify under the language of Article 8. Nevertheless, he recommended that they not be treated as base points. This conclusion was reached by what the master characterized as a "practical" approach to the issue. Report at 26. He cited as his guide the notation of McDougal and Burke that "[t]he principle policy issue in determining whether any effect for delimitation purposes ought to be attributed to other formations and structures is whether they create in the coastal state any particular interest in the surrounding waters that would otherwise not exist, requiring that the total area of the territorial sea be increased."[32] The master then concluded that California's piers create no such interest and recommended against their use as base points. Report at 29.

California took exception to that recommendation before the Supreme Court. However, the Court agreed that the piers are neither coast protective works nor harborworks and adopted the position of the master.[33]

30. Denver Transcript at 341.

31. *Id*. at 407. (Federal witness)

32. McDougal and Burke, *The Public Order of the Oceans* (1962) 387-388, cited in the Report of the Special Master, at 26.

33. *United States v. California*, 447 U.S. 1, 4-6 (1980). See also, final decree at 449 U.S. 408 (1981). The federal government has traditionally declined to use piers as base points. See Minutes of the Coastline Committee of August 30, 1970; October 26, 1976; December 17, 1976; and December 21, 1976. The Committee specifically considered the possible use of the California piers in response to a petition from the state and declined to alter its previously established practice. Minutes of December 17 and 21, 1976. In 1959 the geographer of the Department of State wrote that "[t]he outermost of certain permanent installations associated with port facilities are construed as parts of baselines, and the territorial sea is measured from them. Piers and breakwaters are the most common examples." Pearcy, *Measurement of the U.S. Territorial Sea*, Department of State Bulletin, June 29, 1959. That statement encouraged California until, during a deposition taken for purposes of the litigation, Dr. Pearcy explained that the passage did not refer to open-pile piers such as those along the California coast.

Commander Beazley has taken the position that certain English piers, specifically designed for the berthing of ships, ought to be treated as base points. Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation* (The Hydrographic Society, Spec. Pub. No. 2, 2d ed. rev. 1978) at 23. It is not clear whether the piers to which Beazley refers can be distinguished from those along the California coast. It is clear that the Supreme Court has rejected their use as base points in the United States.

Existing Supreme Court decisions probably do not exhaust the possible types of structures that might be argued to constitute part of the baseline. Bridges, for example, may raise questions. In the article just mentioned, Pearcy concluded that "[b]ridges along the periphery of a coast, such as those connecting the keys on U.S. Highway No. 1 between Miami and Key West, are not covered by a law-of-the-sea convention . . . ."[34] Since that article was written, however, the Court has twice considered the status of bridges.

The first such occasion arose in *United States v. Florida*, Number 52 Original, and involved the very series of bridges cited by Pearcy. The special master in that action had recommended that Florida Bay, bounded on the north by the Everglades and on the south by the Florida Keys, is a juridical bay. (Figure 31) In fact, neither party had taken that position in the proceedings before the master and it could only be reached upon the assumption that the Keys constitute, at least for these purposes, part of the mainland of Florida.[35] The Florida Keys are clearly so widely separated, including one gap of 7 miles, that unless the bridges are also considered extensions of the mainland, the line of Keys would not qualify as the headland of a bay.

The United States took exception to the recommendation and the Court, noting that the issue had not been presented before the master, returned it for further proceedings. At that stage the State of Florida accepted the federal position and a final decree was ultimately entered that did not include Florida Bay as inland water. Implicit in that determination is the assumption that the bridges connecting the upper Florida Keys are not part of the coastline. If they were, Florida Bay would, without question, qualify as a juridical bay.[36]

The question of bridges also arose in the *California* piers case. One of the structures at issue there was not technically a pier but a bridge connecting an artificial island to the mainland. The island itself was built to accommodate offshore oil drilling. It is, in fact, the platform from which a large number of producing wells have been directionally drilled. (Figure 32) Although the island, known as Rincon, is a substantial structure many acres in size, the state acknowledged that it could not be treated as part of the baseline because it is man-made. Nevertheless, the state argued that the bridge to the island should be considered a harborwork on the same basis

34. Pearcy, *supra*, at 4-5.

35. The Supreme Court itself had previously ruled that a bay is an indentation into the mainland and may not be formed by a string of islands unless those islands are so aligned that they may be construed to constitute an extension of the mainland. *United States v. Louisiana*, 394 U.S. 11, 60-66 (1969).

36. It must be emphasized that the issue was never argued before the master or the Court. It reached the Court on a stipulated settlement by the parties after Florida determined to accept the federal position. Nevertheless, the final decree entered by the Court can be said to be consistent only with the understanding that these bridges, at least, are not part of the coast line of the United States.

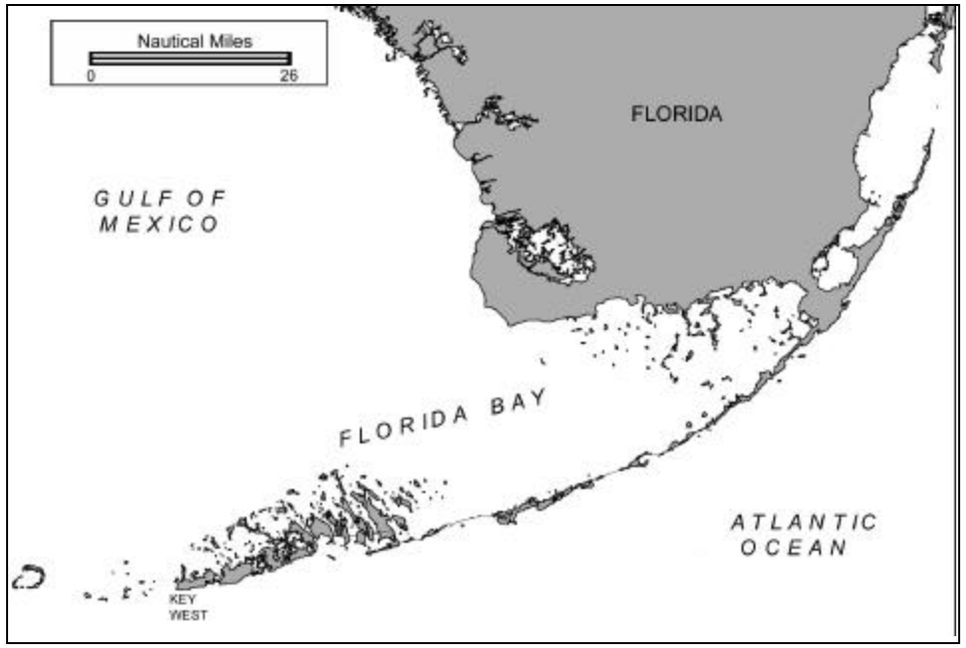

Figure 31. Florida Bay, Florida. The "bay" is formed by the mainland and islands connected by bridges.

as the coastal piers in contention. Both the master and the Court rejected the state's arguments. Neither Rincon Island nor the pier connecting it to the mainland is to be considered a harborwork.[37]

The Florida and California bridges are much like the piers now rejected by the Court as base points. However, more substantial structures might present a more difficult case. For example, it would appear that certain causeways more closely resemble the jetties that have been accepted as part of the coast line. We might expect that they will be proposed for consideration either as base points themselves or as part of the mainland for purposes of creating headlands to bays.

Spoil Banks

The treatment of artificial spoil banks became a difficult issue in *United States v. Louisiana*, where a number of "fingers" of land had been created by dredges digging channels for offshore oil equipment to follow through the shallow waters of the Mississippi River delta and the adjacent Gulf. (Figure 33) The United States pointed out that the banks were not useful, had not

37. *United States v. California*, 447 U.S. at 7-8.

Figure 32. Rincon Island off the coast of California. Neither the island nor the bridge to the mainland (left foreground) is part of the legal coast line. (*Photo by C. Wishman*)

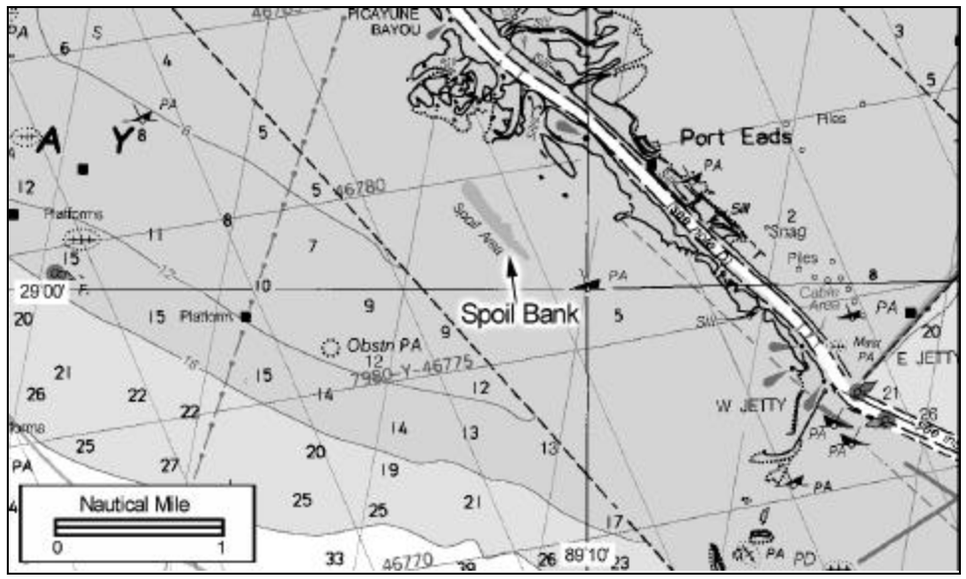

Figure 33. East Bay, Louisiana. Spoil banks are not part of the coast line. (*Based on NOAA Chart 11361*)

been authorized, and were likely to be short-lived. It contended, therefore, that the features should not be treated as part of the coast line. With respect to spoil attached to the mainland, the Court was not persuaded, noting that, "[i]t suffices to say that the Convention contains no such criteria." *United States v. Louisiana*, 394 U.S. 11, 41 (1969).

Islands

The coast line of an island is determined in exactly the same way as that of the mainland. Each island is generally understood to generate its own territorial sea and other maritime zones.[38] (Figure 34) There is, however, some controversy as to what features qualify as islands. Article 10 of the Convention on the Territorial Sea and the Contiguous Zone provides that "[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide."[39] The definition contains three elements that have been the subject of litigation. Those will be discussed in turn. But first we note the particular significance of islands to the maritime boundary question.

Dr. Robert Hodgson, the late geographer of the United States Department of State, estimated that there are "more than one-half million pieces of distinctly subcontinental land territory defined generally as islands, with a combined area worldwide exceeding 3,823,000 square miles."[40] Although many of these are within the territorial sea of a continent or other islands, many are not and generate maritime zones far larger than the area of the islands themselves. For example, an island of the smallest possible size would possess a territorial sea of 28.3 square miles

38. We say "generally" because there may be two exceptions to this proposition. First, islands may occur within inland waters. The fact that such islands do not have their own territorial seas is apparently the reason for the wording of Article 10 (2) of the 1958 Convention, rather than the simple statement that all islands have their own territorial seas, as proposed by the International Law Commission. McDougal and Burke, *supra*, at 397.

Second, although it is still true that all islands lying outside inland waters may generate territorial seas, Article 121(3) of the 1982 Law of the Sea Convention provides that more seaward maritime zones are not created by mere "rocks."

The existence of territorial seas surrounding islands has not always been taken for granted. When the American vessel, *The Anna*, was seized by a British privateer more than 3 miles from the mainland coast but within 2 miles of an uninhabited island off the Mississippi River delta, the British admiralty court recognized a territorial sea around the island, not wholly in its own right but because it formed a "portico to the mainland." *The Anna*, 5 Rob. 373 (1805). Eventually, however, all islands were understood to generate maritime zones. 1 O'Connell, *supra*, at 185. The United States has followed this practice consistently, most often in distinguishing this method of treating islands individually from alternative archipelagic proposals. For histories of American practice with respect to islands, and citations to official government statements and judicial decisions, see *United States v. California*, Report of the Special Master of October 19, 1952, at 10-12; 4 Whiteman, *supra*, at 293; 1 Shalowitz, *supra*, at 161, 206, and 228; and Symmons, *supra*, at 2 and 84-88. British practice is in accord where islands lie outside the straight baseline system established by the Territorial Waters Order in Council of 1964. 1 O'Connell, *supra*, at 187-188; Symmons, *supra*, at 89. See also, Bowett, *supra*, at 16.

39. The Supreme Court has also adopted this definition. *United States v. California*, 382 U.S. 448, 449 (1965).

40. Hodgson, *Islands: Normal and Special Circumstances*, in *Law of the Sea: The Emerging Regime of the Oceans* 137 (John K. Gamble and Giulio Pontecorvo eds. 1974).

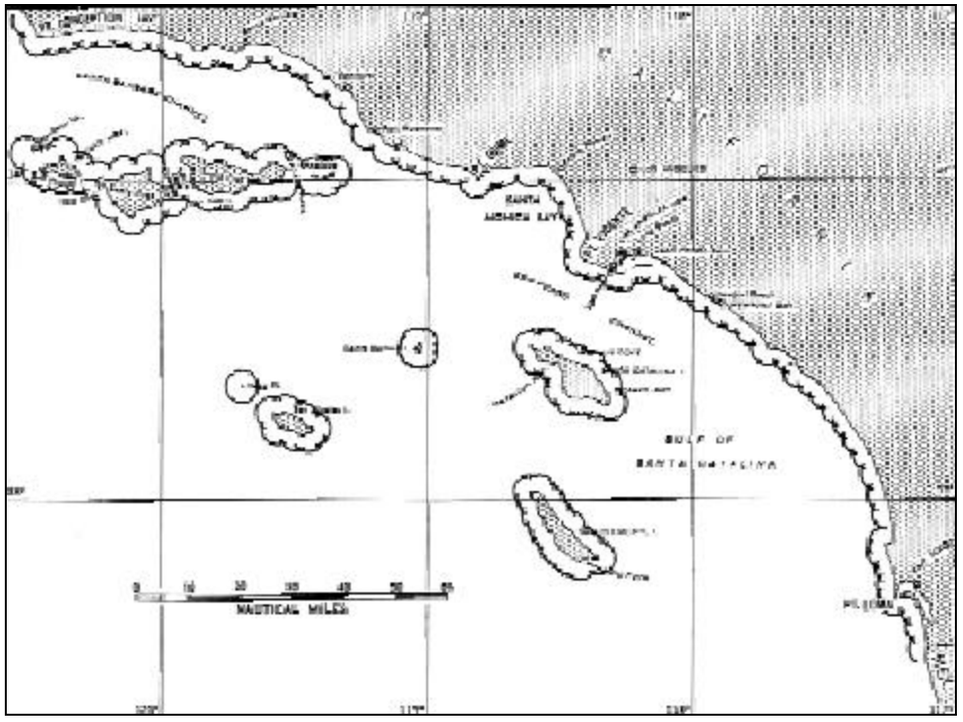

Figure 34. California mainland and islands with 3-mile maritime boundaries. The boundaries are constructed by an envelope of arcs from the coastlines. (*After I Shalowitz, Figure 13*)

even with a minimum 3-mile claim.[41] (Figure 35) According to Dr. Hodgson, a single minor island may command an exclusive economic zone of 125,000 square miles of adjacent ocean and seabed.[42] What, then, qualifies as an island?

Naturally Formed

To begin, an island must be "naturally formed." It is universally understood that artificial islands do not qualify as base points from which the standard maritime zones are delimited.[43] It is less clear just what qualifies as a natural island.

41. Department of State Publication, *Sovereignty of the Seas* 8 (1969).

42. Hodgson, *Islands . . . . supra*, at 68.

43. This is not to say that a state may not assert sovereignty over artificial islands or installations or even create limited safety zones around them. See: Law of the Sea Convention, Article 60; Papadakis, *The International Legal Regime of Artificial Islands* (1977); and Bowett, *supra*, at 5. McDougal and Burke point out that there are substantial policy reasons for treating the waters among houses constructed on piles on the ocean floor as inland (which would, presumably, result in the recognition of adjacent territorial seas) but even they do not suggest that the Convention permits that result. McDougal and Burke, *supra*, at 390.

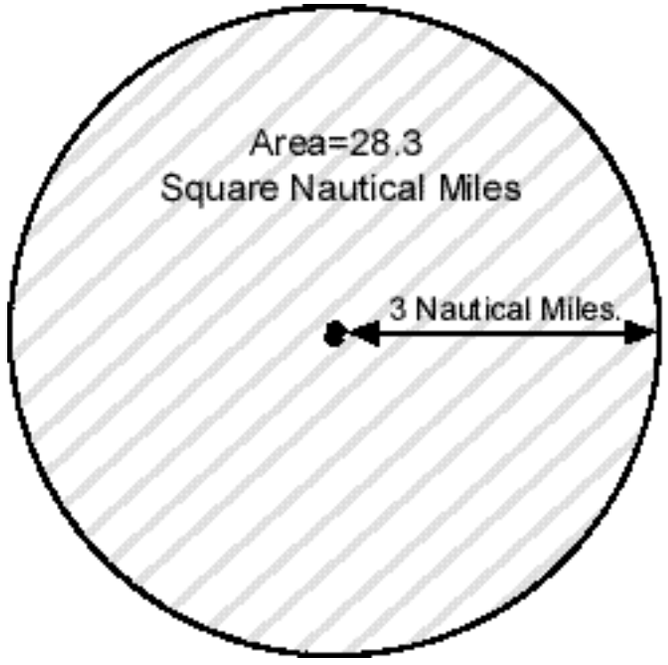

Figure 35. Insignificant islet with a 28-square-mile maritime zone.

O'Connell notes that the term "naturally formed" is ambiguous and may refer either to the materials used in construction or to human intervention. O'Connell, *supra*, at 196. However, Symmons states that the usual view is that there must have been no human intervention whatsoever for a feature to attain insular status. Symmons, *supra*, at 36. That understanding would seem to be consistent with the legislative history of the provision.[44]

The term "naturally formed" was not part of the originally proposed definition of an island. Early drafts of the article would have included among "islands" those features composed of natural materials even though placed on the seabed by man. *Id.* at 31-32.[45] The American delegation expressed concern that governments might seek to extend maritime jurisdiction, and, thereby encroach on the high seas, by creating offshore islands with landfill. To preclude that possibility, the "naturally formed" requirement was added.[46] From this, we can conclude that the provision

44. Commander Beazley seems to agree that a structure of man-made materials does not qualify as an island but is less clear as to whether "reclaimed land" is precluded. Beazley, *supra*, at 24.

45. This was consistent with the Harvard Research Group's draft proposal. McDougal and Burke, *supra*, at 391.

46. *Id*. at 4 and 36.

must be interpreted to deny insular status to any feature that owes its existence to the direct intervention of man.[47]

United States practice has been consistent with this concept. In an early decision, a federal court determined that the territorial sea did not extend from a beacon built on a permanently submerged reef.[48] More recently, the Supreme Court noted that Rincon Island, a substantial artificial island constructed as a base for offshore petroleum drilling, does not qualify as an island because it is man-made.[49] The Coastline Committee has also declined to make use of a lighthouse on a submerged feature as a base point for delimiting the territorial sea of the United States.[50] The Supreme Court has established that spoil banks created by dredging channels through coastal waters are not part of the baseline, if severed from the mainland, because they are not naturally formed.[51]

The difficulty of distinguishing spoil banks from natural islands, especially some years after their creation, presents a factual problem. Dr. Hodgson suggested that the provision "naturally formed" might be interpreted as distinct from "naturally created."[52] Under that interpretation, an aging spoil bank whose present "form" is more properly attributable to natural processes over the years might become an appropriate base point.

Although a possible interpretation, this suggestion is not consistent with the history of Article 10 or Supreme Court precedent. The better approach would seem to be in equating "formed" with "created" and

47. The qualification that intervention be "direct" is not intended to exclude features that rise from the seabed as a result of natural processes but through the influence of a nearby man-made feature. For example, man-made jetties commonly cause the subsequent accumulation of accretion through what might be considered natural processes. If an artificial structure encouraged the growth of an insular feature, not attached to the structure itself, it is not clear that Article 10 would preclude the use of that insular feature as a base point from which to measure the territorial sea. Churchill and Lowe ask a similar question but do not suggest that the Conventions provide an answer. *The Law of the Sea* 37 (1983).

48. *United States v. Henning*, 7 F. 2d 488 (S.D. Ala. 1925).

49. *United States v. California*, 447 U.S. 1, 5 (1980). The matter came up in the phase of this case in which California sought to have coastal piers included as base points for measuring the territorial sea. One of the "piers" of interest to California is actually a bridge connecting Rincon Island to the mainland. Although the state argued that the bridge should be used as a base point, it recognized that under no circumstance could the man-made island be used; and the latter question was not an issue in the case. See: *United States v. California*, Report of the Special Master, August 20, 1979, at 29.

50. Minutes of August 10, 1970. The Committee has, however, used the seaward tip of the Zuniga jetty, at San Diego Bay, as a base point. That structure may appear to be an artificial island but is in fact merely the seawardmost extension of a continuous harborwork that is connected to the mainland. Where it appears above water it qualifies as part of the coast line. The Supreme Court has also ruled that this structure forms the eastern headland of San Diego Bay. *United States v. California*, 449 U.S. 408 (1981).

51. *United States v. Louisiana*, 394 U.S. 11, 41 n.48 (1969). In this instance the Court was specifically referring to banks that extend only above mean low water, but the "naturally formed" requirement applies equally to Articles 10 and 11 and there is no room to argue that a spoil bank that extends above high water should be accorded different treatment once severed from the mainland.

52. Hodgson, *Islands . . . , supra*, at 13.

establishing the juridical status of such features at the time of their creation.[53]

Areas of Land

The second requirement of island status is that the formation consist of "land." That is, it must be composed not only of natural materials, as already discussed, but those materials must be in the nature of *terra firma*.[54]

The question arose in *United States v. Alaska*, Number 84 Original, when evidence indicated that a natural formation off the north slope of Alaska, which the state argued is an island, was found by the federal government to be composed of alternating layers of gravel, clear ice, and ice mixed with gravel. The formation, known as Dinkum Sands, varies in elevation but may occasionally appear above mean high water, and therefore arguably qualifies as an island, only through the introduction of this "excess" ice. The federal government argued that the formation's elevation could not be calculated, for island qualifying purposes, without discounting elevation attributable to that ice.

Professor Symmons, testifying for the United States, explained that "land . . . is something which is formed of truly terrestrial components such as sand, rock, coral, and truly organic compounds of that nature."[55] From this he concluded that "the mention of 'land' in Article 10 of the 1958 Convention implies that an island for the purposes of that article must be composed of wholly terrestrial or organic substances."[56]

Other commentators are in agreement. Dr. Hodgson maintained that islands must be made of dirt, rock, organic matter, or a combination thereof.[57] Likewise, Lumb has concluded that "[t]he areas must be a naturally formed area of land (rock, sand etc.)."[58]

53. The Coastline Committee determined early in its existence that spoil banks would not be used as base points but recognized that occasionally it is difficult to determine from charts whether a feature is natural or man-made. It decided not to use features marked as spoil or that are obviously spoil because of location or description. However, if one cannot reasonably assume that a feature is spoil, it has been treated as natural. Minutes of August 3, 1970. Presumably, if a particular feature becomes the subject of litigation, its status will be a question of fact, whatever its treatment by the Committee.

54. Symmons, *supra*, at 21.

55. *United States v. Alaska*, Number 84 Original, transcript of proceedings before the Special Master, at 1118.

56. *Id.* at 1099.

57. Hodgson, *Islands: Special and Normal Circumstances*, Gambell & Pontecorvo (eds.) *Law of the Sea: Emerging Regime* 148 (1974).

58. Lumb, *The Law of the Sea and Australian Off-Shore Areas*, 2d. ed. 1978, at 14. See also: Papadakis, *The International Legal Regime of Artificial Islands* 93 (1977); and Johnson, *Artificial Islands*, 4 International Law Quarterly 203 at 213-214 (1951).

Ice has been consistently distinguished from land in a slightly different, but closely related, law of the sea context. It seems to be agreed that ice floes, or ice islands, are not treated as islands and do not, therefore, generate maritime zones.

According to Pharand, the 1958 Conventions "make it quite clear that an island must be land before it can be legally considered an island."[59] Teutenberg suggests agreement when he asks, "Can one equate *'terra firma'* with *'glacies firma'*? . . . the overriding conclusion seems to be that sea ice, pack ice, ice keels etc., which are constantly changing in appearance and position in the Arctic basin, do not have the permanence and stability required by international law in order to be the object of sovereign possession — in the same way as sovereignty over land. It would be illogical to claim national, permanent sovereignty over areas which can 'melt' when the weather gets warmer."[60]

In the Alaska litigation the parties conducted a joint scientific survey to collect evidence on the matter. The survey was composed of two inquiries. The first was to establish the surface level of the feature with respect to a theoretical horizontal plane. The second was to establish the mean high-water datum with respect to that same plane. Both inquiries were conducted and combined to determine whether the surface lay above mean high water. That process, and its product, will be discussed below. In sum, it was learned that the surface did not generally extend above mean high water and the feature did not meet the definition of an island.

Nevertheless, both parties challenged various conclusions of the survey. Alaska contended that errors in calculating the high-water datum resulted in an improperly high determination, prejudicing the state's position. In response the United States contended that layers of ice and ice mixed with gravel existed below the measured surface, and elevation attributable to the ice should be deducted before calculating the feature's height. (Figure 36) Dr. Erk Reimnitz, testifying for the United States, explained that Dinkum Sands, as measured, is not composed entirely of "land" but includes up to 50 percent ice that melts during the summer. *United States v. Alaska*, Report of Special Master Mann of March 1996, at 270. The "ice collapse" causes the feature to "slump" in elevation. *United States v. Alaska*, 521 U.S. 1, 23 (1997).

59. Pharand, *The Legal Status of Ice Shelves and Ice Islands*, 10 C. de D. 461 (1969) at 174.

60. Teutenberg, *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions* 42 (1984). On this same subject see Gidel, *Le Droit International Public de la Mer*, BK IV, Pt. 3 at 530 (1934). O'Connell points out that with the advent of submarines that are capable of transiting beneath pack ice in the Arctic one may ask whether the argument for treating ice as water, rather than land, has not been further strengthened. 1 O'Connell, *The International Law of the Sea* 198 (1982),

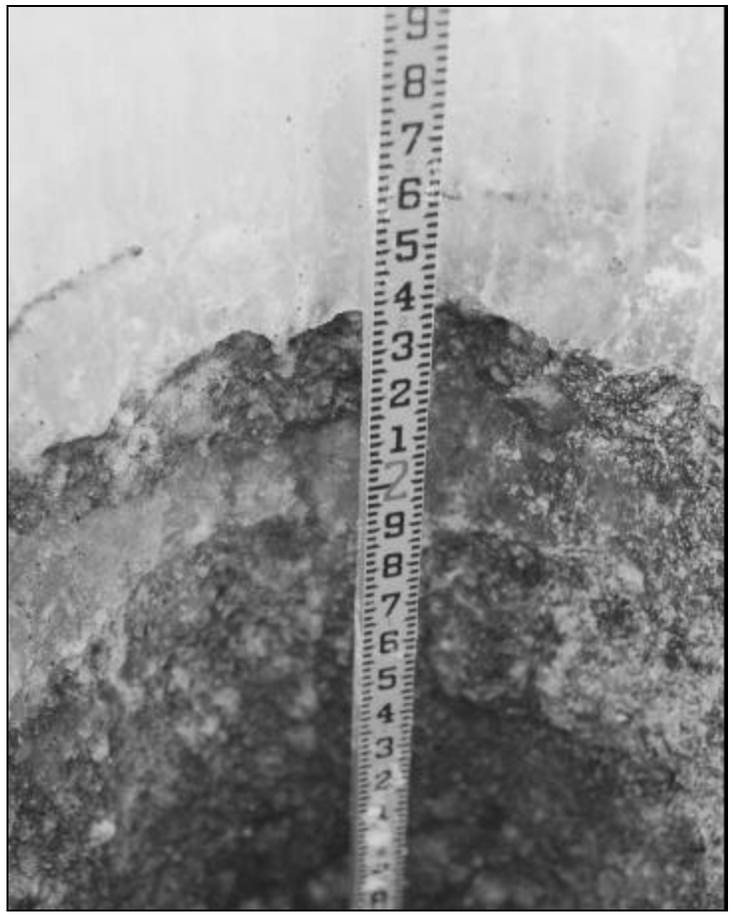

Figure 36. Ice/gravel mix in subsurface of Dinkum Sands, Alaska. The U.S. contended that ice should be discounted in calculating the feature's elevation. (*Photo by Dr. Erk Reimnitz*)

As it turned out, the "composition" question did not affect the outcome of the Dinkum Sands issue and, therefore, the master and Court did not have to make detailed determinations regarding the extent to which ice contributed to the feature's elevation.[61] However, the master provided insights that may prove helpful if the issue arises in a future case. He concluded that difficulties in measuring seasonally melting ice would make the federal proposal impractical, and recommended that the Convention be

61. The special master rejected Alaska's proposed modifications to the mean high-water calculation from the joint survey and found that Dinkum Sands is frequently below mean high water and is, therefore, not an island as a matter of law, even treating its ice content as land. Report at 310. The Supreme Court agreed. *United States v. Alaska, supra*, at 32.

read to assimilate all submerged ice to land. Report at 275. At the same time he emphasized that measurements made early in the year, and more likely to be affected by ice in the structure, "cannot be relied upon as representative of the whole year," Report at 275, and that late season measurements must be included to obtain a "fair picture" of Dinkum Sands' height.

Although the Supreme Court noted the ice content of Dinkum Sands, and the process of "ice collapse" as part of the explanation for the feature's regular change in elevation, the Court did not have occasion to comment on the United States' theory that it should be discounted in determining elevation or the master's recommendation on that matter. Whether the Supreme Court would treat ice as land, for purposes of defining an island, will have to await another case.

Above the Water at High Tide

This final element of insular status actually raises two distinct issues. The first, and more obvious, is the requirement that the formation exist above the specified tidal datum, high tide. The second, and possibly less apparent, is the need for some degree of permanence in elevation.

The present language of Article 10 is the product of evolution. The relevant portion of the 1930 draft provided that an island must be "permanently above high water mark."[62] The 1956 International Law Commission draft qualified that provision slightly to read "which in normal circumstances is permanently above high-water mark."[63] This amendment was thought necessary so as not to disqualify features that stood above high water except during extraordinary events, such as hurricane-driven seas. Yet, during the negotiations that led directly to the 1958 Convention, the United States suggested that the provisions "in normal circumstances" and "permanently" were conflicting and should be deleted.[64] They were.

There is no international consensus on the definition of "high tide," as that term is used in Article 10. It could refer to the highest astronomical tide, mean high-water spring tides, mean high-water neap tides, mean sea level, mean higher high water, or probably a number of others.[65] The British have argued that mean high-water spring tides should be used. The French

62. United Nations Document A/C.6/L.378 at 47.

63. *Id*. at 44.

64. Symmons, *supra*, at 43.

65. 1 O'Connell, *The International Law of the Sea* 173 (1982).

have said that for insular status a feature should remain above all stages of the tide, including the highest annual tide mark, the equinoctial tide.

The controversy, of course, is more theoretical than practical, as with the problem of defining the low-water line. It arises primarily because there is no internationally agreed-upon charting practice. The obvious solution is simply to adopt the high-water datum employed by each sovereign in its official charting capacity. That line has been accepted by all parties to the tidelands litigation in the United States. The National Ocean Service uses the mean of all high waters over a specific 19-year period (National Tidal Datum Epoch) to construct the "high-water line" for the United States. That line is reflected on its charts, and a feature that is entirely surrounded by water, and which is shown to have a high-water line, is treated as an island.[66]

More difficult is the question of permanence. The matter arose in *United States v. Alaska* when the elusive "Dinkum Sands" was determined to have existed above high water for some period in the past, and possibly on occasion in recent years, but is thought to spend most of its life below high tide.[67] (Figure 37)

As noted above, an early draft of Article 10 included permanence above mean high water as a requirement of insular status. That term, along with "in normal circumstances," was dropped at the suggestion of the delegate from the United States. According to Professor Symmons, testifying for the United States before the special master in the Alaska case, this change was merely a "drafting, tidying up process,"[68] which did not produce a substantive change in the Convention's definition or in customary international law.[69]

Dr. Symmons's interpretation is consistent with that of two influential members of the International Law Commission, which had produced the

66. An interesting question may arise as to when in the daily tidal cycle one determines whether a feature is an island or part of the mainland. Article 10 might be read to suggest that insular status is determined at the time of mean high water. If, at that time, a naturally formed area of land extends above the sea and is surrounded by water, it is an island. Consider, however, an extensive sandbar, which lies below water at high tide but connects a permanently dry feature to the mainland at low water. If the status of the feature is determined at low water, it is a peninsula. If at high water, it is an island. Its ultimate characterization could affect title to substantial areas. Notwithstanding the possible contrary interpretation of Article 10, Symmons opines that the feature described is not an island but part of the mainland. Symmons, *supra*, at 41. That would seem to be the proper conclusion. It may be supported by the provision of Article 10 that an island must be "surrounded by water." This provision might be read to indicate that an island must be surrounded by water at all stages of the tide, precluding the treatment of the seaward portion of this peninsula as an island. That interpretation would be consistent with the permanency of elevation requirement discussed below.

67. Because Dinkum Sands lies more than 3 miles from the mainland coast, or the coast of any true island, it could serve as a base point from which to measure Alaska's Submerged Lands Act grant, only if it were an island. Extending above mean low water, and thereby qualifying as a low-tide elevation, would not have been sufficient. See Article 11 and discussion below.

68. *United States v. Alaska*, Transcript of proceedings before the Special Master at 1111.

69. *Id.* at 1135. See also: Symmons, *supra*, at 23, 25, and 37.

Figure 37. Alaska expert, Claud Hoffman, claiming Alaskan "sovereignty" over Dinkum Sands. (*Photo by Richard Davis*)

draft articles for consideration.[70] It is also consistent with the understanding of the British delegate to the Conference, and later judge on the International Court of Justice, Mr. Fitzmaurice, who commented on islands immediately after the Conference, saying "in the absence of any special agreement to the contrary, any natural formation (even a rock) permanently (even if just visible at all states of the tide) generates a territorial sea."[71] More recently, O'Connell has discussed the long trend

70. Symmons, *supra*, at 42.

71. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 I.C.L.Q. 73, 85 (1959). Other commentators have emphasized the need for permanence. See: Fulton, *The Sovereignty of the Sea* 640 (1911); and Boggs, *Delimitation of Seaward Areas Under National Jurisdiction*, 45 Am.J.Int'l L. 256, 263 (1951).

toward the requirement of permanence, beginning with the decision in *Soult v. Africaine*, 22 Fed. Cases 13179 (D.S.C. 1804), with no hint that that trend had been suddenly reversed with the 1958 Convention.[72]

Vertical or Horizontal Migration

The Convention's history was the basis for part of the federal legal argument in *United States v. Alaska*. The areas of Dinkum Sands that rise above high-water datum, if any, are acknowledged to meander horizontally along the extensive subsurface shoal and also vary in vertical elevation, either because of ice collapse, as discussed above, or through traditional erosion, or both.

The parties put on extensive evidence to document Dinkum Sands' existence above or below water over many years. Some was tide controlled and some was not. It is fair to say that neither side could prove that Dinkum Sands has consistently existed either above or below mean high water. Thus, the question became – does Article 10 include features that regularly slump below mean high-water datum? The United States argued that to qualify as an island a feature had to permanently remain above mean high water.

Special Master Mann adopted something just short of the federal position. He concluded, as a matter of law, that Article 10 requires "general," "normal," or "usual" elevation above mean high water. He found, as a matter of fact, that "Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island." Report at 309.

Alaska took exception to that recommendation and put the issue before the Supreme Court. The Court recognized the master's interpretation as being more lenient than that proposed by the federal government ("generally," "normally," or "usually" as opposed to "permanently" above mean high water). *United States v. Alaska, supra*, at 24. It went on to note that the history of Article 10 supports a standard at least as stringent as that adopted by the master. *Id.* at 25. The Court noted that the drafter's concern that island status not be denied merely due to submergence during abnormal events is taken care of by the use of "mean" high water. *Id.* at 27. It pointed out that Alaska was not seeking insular status for a feature that is occasionally inundated by abnormal water levels, as feared by the drafters, but for a feature that "exhibits a pattern of slumping below mean high water because of *seasonal* changes in elevation." *Id*. [emphasis in original].

72. 1 O'Connell, *supra*, at 170.

The Court concluded that "to qualify as an island, a feature must be above high water except in abnormal circumstances. Alaska identifies no basis for according insular status to a feature which is frequently below mean high water." *Id.* at 27. The history of Article 10 "does not support the broader conclusion that a feature with a *seasonal* loss in elevation, bringing it below mean high water, qualifies as an island." *Id*. at 31 [emphasis in original].

It has been asked whether a feature such as Dinkum Sands should be given island status when it rises above mean high water and treated as a low-tide elevation, or seabed, as it subsides. That result might be thought to follow from the general propositions that coast lines are ambulatory with accretion and erosion. Such a result in the *Alaska* case would have meant babysitting the feature around the clock (and the calendar) and allocating mineral royalties from a vast area of seabed accordingly.

Although the parties to the *Alaska* case acknowledged the possibility of that result, they both understood its difficulties and neither adopted it as a primary position, or even briefed it, before the special master. In his Report Dean Mann emphasized the practical difficulties associated with "divided ownership" and its inconsistency with the Court's goal of achieving stability in offshore boundaries. Report at 306. His conclusion that a feature must be "generally," "normally," or "usually" above mean high water resolved the issue for him. Dinkum Sands would be an island if it met those criteria, would not if it didn't, but its legal status would not vary absent "a sustained change in its characteristics." *Id*. at 307.

Alaska took greater interest in the theory when it got back to the Supreme Court, arguing that Dinkum Sands should indeed be treated as an island whenever any part of it peeked above mean high-water datum. The Court was not convinced. It distinguished the concept of an ambulatory low-water line from that of an island that would come and go in its entirety, finding no support in the Convention for the latter. It too identified significant practical problems with such an approach and adopted its master's position. *United States v. Alaska, supra*, at 32. A feature that regularly comes and goes in its entirety will not be treated as an island.

Thus, although the coast line of an island may be ambulatory on a horizontal plane, the feature must have some degree of vertical permanence such that it is not regularly appearing and disappearing above and below the level of mean high water.

In sum, an island must be naturally formed. That is, it must be composed of natural substance that has been naturally placed; it may not be man-made. Second, it must be composed not only of natural substance but

of "land." Finally, it must extend above the level of high tide, most logically that datum charted by the sovereign concerned, and must have some significant permanence of elevation above that datum.[73]

Reefs

Coral reefs, often submerged at all stages of the tide, present a separate problem. The 1958 Convention on the Territorial Sea and the Contiguous Zone makes no mention of such features. From that we can only conclude that they may not be used as base points for measuring the territorial sea.[74] (Figure 38) Sometime thereafter, however, additional consideration was given to the matter,[75] and Article 6 of the Law of the Sea Convention of 1982 provides that "[i]n the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State."

73. At times in the history of the law of the sea, it has been suggested that an island must be of some minimum size and must be capable of habitation, or some other particular use. See: Fachille, *Traite de Droit International Public, pt. II* 202 (8th ed., 1925);Gidel, *Le Droit International Public de la Mer* 684 and 717 (1934) [quoted at 4 Whiteman 285]; Bowett, *supra*, at 7-9; and Symmons, *supra*, at 41. The habitability criterion has not been required by American courts. *Middleton v. United States*, 32 F.2d 239, 240 (5th Cir. 1929). Nor has it played a part in American diplomatic practice. In 1975 the unarmed cargo vessel *Mayaguez*, under contract to the U.S. Navy, was seized by the Khmer Rouge within the claimed territorial sea of the uninhabited rocks of Pulo Wai, in the Gulf of Siam. Although the United States protested the incident as a violation of the right of innocent passage, it did not assert that because they were uninhabited the rocks generated no territorial sea. It is clear that Article 10 contains neither requirement. See: Symmons, *supra*, at 37 and 41; Bowett, *supra*, at 9; and McDougal and Burke, *supra*, at 397. However, Article 121 of the recent Law of the Sea Convention appears to breathe fresh life into the habitation requirement by providing that mere rocks, incapable of sustaining habitation or economic life of their own, while generating territorial seas, do not generate exclusive economic zones or continental shelves, two of the maritime zones traditionally associated with islands.

Although the new provision is clearly intended to minimize the effect of minor features on maritime jurisdiction, its application seems certain to be controversial. As Professor Prescott points out, one must initially discern how "rocks" are to be distinguished from "islands," and then must determine what minimum requirements for sustaining habitation or economic life might include. Prescott, *supra*, at 72. Prescott opines that a rock large enough to accommodate a shelter would qualify under the initial criterion, and that the regular collection of guano would satisfy the second. *Id.* at 73. He is less sure whether the feature should have to be capable of providing all necessities of life, *id.*, a requirement that would seem to preclude the use of numerous islets around the world that are presently given full island status. Likewise, Prescott questions whether the use of a rock to support a navigation aid or collect weather data could be said to fulfill the economic requirement. *Id.* If so, it would seem that no feature would be disqualified, again indicating that such a test is more liberal than the drafters intended.

Interestingly, Professor Prescott suggests that to be considered a "rock" for these purposes, a feature should consist of "solid parts of continental crust" but that sand islands should generate maritime zones even though incapable of sustaining habitation or economic life. *Id.* His reasoning is not entirely clear. It would seem that if a substantial and permanent "rock" is to be denied full island status for its inability to sustain habitation or economic life, a sand cay that suffers from the same shortcomings and, additionally, is likely to be here today and gone tomorrow, should be attributed even less legal standing.

74. Although the International Law Commission's committee of experts had recommended that "[a]s regards coral reefs, the edge of the reef . . . should be accepted as the low-water line for measuring the territorial sea," that provision was not included in the Convention. See Bowett, *supra*, at 14.

75. Hodgson and Alexander, for example, recommended that the territorial sea should be measured from the outer limit of a reef, even though it may lie below mean low water. Hodgson and Alexander, *supra*, at 52-54.

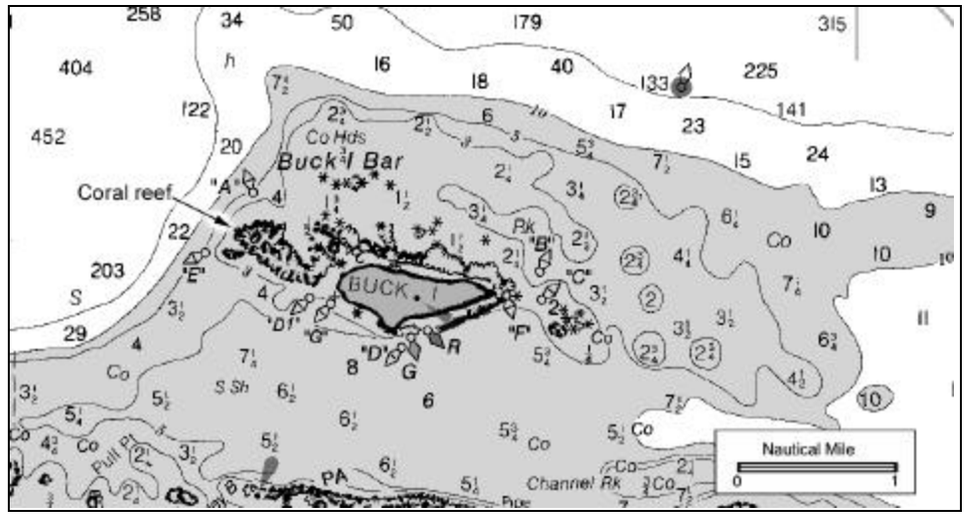

Figure 38. Coral reefs off Buck Island, U.S. Virgin Islands. These reefs emerge at some stages of the tide; others are permanently submerged.
(*Based on NOAA Chart 25641*)

Article 6 has focused new attention on the possible uses of reefs in maritime boundary delimitation. But its consequence is not entirely clear. To begin our consideration, we note that Article 6 applies only to delimiting the territorial seas of "islands" which lie on atolls or have fringing reefs. Presumable reefs lying off a mainland coast will affect maritime jurisdiction only under separate articles, if at all. The provision makes clear that any portion of a reef which extends above mean low water will serve as a base point for territorial sea measurement. Query whether, in these limited circumstances, Article 6 thereby trumps the traditional requirement that to serve as a base point a low-tide elevation must lie within the breadth of the territorial sea from the mainland or an island.[76] If so, a low-tide elevation that is more than the breadth of the territorial sea from an island may function as a base point if it is part of a reef.

Neither is Article 6 clear about whether submerged portions of a reef may be used as base points.[77] It provides that the baseline is the "low-water line" of the reef, but goes on to describe that line as that "shown by the appropriate symbol on charts officially recognized by the coastal State." Charting symbols for reefs may not indicate whether the feature dries at any stage of the tide.

76. Convention on the Territorial Sea and the Contiguous Zone, Article 11; Convention on the Law of the Sea, Article 13.

77. As suggested by two American experts. See note 75, *supra*.

United States practice may even have deviated over time. When our territorial sea was first depicted, in 1971, submerged portions of the Florida reef were not employed as base points. Nor were they included in the Supreme Court's description of the Florida coast.[78] However, when similar boundaries were constructed in the United States Virgin Islands, after negotiation of the Law of the Sea Convention, it would appear that reefs were used as base points.[79]

Even more troubling, if the 1982 Convention is read to permit submerged portions of reefs to serve as base points, is the possibility that they may be said to enclose inland waters. If a feature is part of the coast line for base point purposes, it is presumably part of the coast line for all purposes. Thus, under this interpretation, Article 6 might allow a submerged portion of a reef to serve as the headland of a bay. Yet that proposition is disturbing. In fact, it was that very extension of logic that the Supreme Court used to indicate how irrational it would have been to adopt Louisiana's contention that submerged features should be considered harborworks.[80]

It would appear that there has been insufficient opportunity to evaluate the potential implications of Article 6, but possible interpretations could produce anomalous results.

Low-Tide Elevations

Article 11 of the Convention defines “low-tide elevations” and provides that they will generate territorial seas only when within the territorial sea of a true island or the mainland. (Figure 39)

The provision is a compromise stemming from disagreement as to how the term “island” was to be defined at the time of the 1930 Hague Codification Conference. Although it was understood that islands

78. *United States v. Florida*, 425 U.S. 791 (1976).

79. Coastline Committee Minutes of November 17, 1982, and November 18, 1983. In 1978 the Committee noted that submerged reefs should not be used as base points of the Micronesian Trust Territory. Minutes of March 31, 1978. In subsequent negotiations, green tint indicating the Samoan Reef was used as the "best estimate" of the low-water line. Similarly, the upper limit of visible coral was treated as low water along the New Zealand coast. Minutes of February 27, 1980. It would appear from the context that these charted lines were adopted for negotiating purposes, being the best evidence available, and that the parties were not necessarily endorsing the use of submerged features for unilateral claims. For other Committee consideration of reefs, see Minutes of January 13, 1976; December 15, 1977; and March 31, 1978.

80. *United States v. Louisiana*, 394 U.S. 11, 36-40 (1969). The Coastline Committee also refused to employ a reef extending from Point St. George (near the California/Oregon border) as a headland of Pelican Bay, reasoning that the "headland" would be 99.9 percent water. Minutes of December 17, 1976. Although this example may be distinguishable in that it probably does not fall within Article 6's requirement that a reef fringe an island, apparently in contrast to fringing the mainland, it points out the conceptual difficulty of "enclosing" inland waters with submerged features. The waters would not be landlocked in any traditional sense.

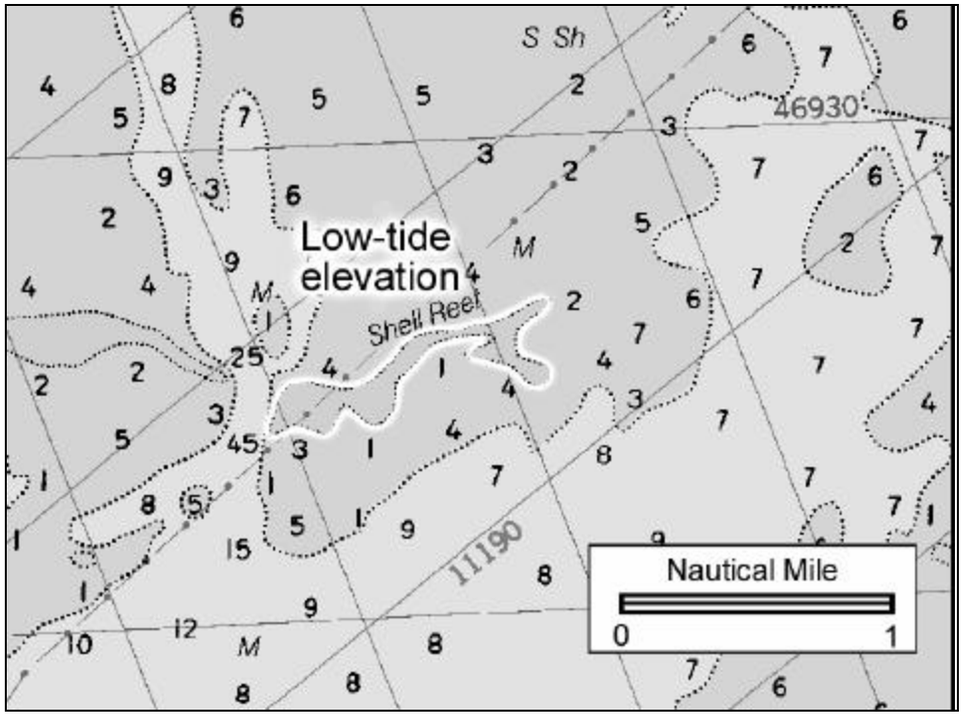

Figure 39. Low-tide elevation. Shell reefs are typical low-tide elevations off the coast of Louisiana. (*Based on NOAA Chart 11351*).

generated territorial seas, there was no understanding on what constituted an island. Some states insisted upon elevation above high water (as ultimately required by Article 10), while others suggested that no emergence was necessary at all, so long as it was not practical to navigate above the feature.[81] The International Law Commission’s (ILC) draft text, and the ultimate Convention, represented a compromise solution.[82]

Article 11 defines a low-tide elevation exactly as Article 10 defines an island, except for the requirement that the low-tide elevation need only emerge at low tide. We will not, therefore, repeat the discussions of the terms “naturally formed,” “area of land,” and “surrounded by water,” all of which apply equally here. Instead, we deal with the distinctions between islands and low-tide elevations.

81. Bowett, *supra*, at 7.

82. 4 Whiteman, *supra*, at 306: Bowett, *supra*, at 10. See, however, McDougal and Burke, *supra*, at 394, who suggest that security considerations may have been used to justify the use of low-tide elevations.

The Low-Water Line

As with the term "high water," the Convention's use of "low water" does not refer to a single, internationally recognized datum. The issue arose in *Post Office v. Estuary Radio Ltd.*, in which the *situs* at issue was said to lie within 3 miles of a low-tide elevation and, therefore, within the territorial sea. It happened that the Convention and the Territorial Waters Order in Council[83] defined the term differently. Diplock L.J., writing for the Court of Appeal, noted that "[u]pon these definitions interesting and difficult questions arise as to whether a 'low-tide elevation' must be above water at all low tides, at mean low-water spring tides, at Admiralty datum, at the lowest tides experienced from time to time (and if so, how often?) in the course of a year, or at lowest astronomical tides. Some day some court, municipal or international, may have to decide this." [1968] 2 Q.B. 740 at 761.

At one time the same question might have arisen in American practice. However, since the Supreme Court determined in *United States v. California* that the term "low-water line" as used in Article 3 means the particular datum employed in the construction of our official nautical charts, the matter must now be considered resolved.[84] Any naturally formed area of land that is surrounded by water and above water at the charted low-water datum is a low-tide elevation. It would appear that Commander Beazley arrived at this same conclusion following the decision in the *Post Office* case.[85]

Contrasted with Islands

Low-tide elevations do not, however, rise to the status of islands for the purpose of establishing zones of maritime jurisdiction. Under the 1958 Convention, every island generates the full spectrum of maritime zones, including a territorial sea, contiguous zone, and continental shelf. The same is true under the Law of the Sea Convention, although the exclusive economic zone is added and certain "rocks" are deprived of a continental shelf and economic zone. In contrast, Article 11 specifically provides that only those low-tide elevations that lie within the territorial sea of the mainland or a true island will generate a territorial sea (and, presumably, a contiguous zone and continental shelf). In effect, the most that a low-tide elevation can do is create an additional "bulge" in an already existing territorial sea. (Figure 40) It will never, by definition, have a territorial sea

83. S.I. 1965, Vol. 3, 6452A.

84. *United States v. California*, 381 U.S. 139, 175-176 (1965).

85. Beazley, *supra*, at 24.

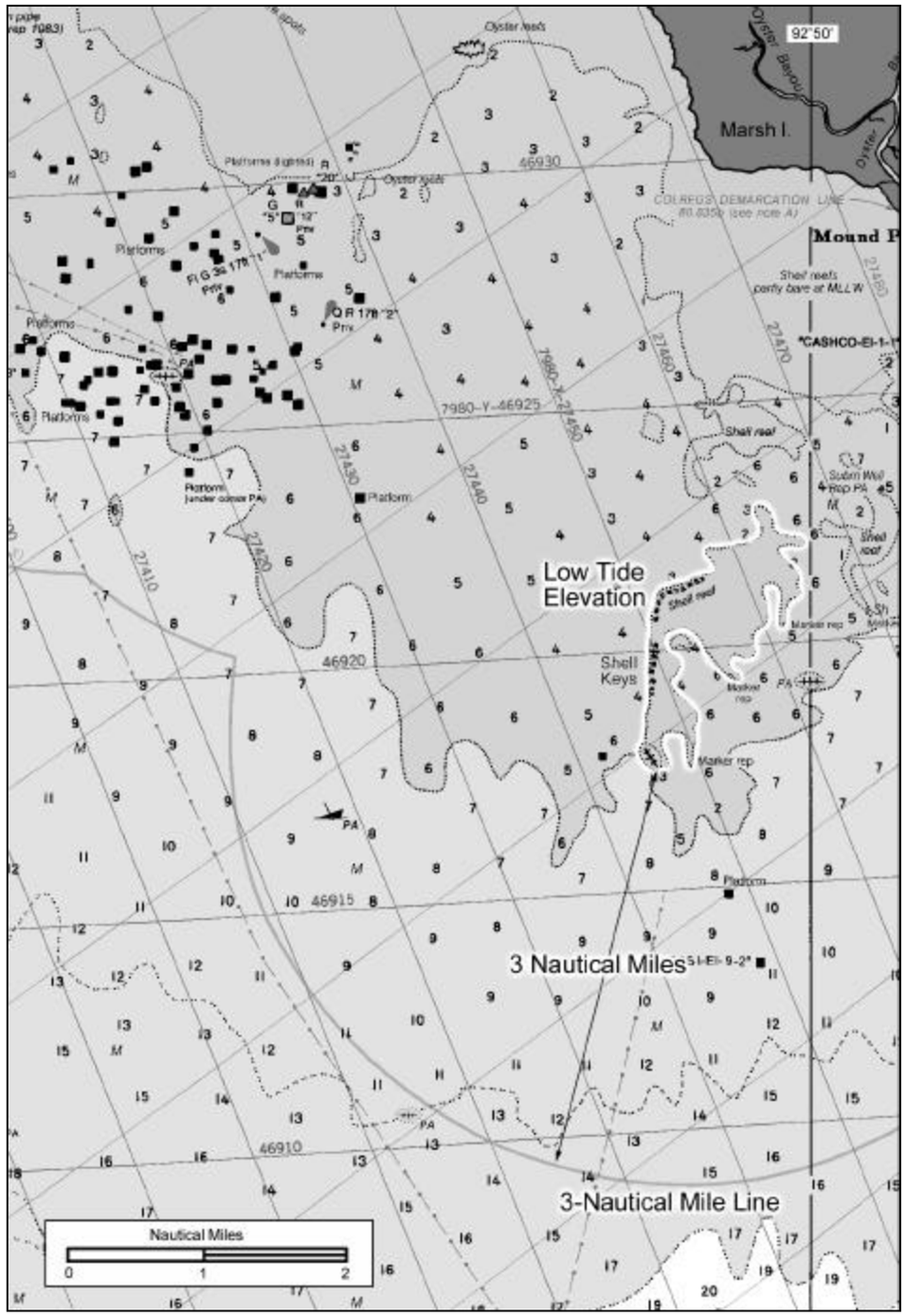

Figure 40. Coastal Louisiana. A low-tide elevation within the maritime boundary of Marsh Island, Louisiana, extends the boundary. (*Based on NOAA Chart 11349*)

that does not overlap that of a nearby island or the mainland. Nor may a state's total territorial sea be increased by leapfrogging seaward from one low-tide elevation to another.[86]

At least one controversy does arise concerning which low-tide elevations are to be treated as base points, and that comes in interpreting the requirement that they be within the breadth of the territorial sea of the mainland or an island. The question is whether it is enough to be within the territorial sea of the closing line of an inland water body, or, if to be considered a base point, a low-tide elevation must actually be within the territorial sea of the low-water line of the mainland or an island.

Bowett is of the opinion that it is not enough to lie within the territorial sea where that zone is measured from an inland water closing line. He appears to reach that conclusion by analogy to the International Law Commission's explanation of why it would not permit Article 4 straight baselines to be drawn to low-tide elevations.[87]

Although the reasoning may be convincing, it comes too late for American practice. The Supreme Court was faced with the identical issue in *United States v. Louisiana*. A low-tide elevation lay more than 3 miles from any land but within 3 miles of the closing line of a juridical bay. (Figure 41) The federal government interpreted Article 11 to preclude the use of the feature as a base point. Louisiana contended that because it fell within the existing territorial sea, it generated a territorial sea of its own. The Court agreed with the state. It concluded that the drafters intended to give significance to all low-tide elevations that fall within the territorial sea of the mainland or an island. Thus, at least for this purpose, inland waters are to be treated as "mainland."[88]

American practice has conformed to the Court's determination in the subsequent instances in which the question has arisen. For example, a low-tide elevation in southeastern Alaska, known as Hanus Reef, has been used as a base point. The feature lies more than 3 miles from land but within 3 miles of the bay closing line across Lynn Canal. Its use as a base point serves to eliminate or reduce the size of several potential high-seas enclaves in the area.[89]

86. Bowett, *supra*, at 12. However, as territorial seas are extended from 3 to 12 miles, low-tide elevations take on new significance. Such a formation lying 11 miles offshore has no boundary significance with a 3-mile territorial sea claim. But, if it lies within a 12-mile territorial sea, it generates a significant "bulge" of additional jurisdiction. See: Churchill and Lowe, *supra*, at 35.

A good example can be found off the coast of Louisiana where, just south of Marsh Island, a series of low-tide elevations extends more than 3 miles offshore. The elevations within 3 miles of Marsh Island generate territorial seas of their own, while others farther seaward have no such effect. *United States v. Louisiana*, 452 U.S. 726 (1981); Coastline Committee Minutes of April 25, 1972.

87. Bowett, *supra*, at 13.

88. *United States v. Louisiana*, 394 U.S. 11, 45, and 47 (1969).

89. Coastline Committee Minutes of September 20, 1971.

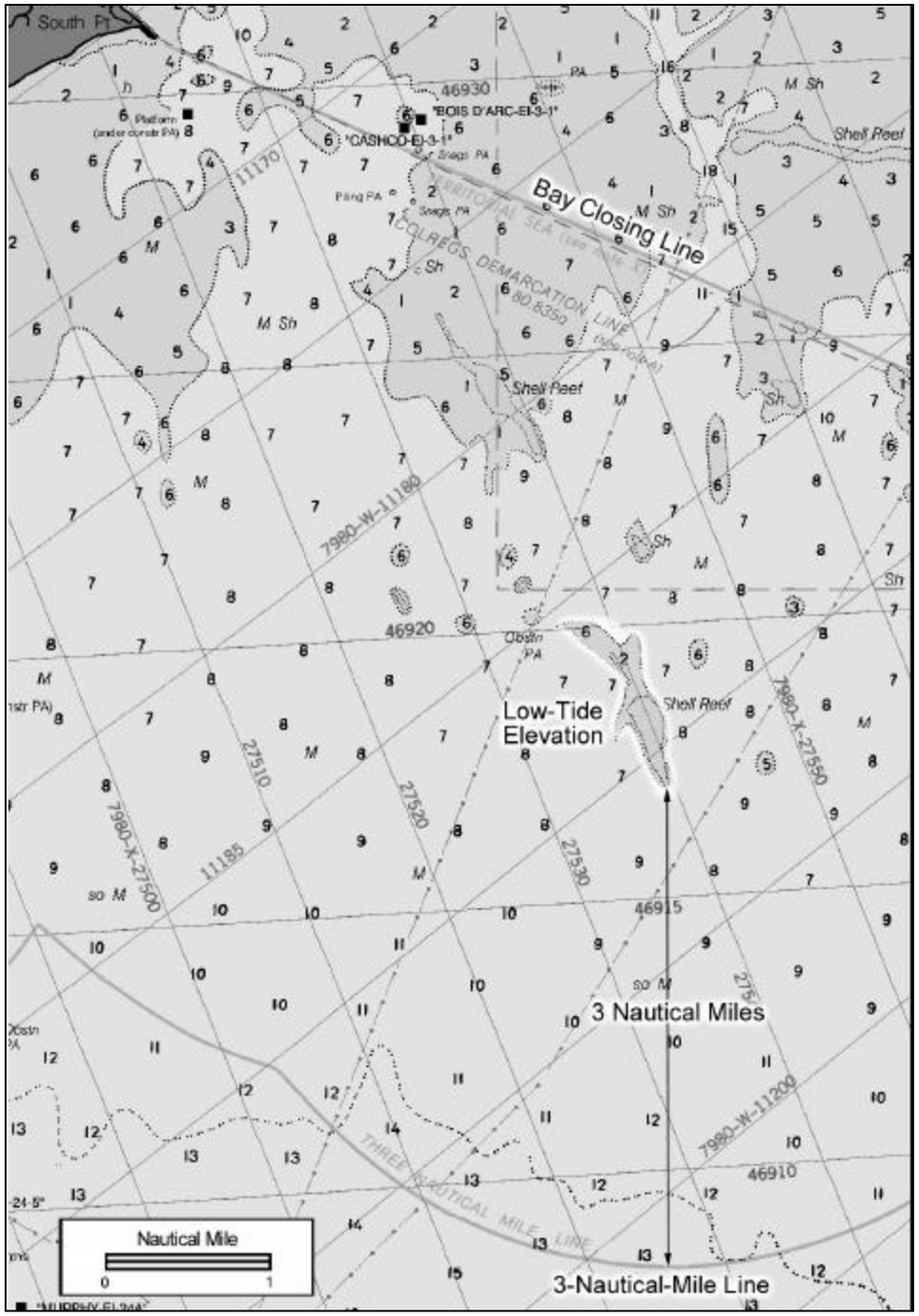

Figure 41. Atchafalaya Bay, Louisiana. A low-tide elevation within the maritime boundary measured from a juridical bay closing line extends the boundary. (*Based on NOAA Chart 11351*)

Practical Problems

The most difficult issue with respect to low-tide elevations has been determining whether a given feature extends above the low-water datum. The farther offshore the feature is located, the more technically difficult the problem. The federal government has faced this issue off the coasts of both California and Alaska. Carpenteria Rock, off the coast of California, has been the subject of extensive survey by both federal and state experts with no consensus as to its status. It would appear that the surface of the rock lies within as little as 2 inches above or below mean low water. The parties cannot agree which. Consequently, the area around the rock has been withheld from oil and gas leasing.

The problem typically arises when a geographic feature is charted with a symbol that does not purport to indicate its elevation with respect to the tidal datum. Most features are shown with both high- and low-water lines (for islands) or low-water lines (for low-tide elevations) and are, further, tinted to symbolize their status. Some, however, are represented merely by asterisks, symbols used to indicate that the surface of the feature lies at an elevation within a given range of feet either above or below the datum. This is, of course, proper charting practice in that it puts the mariner on notice of a potential hazard to navigation and avoids the need to conduct thorough, and extremely expensive, individual surveys. It does not, however, provide sufficient information for boundary determinations.

As a group, features denoted with asterisks are characterized as "rocks awash." The International Law Commission's committee of experts made clear that rocks awash are not to be taken into consideration in boundary delimitation.[90] Thus, the Coastline Committee, in establishing guidelines for its work in delimiting the coastline of the United States, determined that it would not use asterisks as base points absent additional information to indicate that they actually qualify under the Convention, either as islands or low-tide elevations.[91]

The federal government and State of Alaska have undertaken a joint project to survey a large number of features marked with asterisks and have, in many cases, reached agreement as to whether or not they qualify as base points. The information collected has then been presented to the Coastline Committee, which has modified the official charts delimiting our maritime boundaries accordingly.[92] The Committee has also gone so far as to

90. 4 Whiteman, *supra*, at 182.

91. See Coastline Committee Minutes of: June 1, 1970; August 3, 1970; September 20, 1971; April 25, 1972; and August 2, 1972. In some cases the asterisk will be accompanied by a number that indicates that it dries to that elevation. Such additional symbolization has been taken as sufficient evidence to justify use as a base point. Coastline Committee Minutes of September 27, 1979, and December 16, 1981.

92. Minutes of November 1 and November 26, 1985.

research historic records to determine whether a lighthouse was originally constructed on a low-tide elevation and should, therefore, be treated as a base point.[93]

Unanswered Questions

Finally, the 1982 Law of the Sea Convention apparently leaves unanswered an interesting question as to the effect of low-tide elevations; that is, whether they generate only limited maritime zones. As noted above, Article 121(3) of the Convention provides, with respect to islands: "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Churchill and Lowe point out that there is no indication that low-tide elevations are similarly limited, even though the latter will be a less visible "manifestation of land."[94]

However, as a purely logical matter, it seems that had the drafters considered the matter, they would have included a like restriction on all low-tide elevations, permitting their use for territorial water and contiguous zone purposes but not for exclusive economic zones or continental shelves. It would seem to go without saying that a low-tide elevation is not suited to human habitation nor capable of supporting an economic base.[95] The issue has not yet been litigated. As Professor Prescott suggests, it is probably safe to predict that most states will make the maximum claim possible in the face of this anomaly.[96]

In sum, a low-tide elevation must be naturally formed, made of land, surrounded by water, and extend above the charted low-water datum but not above the high. Such features will generate maritime zones if they lie within the territorial sea of the mainland or an island, whether measured from the low-water line or inland water closing lines. Otherwise they will not.

93. Minutes of August 10, 1970.

94. Churchill and Lowe, *supra*, at 36.

95. Although imaginative advocates will quickly suggest means by which people might live, and make a living, on a low-tide elevation, it seems clear that the situations would necessarily be so extreme that if applied equally to rocks there would be no meaning left to Article 121(3).

96. Prescott, *supra*, at 62.

CHAPTER 6

INTERNAL WATERS

Waters landward of the baseline from which the territorial sea is measured constitute the internal waters of a state.[97] Thus, the territorial sea's baseline is composed of two parts, the low-water line along the open coast, or "normal" baseline, and a series of imaginary lines separating inland water bodies from the open sea.

It may be important to know the exact location of the line between internal waters and the territorial sea. Internationally, foreign vessels may enter internal waters only with permission of the coastal state. Though vessels may transit the territorial sea in innocent passage, other limitations apply. For example, foreign submarines must surface to enter the territorial sea; and foreign aircraft may fly over only with permission. Domestically, the waters landward of the baseline have traditionally belonged to the states[98] while those seaward, 3 miles from the baseline,[99] were only granted to the states in 1953.[100] Some statutory prohibitions apply only in the territorial sea and not inland waters. For all of these reasons, it is important to be able to determine the seaward limit of inland waters.

Inland waters include bays, rivers, harbors, waters enclosed by Article 4 straight baselines, and the area between mean high and mean low water along the open coast.[101] Although the 1958 Convention on the Territorial Sea and the Contiguous Zone and subsequent Law of the Sea Convention provide some guidance on how to delimit internal waters, their rules are necessarily general. This section reviews, among other authorities, the numerous U.S. Supreme Court decisions, including those of its special masters, that have put meat on the bones of these rules through their application to a large number of actual coastal situations.

97. Convention on the Territorial Sea, Article 5. In American practice the internal waters are often referred to as "inland" waters. The terms are synonymous.

98. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

99. Or up to 3 leagues off the Gulf coasts of Florida and Texas.

100. 43 U.S.C. 1301 *et seq.*

101. The United States has produced official charts depicting the limits of its territorial sea and contiguous zone. To date no other country is known to have done so with the exception of those that employ Article 4 straight baselines for their entire coasts. Even the United States has not attempted to depict the vast majority of closing lines across the mouths of inland water bodies. Early in its delimitation exercise, the Coastline Committee determined that to avoid additional clutter on nautical charts only those closing lines that affect the outer limit of the territorial sea would be depicted. Minutes of August 3, 1970.

BAYS

The most difficult problems of inland water delimitation arise at the mouths of juridical bays. Article 7 of the 1958 Convention sets out the criteria for constructing bay closing lines.

Bays of a Single State

Article 7 begins with a disclaimer. Paragraph 1 provides that the article relates only to bays the coasts of which belong to a single state. That is to say, Article 7 does not authorize the closure of an indentation into the mainland, that otherwise meets all of its criteria, if the shores of that indentation are controlled by more than one state. According to one authority, there are more than 40 such bays in the world.[102] Most, if not all, such bays will lie on the border between two sovereigns, such as Passamaquoddy Bay, between Maine and New Brunswick.

The Convention does not establish that such bays are not inland waters; it merely leaves the question unresolved.[103] Sohn and Gustafson indicate that there is no clear rule in such circumstances, and discuss three alternative views.[104] First, each state bordering on the bay is understood to have a belt of territorial waters along the shore, and the center of the bay is left as high seas (or, presumably, zones of lesser maritime jurisdiction). Second, each state will have an exclusive territorial sea along the shore, as above, but the remainder of the bay will be subject to the joint jurisdiction of the coastal sovereigns.[105] Finally, the bay may be divided among the bordering states through principles usually applicable to such divisions between states with adjacent or opposite coasts.

Lauterpacht has no hesitation in proclaiming that the first alternative represents the majority view and provides a thorough discussion in support.[106] Likewise, Churchill and Lowe characterize the second as an

102. Churchill and Lowe, *supra*, at 33.

103. Historic waters are treated in the same way. See Article 7(6).

104. Sohn and Gustafson, *The Law of the Sea* at 45-46 (1984).

105. This example comes from the decree of the Central American Court of Justice in *El Salvador v. Nicaragua*, holding the Gulf of Fonesca to be under the joint sovereignty of those two nations and Honduras, all of which border on the Gulf. See: 11 A.J.I.L. 674 (1917). The International Court of Justice has since confirmed that the Gulf is historic water but has left the three parties to resolve their boundaries within it. *El Salvador/Honduras, Nicaragua Intervening* [1992] I.C.J. 351. It is doubtful that that decision is binding on any but the parties involved or that its reasoning, based largely on local history and geography, can be easily extended to other boundary waters.

106. 1 Lauterpacht, *Oppenheim's International Law* 508 (8th ed. 1955).

exception, as surely it must be.[107] However, as a practical matter, it would appear that the third alternative is most applicable, with the caveat that what is being divided is not an area of inland water sovereignty but lesser maritime jurisdiction. With contiguous zones of up to 12 miles recognized in the 1958 Convention and up to 24 miles in the 1982 Convention, and exclusive economic zone rights extending to 200 miles, it is clear that any boundary bay with an entrance of less than 24 miles will be sufficiently small that all of its waters will fall within one of these categories, and the coastal states will be permitted to divide the bay among themselves at least for these more limited purposes.[108]

That is not to say that the international community may not still consider it important to assert other high-seas rights within the bay, such as the right of passage, but the extension of maritime zones in recent years would appear to protect most coastal state economic interests in boundary bays without asserting inland water claims.

In short, Article 7 does not apply to boundary bays. The accepted rule is that such bays are not inland waters.[109] However, contiguous and exclusive economic zones would appear to protect most coastal state interests in such bays.

What Is a Bay?

Article 7(2) of the 1958 Convention defines a bay through a number of rather subjective terms and a separate, precise objective criterion. First, it describes a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." Then it provides that "[a]n indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." (Figure 42) But how are these criteria to be applied?

Some have suggested that the more subjective, and first mentioned, criteria are subsumed in the semicircle test, and that any indentation that conforms to that test is, by definition, landlocked.[110] It is clear that the

107. Churchill and Lowe, *supra*, at 33.

108. Nothing in either treaty prevents coastal states from asserting these recognized rights in boundary bays.

109. Boundary rivers are treated differently. See discussion *infra*.

110. For example, Sohn and Gustafson assert that the "well-marked indentation" requirement is met when the semicircle test is met. Sohn and Gustafson, *supra*, at 41. This may merely represent a shorthand statement of the authors, or be based upon some early judicial language that might be so interpreted. In *United States v. California*, the Supreme Court emphasized the semicircle test in its evaluation of Monterey Bay. 381 U.S. 139, 164, 169-170 (1965). See, also: *Island Airways, Inc. v. C.A.B.*, 352 F.2d 735, 738 (1965). But the history of the Convention and subsequent Supreme Court decisions make clear that more is required.

Figure 42. Delaware Bay. This landlocked body clearly meets international criteria for juridical bay status.

Convention's drafters did not intend that result, nor has the Supreme Court accepted it.

Prior to the 1958 Convention there was certainly no internationally agreed-upon set of rules for the enclosure of bays. The ILC committee of experts sought to provide an objective approach to the subject and recommended the semicircle test. That test, and the maximum 10-mile limit for closing lines, provided specific criteria. However, the International Court of Justice had recently rejected the 10-mile rule and, in that environment, the ILC considered such complete dependence on objective criteria to be too great a departure from customary international law.[111]

111. 1 O'Connell, *supra*, at 389.

Thus, the more traditional term "so as to contain landlocked waters" was adopted from the judgment of Judge McNair.[112] Commentators have interpreted this requirement to involve two separate inquiries.[113] So has the Supreme Court.

In *United States v. Louisiana*, the parties disagreed over the juridical status of a number of coastal indentations. The state took the position that any area that met the semicircle test *ipso facto* qualified as a bay under the Convention. The federal government insisted that the objective semicircle test is a minimum requirement to be applied only after a water body has been determined to be landlocked under the primary criteria.[114] Although at that stage of the case the Court did not rule on the status of individual indentations, it did adopt the federal position that the subjective criteria of Article 7 must be met before the semicircle test will be applied.[115]

What Waters Are Landlocked?

O'Connell points out that the International Law Commission's preoccupation with arithmetic limits distracted it from looking carefully at the term "landlocked," with its obvious ambiguity.[116] Since 1958, lawyers and geographers have wrestled with the problem, seeking to provide objective criteria by which the term can be applied and to determine whether specific indentations are actually landlocked. A number of factors have been considered and some ruled upon by the Court or its masters.

THE TWO-DIMENSIONAL CRITERION. At first blush it may appear reasonable to contend that waters that are enclosed by high bluffs or underwater sills are more "landlocked" than those whose headlands barely rise above the tidal datum or whose bottom is merely a continuation of the bed of the open sea. For example, in *United States v. Maine (New York/Rhode Island)*, the states argued that an underwater "sill" running between Montauk Point, Long Island, and Block Island "caused the waters of Block Island Sound to have a 'different character' than the waters outside Block

112. *Fisheries Case*, [1951] I.C.J. Rep. 116, 163.

113. O'Connell indicates that the definition "contains three main elements: bays must (a) be 'landlocked;' (b) satisfy the semi-circle test of penetration; and (c) satisfy the twenty-four mile rule." *Supra*, at 390. Gross has said that "[u]nder this test, . . . true bays must constitute more than mere curvatures in the coast, contain landlocked waters, and contain an area as large or larger than that of a semi-circle . . . ." Gross, *The Maritime Boundaries of the States*, 64 Mich. L. Rev. 639, 651 (1966).

114. *United States v. Louisiana*, 394 U.S. 11, 48, and 54 (1969).

115. *Id.* at 54. Prescott agrees with this interpretation but does not believe that any country would refuse to close an indentation that meets the semicircle test except, as in the case of the United States, where the national sovereign stands to gain thereby in disputes with its constituent political subdivisions. Prescott, *supra*, at 53. That position suggests, contrary to the history of Article 7 and the Supreme Court's decisions concerning it, that the more subjective criteria are superfluous. It is too late in the day to pursue that route.

116. O'Connell, *supra*, at 388.

Island Sound."[117] (Figure 43) From this, they suggested that Block Island Sound should be considered landlocked.[118] Neither the special master nor the Supreme Court accepted this logic.

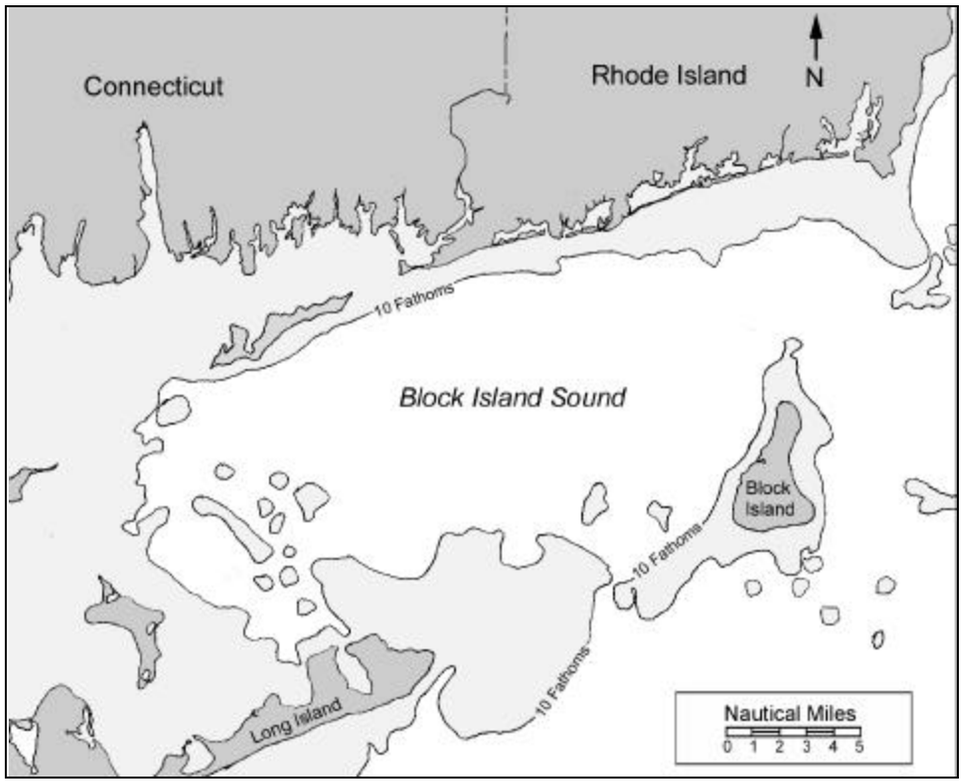

Figure 43. Block Island Sound. The shallow sill between Long Island and Block Island was said to help "enclose" the waters of Block Island Sound. (*Based on NOAA Chart 12300*)

A similar argument had been made in the English courts when, in the famous pirate radio station case, a determination had to be made as to the limit of landlocked waters in the Thames estuary.[119] Defendants there argued that factors such as geology, tide streams, and the position of lights and shoals should be considered, while the Crown espoused a two-dimensional approach, concentrating on a search for headlands above the tidal datum that enclosed landlocked waters.[120]

117. Report of the Special Master of October Term 1983, at 55-56 n.42.

118. *Id.* at 55.

119. *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740.

120. O'Connell, *supra*, at 398.

Finally, the state of Florida has taken the position that the limits of the Gulf of Mexico should be determined by defining the subsurface basin that is identified with that water body, rather than the land features that provide its character as a gulf and distinguish it from the Atlantic Ocean. The question arose because Congress, through the Submerged Lands Act, granted states bordering on the Gulf of Mexico an opportunity to acquire a 9-mile belt of seabed in the Gulf, rather than the standard 3, by proving historic boundaries in that water body. Florida proved its right to the more expansive grant[121] but had next to establish the boundary between the Gulf and Atlantic, because the extraordinary grant did not apply in the latter. Florida defined the entrance to the Gulf as that point on the seabed at which a marble, if dropped, would roll toward the Gulf rather than the Atlantic. The federal government, in contrast, looked to surface features that enclose the area commonly understood to constitute the Gulf. The state's formula provided a boundary running east from the Florida mainland to the Bahamas. The government's line ran due north from Cuba to the Dry Tortugas. The former included the Straits of Florida in the Gulf; the latter made the straits part of the Atlantic. The master and the Court adopted the federal position, relying on the two-dimensional analysis for determining the limits of the Gulf of Mexico and limiting Florida to a 3-mile boundary along the south coast of the Keys.[122]

According to Hodgson, this two-dimensional approach was intended by the committee of experts and final drafters of Article 7.[123] So, although it may once have seemed logical to consider subsurface features for purposes of determining whether a water body is landlocked, that argument is now closed. The approach is two-dimensional. Only features that extend above the low-water datum may be considered, and each of those is equally capable of "locking" adjacent waters, regardless of elevation.[124]

121. 363 U.S. 121 (1960).

122. *United States v. Florida*, 420 U.S. 531 (1975).

123. Hodgson, *Toward a More Objective Analysis*, *supra*, at 3. The geographer goes on to explain that the depth of water within an indentation is irrelevant to bay status. A bay may be navigable or not so long as the specified two-dimensional criteria are met. It seems equally well accepted that nomenclature has no legal significance. Florida Bay, Florida, and East Bay, Louisiana, are examples that have been the subject of litigation. On the other hand, the water body formed by the western side of the Mississippi River delta and the mainland of Louisiana was determined to qualify as an overlarge bay by Special Master Armstrong in *United States v. Louisiana*. The United States did not take exception to his recommendation and an appropriate 24-mile fallback line was included in the Court's baseline decree. 422 U.S. 13 (1975). The indentation was denominated "Ascension Bay" by the state but that name does not typically appear on charts of the area. See also: Beazley, *supra*, at 12 and 2 Shalowitz, *Shore and Sea Boundaries* 367 (1964).

124. The entrance to San Diego Bay provides a graphic example. The western headland to the Bay is the formidable Point Loma, a massive peninsula jutting into the Pacific and rising probably 100 feet above sea level. The eastern headland is a man-made jetty that rises above the tidal datum only in places. Nevertheless, each is given equal status as a headland of San Diego Bay. *United States v. California*, 449 U.S. 408 (1981).

THE HEADLAND REQUIREMENT. Typical bays are characterized by a pair of headlands which, in some sense, pinch in toward each other to enclose the waters between. Such headlands have traditionally caused inland waters to be described as *inter fauces terrae,* within the jaws of the land.[125] The term had its genesis in early English attempts to determine the limits of admiralty jurisdiction but continues as the essence of inland water status.[126]

The need for identifiable headlands was the focus of a significant issue in *United States v. Louisiana*. East Bay, at the southern tip of the Mississippi River delta, is a triangular feature formed primarily by two of the river's passes into the Gulf. (Figure 44) The seawardmost potential headlands are the southern tips of the jetties that form those passes. However, the waters enclosed by a line between those headlands do not meet the semicircle test, disqualifying the whole of those waters from juridical bay status. Nevertheless, it was agreed that lines could be drawn within the triangle, enclosing waters that do meet the semicircle test. Louisiana contended that such waters automatically qualified as a juridical bay. The United States took the position that to achieve bay status the lesser indentation had to qualify separately. This, according to the federal government, required identifiable headlands enclosing landlocked waters. The Court agreed, and left its special master the problem of determining, in the first instance, whether such headlands existed within East Bay.[127]

It is difficult to predict in advance what feature will qualify as a headland. Headlands to Monterey Bay, recognized by the Court in *United States v. California*, are substantial and readily identifiable.[128] In contrast, the headlands selected for East Bay were little more than bumps on an otherwise straight coastline. What is clear is that headlands are required if an indentation is to be landlocked.[129]

SIZE AND SHAPE. It has sometimes been said that the semicircle is the classic form of a bay,[130] yet a perfect semicircle would, by definition, just

125. O'Connell, *supra,* at 385.

126. *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 18.

127. *United States v. Louisiana*, 394 U.S. 11, 54 (1969). The master ultimately determined that there were sufficient headlands along each of the passes to enclose a lesser landlocked bay that meets all of the criteria of Article 7. Report of July 31, 1974, at 32-35. The United States took exception to that recommendation but it was adopted by the Court, 420 U.S. 529 (1975), and the internal closing line was incorporated in the eventual coast line decree. 422 U.S. 13 (1975).

128. 381 U.S. 139 (1965). See map at Appendix B to dissenting opinion.

129. The means of selecting headlands, and entrance points on them that anchor inland water closing lines, is discussed at length below.

130. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 45.

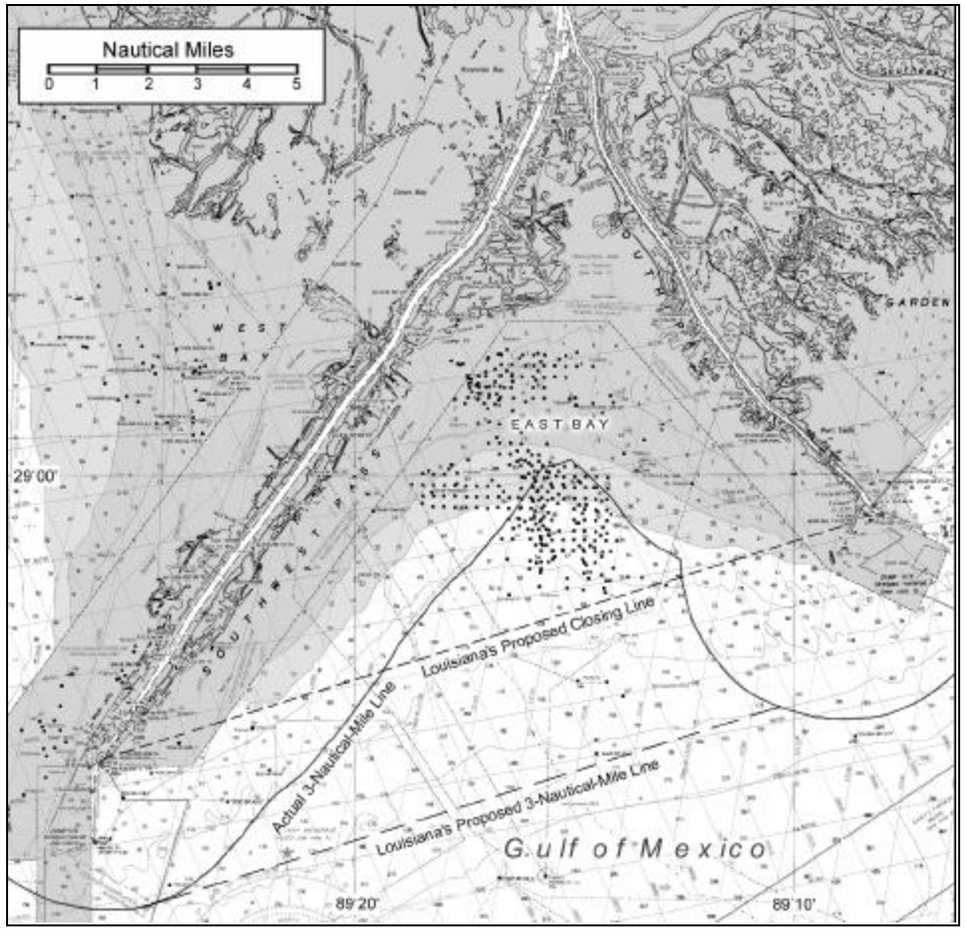

Figure 44. East Bay, Louisiana, at the southern tip of the Mississippi River delta. The limit of East Bay's landlocked waters, as contended by Louisiana, is illustrated. (Note the proliferation of oil production platforms, depicted on the chart as small black squares.) (*Based on NOAA Chart 11361*)

barely meet even the minimum test for juridical bay status. The United States has argued that something in the nature of pinching headlands is necessary to create landlocked waters.[131]

For example, the federal government took the position in *United States v. Louisiana* that a "V"-shaped indentation, East Bay, is not landlocked. The question did not have to be met directly because the entire "V"-shaped feature did not meet the semicircle test, and was thereby disqualified, while the lesser, interior indentations that were found to qualify had minor

131. For a discussion of the effort to locate headlands in the *Post Office* case, see O'Connell, *supra*, at 397-398.

headlands that created landlocked waters. So the question remains whether a perfectly "V"-shaped indentation does enclose landlocked waters. O'Connell has raised the question without answering it.[132] The United States has closed a number of similar bays on its official charts depicting the limits of the territorial sea.[133]

Article 7 itself suggests that a comparison of the length of the closing line to the depth of penetration within the indentation will assist in determining whether waters are landlocked.[134] Numerous commentators have attempted to reduce this requirement to a more objective test. Strohl has suggested that the line of deepest penetration should equal or exceed the length of a bay closing line.[135] Beazley indicates that the closing line shall be twice the depth of the indentation.[136] That formula would seem to be justified under the semicircle rule.

Special Master Armstrong has referred to this relationship on two occasions. With respect to East Bay, he noted that it "would seem to meet this test upon the basis of relationship between the width of its mouth to its depth upon a number of different closing lines . . . ."[137] Applying the test to Mississippi Sound he calculated that "[t]he relation of maximum penetration to width of mouth is therefore .4167:1, which in my opinion is enough to constitute more than a mere curvature of the coast . . . ."[138] The Court was not called upon to comment on either determination.

The issue arose again in *United States v. Alaska* when the state and federal governments disagreed as to whether the southeastern portion of Harrison Bay is landlocked.[139] The state's expert, Dr. Prescott, constructed a proposed closing line, and various penetration lines from it, to various points along the mainland coast to emphasize the depth of penetration as compared to the length of the closing line. The parties agreed on the length of Dr.

132. O'Connell, *supra*, at 394.

133. These include: Ursus Cove, Portage Bay, Abraham Bay, and Puget Bay. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 27-28.

134. Article 7(2).

135. Strohl, *The International Law of Bays* 56-57 (1963).

136. Beazley, *supra*, at 13. Presumably Commander Beazley meant that an indentation will qualify if its mouth is no more than twice its depth, not that it need be that length.

137. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 27.

138. *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 20.

139. Harrison Bay is located on the north slope of Alaska. It is divided into two distinct parts, the northwestern of which is recognized as an Article 7 bay by both parties. However, the federal government contended that the southeastern portion represents a mere curvature in the general direction of the coastline in the area. For that reason, it did not accept a closing line across the most seaward headlands of that embayment. The United States did, however, recognize two lesser bays within it.

Prescott's proposed closing line, but the means of measuring depth of penetration from it does not follow automatically. Four potential methods were suggested.

First, one could begin from the midpoint of the closing line and construct a perpendicular to the mainland coast. On a perfect semicircle this line would be exactly half the length of the closing line. Second, a perpendicular could be drawn from any point on the closing line to the deepest point in the indentation that could be reached with a straight line. Dr. Prescott tested that method in Harrison Bay and calculated ratios of 53 and 65 percent.[140] Third, a straight (but not perpendicular) line could be drawn from the closing line to the point of deepest penetration into the indentation.[141] Here Dr. Prescott calculated a penetration ratio of 120 percent. Finally, and Dr. Prescott's preferred method, is the shortest non-straight line, from the closing line to the point of deepest penetration. In the case of southern Harrison Bay, that produced a ratio of more than 70 percent.

The United States urged a more subjective analysis, suggesting that the inquiry should go to the feature's entire configuration. In particular, the government pointed out, Dr. Prescott's lines went to an arm of the feature whose inland water status was not in dispute, rather than the shallower adjacent feature at issue.[142] Dr. Robert Smith, the federal expert, contended that when viewed as a whole, the closing line proposed by Alaska encloses waters that are not landlocked and the whole of south Harrison Bay should not be considered inland.

The special master carefully considered all of the information offered about southern Harrison Bay. He compared the calculations to similar information from other indentations that are acknowledged by the United States and the courts to constitute juridical bays. In the end he concluded that south Harrison Bay meets the requirements of Article 7 and is inland water. Report at 226. The United States did not take exception to his recommendation.

The requirements as to depth of penetration remain difficult to articulate. Clearly the first sentence of Article 7(2) remains viable. Meeting the semicircle test alone does not assure juridical bay status. "Landlockedness" requires something more. *United States v. Louisiana*, 394

140. The master noted that these ratios exceeded those available for northern Harrison Bay, a water body that the United States conceded to be inland. Report at 205.

141. This method had been suggested by Robert Hodgson, the late State Department geographer, as the most logical for determining penetration. Report at 206, citing Hodgson and Alexander, *Towards an Objective Analysis of Special Circumstances*, *supra,* at 8.

142. As a general proposition the United States objected that penetration should not be constructed into subsidiary water bodies acknowledged to be inland. The master, however, noted that the United States had included those subsidiary features for purposes of applying the semicircle test to the entire feature at issue and concluded that "surely all of the [Article 7] tests should be applied to the same area." Report at 203. His reasoning seems appropriate.

U.S. 11, 54 (1969). Not surprisingly, the answer will often be in the eye of the beholder. The four methods of calculating depth of penetration described above will undoubtedly be useful, but they will often appear to justify closing lines that are clearly inappropriate.

The size of a water body may also help determine whether it is landlocked. According to Hodgson and Alexander, "[t]he scale of the body must also be considered. Basically, the character of the bay must lead to its being perceived as part of the land rather than of the sea. Or, conversely, the bay, in a practical sense, must be usefully sheltered and isolated from the sea. Isolation or detachment from the sea must be considered the key factor."[143] As Dr. Hodgson testified in *United States v. Louisiana*, the smaller an indentation, the less that is required to establish that it is landlocked.[144] That is to say, a bay with the maximum 24-mile closing line may be required to have more pronounced headlands, deeper penetration, and a greater water area than a smaller indentation.

LANDLOCKED FROM THE VIEW OF THE MARINER. A number of commentators have approached the "landlocked" issue from the viewpoint of the mariner and sought to identify tests to establish at what point, from his perspective, inland waters had been reached. These authorities were thoroughly reviewed in the New York/Rhode Island phase of *United States v. Maine*, in which those states contended that Block Island Sound is landlocked and considered inland waters.

The federal government agreed that if Long Island were considered part of the mainland, the waters of Long Island Sound are landlocked to a line from Montauk Point due north to Watch Hill Point.[145] The states contended that those inland waters extended farther to enclose Block Island Sound with lines from Montauk Point to Block Island and Block Island to Point Judith, Rhode Island. The parties could not agree on whether those additional waters of Block Island Sound were landlocked.[146]

The United States relied upon the writings of Bowett, Beazley, and Prescott, all of whom endorse the proposition that to be landlocked, a seaman must be surrounded by land in all but one direction.[147] The states took a slightly different approach, offering the testimony of Jeremy White

143. Hodgson and Alexander, *supra*, at 6; quoted at *United States v. Maine, et al. (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 525 (1985).

144. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 18.

145. The United States did not concede that Long Island is part of the mainland, but the states convinced the special master and the Court that it should be considered so for these purposes.

146. The parties did agree that the semicircle test is met.

147. Bowett, testimony in *Rhode Island and New York Boundary Case*, transcript of November 11, 1981, at 65, quoted at Report of the Special Master of October Term 1983, at 53 n.40; Beazley, *supra*, at 13; Prescott, *supra*, at 51-53. Prescott suggests, in addition, that landlocked waters are those that are difficult to enter or leave under adverse weather conditions. *Id.* at 51-53. See also, Strohl, *supra*, quoted at *Rhode Island and New York Boundary Case* Special Master's Report. *Id.*

who opined that a ship has reached inland waters when there is land in all directions but seaward.[148] This formulation would apparently recognize inland waters that are open to the sea on two sides rather than only one.[149]

Although both tests would appear to be highly objective, it is surprisingly difficult to reach consensus on how they might be applied. Clearly, any true bay will pass the White test. When the closing line is crossed, there is land on 180 degrees of the horizon. Unfortunately, the same is true when a mariner enters a bight, or mere curvature of the coast. The drafters did not intend to include such features among Article 7 bays.[150] That alone indicates that the test does not conform to the requirements of the Convention.

On the other hand, it is not much easier to determine when a mariner has protection from three sides. If his vessel lies just inside the closing line of a relatively large, but admitted, juridical bay, he would seem to be protected only from two sides. At least it is not apparent that he is more landlocked than he might be in an indentation meeting only the White test.

Despite the attempts to bring objectivity to the inquiry, the matter remains subjective. In reviewing the Block Island Sound question, the Supreme Court has adopted the federal position, saying "[w]e agree with the general proposition that the term 'landlocked' implies both that there shall be land in all but one direction and also that it should be close enough at all points to provide [a seaman] with shelter from all but that one direction."[151] Applying those criteria, Block Island Sound was determined not to be landlocked or inland waters. In concluding that "the States' proposed closing line is defective because it includes open sea in the indentation in violation of the mandates of the Convention,"[152] the Court was stating a conclusion more than a test. With the infinite number of geographic possibilities, that may be the best solution.[153]

148. *Rhode Island and New York Boundary Case*, Report of the Special Master, *supra,* at 53.

149. As explained by the special master, Mr. White's test "is based on the observation that if a ship is on the closing line of a bay . . . the angle between the ship and the two headlands, using the ship as the vertex of the angle, is 180 degrees. If the ship proceeds into the bay the angle formed on the seaward side is less than 180 degrees. White, thus, concludes that any point in a bay is landlocked when the sea area, or area of sea horizon, is less than 180 degrees." *Id.* at 56.

150. It might be argued that the semicircle test will eliminate mere curvatures but that puts the test backward. One cannot conceive of any concavity in the coastline that does not meet the White test. Thus, by using it, the semicircle test would become the only means of determining "landlockedness," a result that the Supreme Court has already foreclosed. What is more, in situations akin to Block Island Sound, interior bays, with admittedly landlocked waters, might provide the necessary area to permit the larger body to meet the semicircle test, even though it clearly includes waters that are not landlocked.

151. *Rhode Island and New York Boundary Case*, 469 U.S. 504, 525 (1985), quoting Beazley, *supra*, at 13.

152. *Id.* at 526.

153. The Court also noted that "[a]s the Special Master and the members of the Baseline Committee concluded, the waters in the outer reaches of Block Island in any practical sense are not usefully sheltered and isolated from the sea so as to constitute a bay or bay-like formation." 469 U.S. at 526. Again, this language indicates a subjective approach that probably cannot be avoided in applying the first criterion of Article 7.

Examples of waters that have been determined not to be landlocked may be more instructive than efforts to craft a dispositive test. We have just reviewed the Block Island Sound situation, in which both the special master and the Court determined that lines connecting Block Island Sound with Long Island and Point Judith enclose waters that are not landlocked.[154] Special Master Armstrong was twice faced with similar determinations. The Mississippi River delta has numerous bays along its seaward side, many of which are formed by the arms of the various passes to the Gulf. In many instances these mainland headlands are, in a sense, extended by tiny islets known as mudlumps. The United States proposed that the acknowledged bays be closed with lines between headlands on the mainland passes. Louisiana argued for more seaward closing lines, anchored on mudlumps rather than the mainland. The special master concluded that the state's proposed lines "would not include solely landlocked waters in a coastal indentation, but a substantial area of open water beyond the coastal line."[155] On that basis he rejected the state's proposal and his recommendations were adopted by the Court.[156]

The issue arose again at the mouth of Atchafalaya Bay, to the west of the Mississippi delta. Both parties agreed that the Bay qualified under Article 7, but they could not agree on the location of the headlands that enclose landlocked waters. The federal government nominated South Point on Marsh Island. The state contended that Mound Point should be used. The master adopted the former terminus, finding that "the relation of Mound Point to the coast is such that a line drawn to it would include waters that cannot be viewed as 'landlocked.'"[157]

The Coastline Committee has also faced the issue and, at least twice, concluded that water bodies were not "well-marked" indentations. It determined that the indentation between Cape Spencer and Cape Fanshaw, Alaska, is merely a bight, or change in the direction of the coastline, and not a true bay.[158] Likewise, it decided that southeastern Harrison Bay, Alaska, is not, in its entirety, more than a curvature in an otherwise straight coast.[159]

It will seem that such determinations have been highly subjective and probably will remain so. Commentators and the Court have tried to

154. 469 U.S. 504, 525; Report of the Special Master of October Term 1983, at 59 n.45.

155. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 38. The master went on to note that the islands do not qualify for consideration as extensions of the mainland, a subject that is covered separately herein.

156. *United States v. Louisiana*, 420 U.S. 529 (1975).

157. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 53. Again, the recommendation was accepted by the Court. 420 U.S. 529 (1975).

158. Minutes of September 20, 1971.

159. Minutes of April 14, 1982. That decision was, of course, challenged by Alaska. Special Master Mann recommended the state's position and the United States did not take exception.

provide objective criteria to determine when waters are landlocked but the issue does not appear to lend itself to objective resolution. Future controversies will undoubtedly be resolved as have those in the past. Masters and the Court will review specific indentations, with the subjective criteria in mind, and determine on a case-by-case basis which bodies are indeed landlocked.

INDENTATION INTO THE MAINLAND. A final consideration with respect to the subjective criteria is that the well-marked indentation must be "into the mainland." Bays may not be formed by islands extending out from the mainland even though the waters thus enclosed are, in a certain sense, landlocked. An offshore area formed by enclosing waters between the mainland and islands is a projection from the mainland, not an indentation into it. (Figure 45)

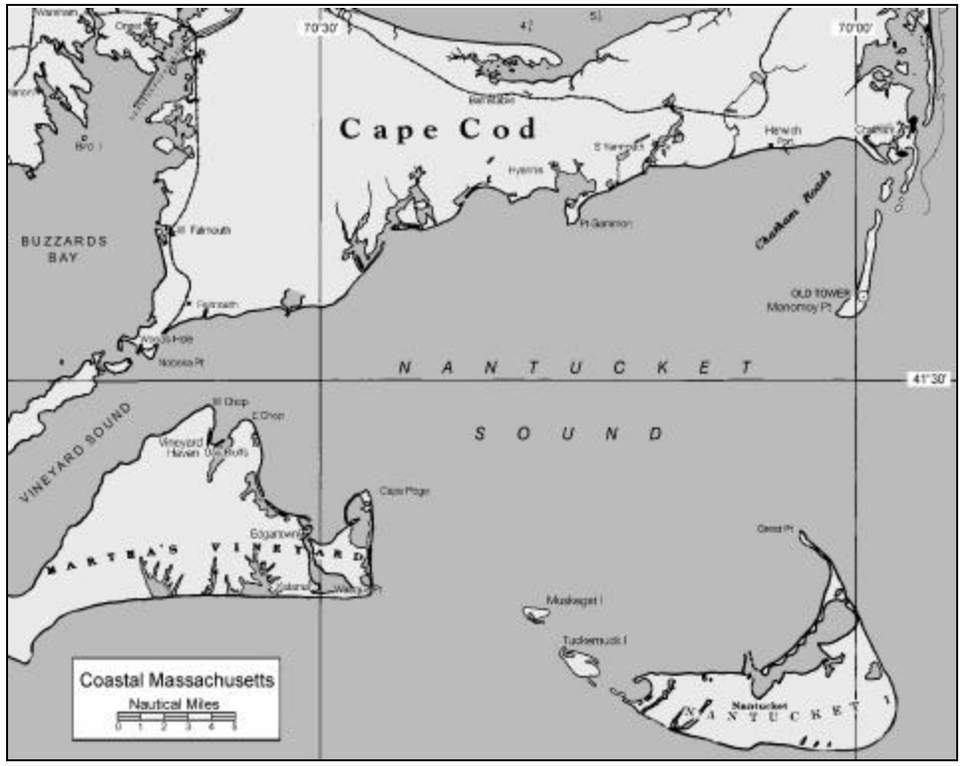

Figure 45. Nantucket Sound, off the coast of Cape Cod, Massachusetts. This water body is formed by islands that are not considered part of the mainland for boundary purposes. (*Based on NOAA Chart 13200*)

This is one of the subjects that was open to question in international law prior to 1958 but specifically resolved by the Convention. Three distinct situations arise, depending on the relationship of islands to the mainland and their distance offshore. First, as with the California Channel Islands, distances may be so great that the "enclosed" water body contains straits of high seas so that a vessel may enter, transit the water body, and exit without passing within 3 miles of the mainland or an island. This would appear to present the least compelling case for inland water status. Second, barrier islands may lie within 6 miles of each other but, on occasion, more than 6 miles of the mainland, creating enclaves of high seas that may only be reached by transiting the territorial sea. Mississippi Sound and the southeastern and northern coasts of Alaska are examples. Finally, the islands may be within 6 miles of the mainland so that all enclosed waters are at least territorial but, if islands are joined by closing lines, minor areas of jurisdiction are picked up to the seaward by measuring from those lines rather than the low-water lines on the islands alone. Caillou Bay, Louisiana, fits this description.

Prior to 1958, areas enclosed by the mainland and offshore islands were sometimes referred to as "fictitious bays." A number of proposals had been discussed that would permit the closure of such water bodies but, according to the Supreme Court, attempts to apply bay-like criteria to such areas "have not got beyond the stage of proposals."[160] Nevertheless, the United States attempted to employ just such criteria when faced with constructing a coast line for Louisiana before the Supreme Court announced that the 1958 Convention would be used for that purpose.

In 1950 the Supreme Court said, in effect, that the same rules apply to Louisiana as had been applied to California in 1947. That is, the federal government and not the state held paramount rights to submerged lands beneath the territorial sea.[161] That decision made it necessary to delimit inland waters along the complicated Louisiana coast. A coast line known as

160. *United States v. Louisiana*, 394 U.S. 11, at 70 n.93 (1969). According to the Court, "[t]he expression seems to have originated in a proposal by the Committee of Experts, made to the Fifth Session of the International Law Commission, suggesting a ten-mile rule for bays, a general ten-mile limit for straight baselines, providing that baselines should not be drawn to islands more than five miles from shore, and limiting baselines to five miles in groups of islands or between such groups and the mainland, except that in such a group one opening could be ten miles. The latter situation was called a 'fictitious bay.'" *United States v. California*, 381 U.S. 139, 170 n.38 (1965). California claimed that the Strait of Juan de Fuca is a fictitious bay, a precedent, it thought, for claiming the Santa Barbara Channel, but the Court concluded that the Strait had not been claimed by the United States. *Id.* at 171.

For a discussion of various proposals, beginning with the 1930 Hague Conference, including policy considerations affecting the propriety of enclosing such areas as territorial sea or inland waters, see McDougal and Burke, *The Public Order of the Oceans* 373-377 and 386 (1962).

161. *United States v. Louisiana*, 339 U.S. 699 (1950).

the Chapman Line (after the then secretary of the interior) was developed. That line enclosed a number of water bodies formed by the mainland and barrier islands such that no entrance exceeded 10 nautical miles, the distance accepted by the United States at the time as the maximum for bay closing lines. Most notable were Chandeleur Sound, on the east side of the Mississippi River delta, and Caillou Bay, some distance west.[162] (Figure 46)

The 1958 Convention, and its adoption by the Supreme Court for Submerged Lands Act purposes, erased any doubt about the existence of "fictitious bays." The Convention provides two means for dealing with islands and water areas adjacent to them. First, each island has its own territorial sea, measured as it would be from the mainland. This is the self-executing provision of Article 10. Article 4, in contrast, provides that straight baselines may be constructed to join fringing islands and that the waters thus enclosed will be inland. That Article is not self-executing and such lines must be specifically adopted by the coastal nation.

The Supreme Court recognized that "[t]he drafters of the Convention and their predecessors were aware that international law permitted such island fringes in some circumstances to enclose inland waters"[163] and concluded that "it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines."[164] "The deliberate decision was that such island formations are not to be treated differently from any other islands unless the coastal nation decides to draw straight baselines."[165] Of course the Court held that only the national government could adopt the straight baseline method for the United States and that it had not done so.[166]

162. For a thorough discussion of the Chapman Line's derivation, see 1 Shalowitz, *supra*, at 108-112.

163. *United States v. Louisiana*, 394 U.S. 11, 68 (1969).

164. *Id*. at 67-68. The Court noted that Strohl suggests that "a fringe of islands can make up one side of a bay" but, at the same time acknowledged that under the Convention, only the straight baseline provisions would authorize such a line. *Id*. at 71. Pearcy, one-time geographer of the Department of State, is cited as the only authority who suggested that islands might form the side of an Article 7 bay. *Id*. at 72. Pearcy was referring to Florida Bay, formed on the south by the Florida Keys. Since that reference, the Florida coast line has been resolved by litigation and Florida Bay was stipulated not to be an Article 7 indentation. *United States v. Florida*, 425 U.S. 791 (1976).

165. *Id*. at 71.

166. "In the same vein, we held that the choice whether to employ the concept of a 'fictitious bay' was that of the Federal Government alone. 381 U.S., at 172. That holding was, of course, consistent with the conclusion that the drawing of straight baselines is left to the Federal Government, for a 'fictitious bay' is merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast. See 381 U.S., at 170 n.38." *United States v. Louisiana*, 394 U.S. 11, at 72 n.95 (1969). The Court had previously ruled in *California* that "as with the drawing of straight baselines, we hold that if the United States does not choose to employ the concept of a fictitious bay' in order to extend our international boundaries around the islands framing Santa Barbara Channel, it cannot be forced to do so by California." *United States v. California*, 381 U.S. 139, 172 (1965).

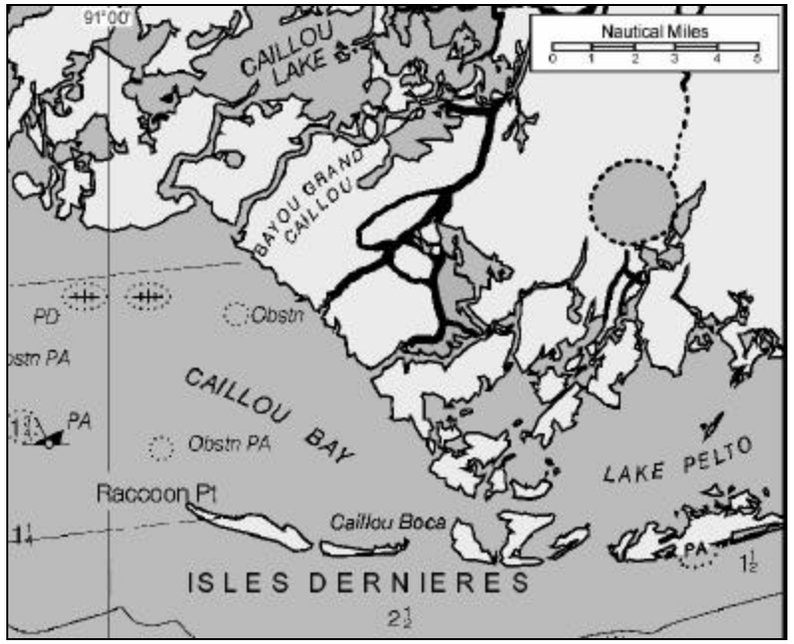

Figure 46. Caillou Bay, Louisiana. This bay might have been treated as inland water under pre-Convention rules sometimes employed by the United States. (*Based on NOAA Chart 11340*)

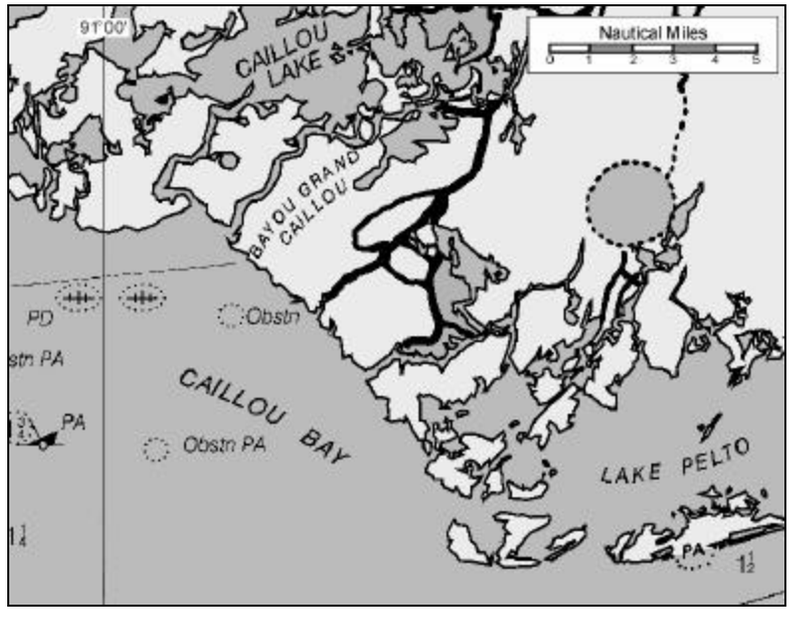

Figure 47. Mainland coast of Caillou Bay, Louisiana. With the islands erased, there are no landlocked waters.
(*Based on NOAA Chart 11340*)

With the Supreme Court's adoption of the Convention for Submerged Lands Act purposes, the federal government abandoned the Chapman Line and employed the Convention's principles in its litigation with Louisiana. Areas such as Caillou Bay became territorial seas under the Convention's principles and, although the state claimed that they continued as inland waters under a number of theories, the master and Court eventually ruled otherwise.[167]

It is now clear that "[a]rticle 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland."[168] Thus, where there is a question as to whether an indentation into the mainland exists in the vicinity of offshore islands, the United States first inspects a chart of the area with the islands erased. Any indentation into the mainland is then tested for bay status without regard to the islands.[169] (Figure 47) (Compare with Figure 46) If a bay exists, the islands are restored to determine whether they form multiple mouths to the bay and thereby affect the closing line. But the bay may not be created by the islands.

THE SEMICIRCLE TEST. The presumably more objective criterion for juridical bay status is the semicircle test. Article 7(2) of the Convention provides that to qualify as a bay, an indentation must have an area at least as large as a semicircle whose diameter is the mouth of the indentation. (Figure 48)

As discussed above, the Supreme Court and its special masters have interpreted Article 7 to impose this test as an absolute minimum limit, once an indentation has been determined to be landlocked through the more subjective criteria.[170] A water body may meet the semicircle test yet fail to

167. Caillou Bay provides the best example of an area that might be said to have been claimed by the United States under principles employed prior to the Convention yet no longer claimed after adoption of that treaty. To that extent, it stands for the proposition that states are not entitled to pre-Convention closing lines that may have been more seaward than those permitted under the provisions of the Convention now employed by the United States. Some states have contended that this constitutes an impermissible contraction of state territory. In fact, it is not established that the principles adopted for construction of the Chapman Line were ever the official international position of the United States. It is clear, however, that in most cases application of Convention principles, such as the 24-mile bay closing lines instead of the traditional 10, has worked to the decided benefit of the states.

The solicitor general determined that the United States would not withdraw its concession of Chandeleur Sound and entered a stipulation that recognizes Louisiana's Submerged Lands Act rights in that body. The stipulation represents no more than federal largess and does not purport to be based upon the application of Convention principles.

168. *United States v. Louisiana*, 394 U.S. 11, 67 (1969). As the Court has noted, "[A]rticle 7 defines bays as indentations in the 'coast,' a term which is used in contrast with 'islands' throughout the Convention." *Id.* at 67.

169. See Report of the Special Master in *United States v. Maine, et al. (Rhode Island/New York)* of October Term 1983, at 24 n.17.

170. See for example, Report of the Special Master in *United States v. Maine*, et al. (*Rhode Island/New York)* of October Term 1983, at 51-52, n.40, quoting Hodgson and Alexander, *supra*. Hodgson has indicated that "while the juridical bay must meet the semi-circle test, a perfect semi-circle (which would not exist in nature) would not in itself meet the criterion of being landlocked." Hodgson, *Toward a More Objective Analysis, supra*, at 20.

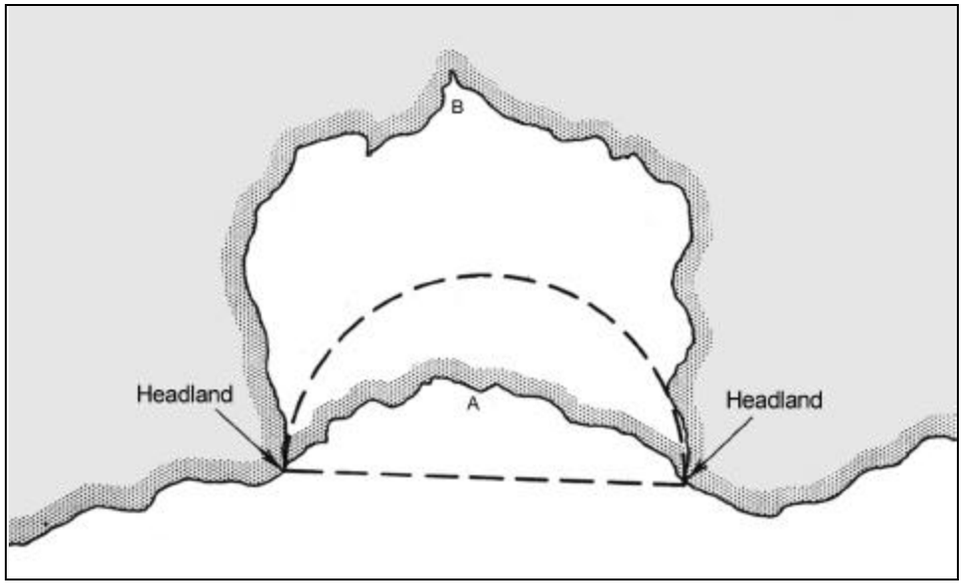

Figure 48. The semicircle test. Applying the semicircle test, indentation "B" qualifies as a bay, but indentation "A" does not. (*After I Shalowitz, Figure 4*)

qualify on other bases,[171] or may appear to be a bay yet not achieve that status for failure to enclose the area of a semicircle.[172]

Only one substantial issue has arisen in litigation concerning the application of the semicircle test to actual geographic situations. That is, what subsidiary water bodies are to be included within the area measured? It is not uncommon to have lesser water bodies adjacent to, or emptying into, the indentation being considered for juridical bay status. Article 7 does not make clear whether, in such cases, the area of those separate bodies is to be included for purposes of the semicircle measurement.

History. The original formulation of the semicircle test avoided this issue. It directed that a belt of water be drawn along the shore of the indentation with a width equal to one-fourth of the mouth and that the area outside that belt but within the mouth be compared to a semicircle with a diameter of one-half the length of the mouth. If the area of the interior exceeded that of the hypothetical semicircle, the indentation qualified.[173] In

171. For example, the Supreme Court rejected Louisiana's argument that any portion of East Bay that met the semicircle test should be considered inland waters even though the entirety of that water body is not. *United States v. Louisiana*, 394 U.S. 11, 53-54 (1969).

172. It has been said, for example, that "Santa Monica Bay on the California coast looks like a bay but does not qualify in the semi-circle test." United States Department of State, *Sovereignty of the Sea* 13 (1969).

173. *See United States v. California*, 381 U.S. 139, 144 (1965). The proposal is often referred to as the "Boggs Formula," after the then geographer of the Department of State, but was apparently developed by Admiral Patton of the Coast Survey at the request of the State Department.

most instances, subsidiary water bodies would be subsumed within the interior belt and not measured for semicircle test purposes. It was then offered by the United States as an appropriate method of determining inland water status at the 1930 Hague Conference on the Law of the Sea. Shalowitz, *Legal-Technical Aspects of the Submerged Lands Cases* 29 (1954). It is also sometimes known as "the reduced area method."

Of course, no treaty resulted from the 1930 Conference and the test, as originally proposed, was thought to be too complicated for practical use unless applied in advance and published on coastal charts.[174]

In 1953 Shalowitz revisited the adjacent water body issue. After discussing the earlier United States proposal, he concluded that an easier approach might be to determine the mouths of interior water bodies in the first instance. Any that qualified as inland waters would be excluded from the area measurement to determine whether the principal water body met the semicircle test. Others would be included.[175] Such an approach is not inconsistent with the language of Article 7 as it now stands. That language was first proposed by the committee of experts in 1953.[176] Before it had been interpreted by the Supreme Court, Shalowitz recognized that problems of interpretation would doubtless arise, making it necessary to establish "a set of secondary rules within the framework of the primary rule."[177] O'Connell seems to agree, noting that the method has been simplified without attention to the question of whether it can be easily applied by the mariner.[178]

174. O'Connell, *supra*, at 392. In fact, the proposal had consequences that required refinement. For example, Shalowitz opined that fractions other than one-fourth might sometimes have to be used "in order not to generalize the shape of the bay too much." 1 Shalowitz, *supra*, at 38. Whether and when other fractions would be used introduces a subjective judgment that reduces the appeal of the test. Yet the fact that San Diego Bay does not qualify as inland water using the one quarter of the headland-to-headland distance indicates that a significant shortcoming exists.

The formula never became a rule of international law, or even the official policy of the United States. Report of the Special Master in *United States v. California* of October 14, 1952, at 25. Yet the federal government urged that it be employed in the *California* case as an appropriate means of determining inland water status and the master made that recommendation. *Id.* at 25 and 26. That issue became moot when the Court later adopted the 1958 Convention for Submerged Lands Act purposes. As a subsequent master has noted, "[a]ny bay which meets the requirements of the semicircle test under Article 7 of the Geneva Convention obviously meets those of the Boggs formula." *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 40.

According to Shalowitz, the method was used by the United States Tariff Commission in its 1930 exercise to delimit the territorial sea of the United States for the purpose of compiling fisheries statistics, by the Department of Commerce for purposes of measuring the areas of coastal states for the 1940 census, and the Department of the Interior in its construction of the Chapman Line along the Louisiana coast. 1 Shalowitz, *supra*, at 40-41.

For a graphic example of how the test is applied, see 1 Shalowitz, *supra*, at 37.

175. Shalowitz, *The Concept of a Bay as Inland Waters*, Surveying and Mapping, Vol. XIII, No. 4 (1953) 432 at 438. Dr. Hodgson has taken a similar position, contending that one must distinguish among water bodies and in measuring one should not include the water area of another, distinct indentation or subsidiary feature. Hodgson, *Toward a More Objective Analysis . . .*, *supra*, at 6. Dr. Hodgson so testified in *United States v. Louisiana*, where his proposals for area measurement were adopted by the master and the closing lines that resulted were eventually incorporated in a Court decree. *United States v. Louisiana*, 422 U.S. 13 (1975).

176. Report annexed to U.N. Doc. A/CN.4.61/Add. 1 (1953). See also, 4 Whiteman, *supra*, at 222.

177. 1 Shalowitz, *supra*, at 41.

178. 1 O'Connell, *supra*, at 392.

The *Louisiana* case provided an opportunity to consider the question in the context of an intricate coastline. Two controversies arose immediately. One involved the treatment of rivers that flow into an indentation and whether any part of the area of the river should be included in the area measurement being made to determine whether the indentation qualified as a bay. The second involved subsidiary bays, and whether their areas could be included for purposes of testing a more seaward indentation.

In each instance, it was in the state's interest to maximize water area so as to assure that the semicircle test would be met in the greatest number of cases, resulting in more bay closing lines and increased state jurisdiction. Louisiana suggested a number of alternative theories for including subsidiary water bodies within the area to be measured for semicircle purposes. First, the state proposed that the low-water line be followed wherever it goes. Second, it recommended that all salt waters be included. Third, it suggested that all tributaries that lead to the main stream of the Mississippi River be followed until the river is reached, including all land areas encompassed by such a line. Fourth, the same water bodies would be included, but only those land areas lying within the mouths of the tributary waters and the bay being measured. Finally, it proposed closing off water bodies where they entered the bay.[179]

The United States emphasized that only the water body being tested should be measured, ignoring tributaries and lands within them. This position appears to have been the same as Louisiana's final alternative.

Rivers. East Bay, at the southern tip of the Mississippi River delta, contains an extremely productive oil and gas field. Although the two major distributaries of the Mississippi in the area form the sides of East Bay, a number of minor passes from the Mississippi empty into it. If the area of East Bay is measured by following its shores, and crossing these river mouths such that they are not included in the area measurement, the bay does not meet the semicircle test. Louisiana made each of the arguments just mentioned to justify inclusion of some of the river water within the bay. (Figure 49)

It contended that its first position conforms to the literal wording of Article 7, which refers to the "low-water mark along the shore of the indentation."[180] Yet, in practice, this proposal is unworkable. In the simple case of a single river emptying into an indentation, one might begin at the headland of the indentation, proceed along the low water to the river

179. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 30-31.

180. Louisiana also argued that this interpretation is supported by Article 13 of the Convention, which provides that "[i]f a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide of its banks." As noted by the special master, "[o]n the principle of *expressio unius est exclusio alterius*, Louisiana argues that if a river does not flow directly into the sea but instead into a bay, a straight line should not be drawn across its mouth but instead the low-water mark around the shore of the bay should be followed up into tributary waters." Report of the Special Master of July 31, 1974, at 30.

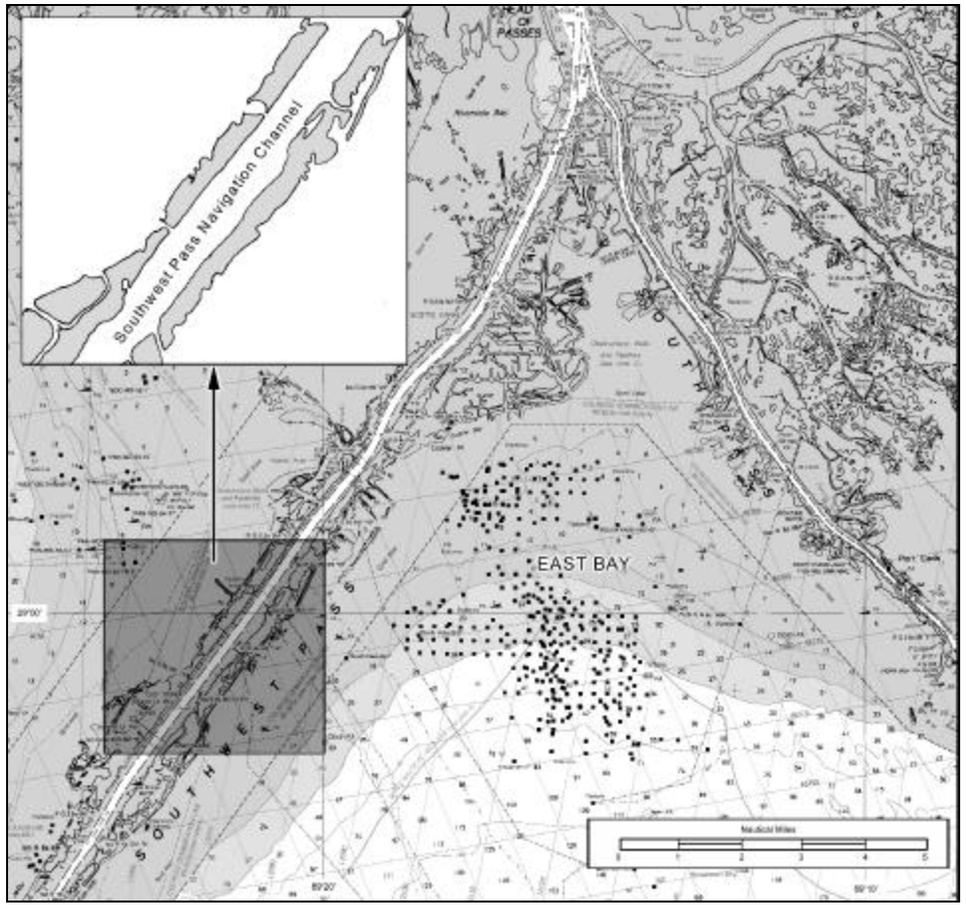

Figure 49. East Bay, Louisiana. Small channels connect the Southwest Pass of the Mississippi River with the bay. (*Based on NOAA Chart 11361*)

mouth, follow the low-water line into the river and upstream to its headwaters, continue down the opposite bank back to the indentation and seaward to its mouth. The Mississippi delta is even more difficult to deal with. By following a channel from East Bay, one shortly arrives at a primary trunk of the Mississippi. By continuing along the low-water line, one proceeds either downstream, eventually returning to the Gulf of Mexico or the indentation being measured, or upstream, where another distributary channel is eventually reached. If the low-water line is followed, one simply returns to the Gulf or the indentation sought to be measured. In either case, it is actually the land forming the indentation that is being measured, not the water area. In neither case does the procedure make any sense.

Louisiana's purpose, of course, was to include substantial portions of the Mississippi River itself, but the proposal could not have that effect

without crossing a channel at some point. And if that is going to be done, no particular crossing is more logical than that where the channel empties into the indentation being defined.

The United States stood by its primary contention that the semicircle test is to be applied to a particular indentation and that clearly separate water bodies should not be included.

The state's second proposal is related. It would have all river waters to the limits of tidal effect included within the area of the indentation into which the river empties. The suggestion does not have the same problem of practical application as the "follow the low-water line" approach and has enjoyed approval among experts on the subject.

In *Post Office v. Estuary Radio Ltd.*, the parties addressed the identical issue. The British government was interested in maximizing the area to be measured so as to qualify the Thames estuary as a bay and establish jurisdiction over the radio station/defendant. To do so, the government argued that the area of the Thames up to Richmond Lock should be measured along with subsidiary rivers to the distance that they were affected by the rise and fall of the tide. The defendant contended, as did the United States in the Louisiana case, that closing lines should be drawn across the mouths of rivers and their waters excluded for purposes of applying the semicircle test to the Thames estuary.[181]

However, the issue was dispositive only if Orfordness and North Foreland were treated as the natural entrance points to the embayment. In fact, the English Court of Appeal selected the Naze and Foreness as the natural entrance points, making it unnecessary to decide the area measurement issue.[182] Nevertheless, O'Conner J. spoke to the issue, rejecting the suggestion that tributary waters should not be included. Subsequent British commentators also acknowledged that the matter is open to that interpretation.[183]

Like Louisiana's primary proposal, however, the "limits of the tides" test makes little sense when applied to the Mississippi River. Tidal effect is felt upriver to Baton Rouge, a distance of 84 miles. As the special master pointed out, if the state's theory were accepted, "the entire lower portion of the State of Louisiana would have to be treated as one gigantic over-large bay, which could only be done as a practical matter if the United States had

181. 1 O'Connell, *supra*, at 398-399.

182. *Id.* at 398-399.

183. Beazley, *supra*, at 15, suggests that one should look for the point at which the water is no longer sea water, which will normally be the limit of tidal effect. 1 O'Connell, *supra*, at 398 indicates that Article 7(3) is open to that same interpretation and bases his position on one of the arguments relied upon by Louisiana. Prescott agrees, indicating that tidal rivers should be included as part of a bay to the limit of tidal influence. Prescott, *supra*, at 60.

adopted a system of straight baselines, which as previously demonstrated it has not done."[184] Furthermore, the master noted that the Supreme Court had already concluded that the whole of East Bay did not meet the semicircle test, clearly indicating that it envisioned no such expansive application of the test.[185]

The master rejected each of Louisiana's first four alternatives and recommended a method of area measurement for East Bay that excluded adjacent river channels. His recommendations were adopted by the Court,[186] and a coast line employing his principles was incorporated in a Supreme Court decree.[187]

Subsidiary Bays. A more difficult problem is determining whether or not to include within the area measurement adjacent water bodies that are more in the nature of coves or bays. Louisiana's approach was easily applied. As before, the state contended that the low-water line should merely be followed wherever it led, thereby including all adjacent water bodies.[188]

The federal government again took the position that the Convention referred to "that indentation" and, therefore, required that measurement be limited to what might reasonably be considered part of the single, outer indentation.[189] The United States conceded that certain tributary water bodies might be included but denied that any rule of law existed that justified the inclusion of any that might be reached by following the low-water line wherever it might lead.[190]

The distinction was to be based upon the nature of the connection between the two water bodies. If the connection were a narrow channel, the federal government took the position that the tributary water body should not be included as part of the area of the indentation under consideration. On the other hand, if the relationship were more in the nature of a bay opening into a larger bay, the areas would be combined.

184. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 29.

185. Report of July 31, 1974, at 29.

186. *United States v. Louisiana*, 420 U.S. 529 (1975).

187. *United States v. Louisiana*, 422 U.S. 13 (1975).

188. 394 U.S. at 50. 1 O'Connell, *supra*, at 399-400.

189. 1 O'Connell, *supra*, at 400.

190. As the Supreme Court noted, "[t]he United States does not reject the notion that some indentations which would qualify independently as bays may nonetheless be considered as part of larger indentations for purposes of the semicircle test; but it denies the existence of any rule that all tributary waters are so includible." 394 U.S. at 51.

In fact, the geographer of the State Department had written that "the water of bays within bays may be included as water surface of the outer bay in determining the dimensions of a coastal indentation." *Sovereignty of the Sea*, *supra*, at 13. Likewise, Shalowitz had said that "in the application of the semicircular rule to an indentation containing pockets, coves or tributary waterways, the area of whole indentations (including pockets, coves, etc.) is compared with the area of a semicircle." 1 Shalowitz, *supra*, at 220 n.28. Both authorities were cited by the Court. 394 U.S. at 51 n.66.

The Court's treatment of an area denominated "outer-Vermilion Bay" by the state makes clear that it accepted the federal approach. The United States argued that the truly inland areas, "inner-" Vermilion Bay and the adjacent Cote Blanche complex, had their own distinct and isolated configurations, and should not be considered together with "outer-" Vermilion Bay. Nevertheless, by following the low-water line they would clearly have been included. The Court emphasized that the water bodies were connected only by narrow channels and that Vermilion Bay could not be included to assist outer-Vermilion Bay in meeting the semicircle test.[191]

On the other hand, if the waterway connecting the two bodies is relatively large except for the existence of islands within it, those islands will not prevent their treatment as a single indentation. The Supreme Court faced that issue in its consideration of Ascension Bay, on the west side of the Mississippi River delta. The state contended that it is an overlarge bay and meets the semicircle test by including the water areas of the Caminada-Barataria Bay complex to the north. The United States argued that the latter bodies are distinct, being separated from Ascension Bay by a series of barrier islands. (Figure 50) The Court adopted the state's position. It reasoned that Article 7 seeks to keep islands from defeating the semicircle test and the barrier islands, therefore, should be ignored when applying that test to Ascension Bay. Once that was done, the opening to Caminada-Barataria is so broad as to make that subsidiary bay includable under even the federal position, and Ascension Bay meets the test.[192]

Hodgson later endorsed what may be an even more conservative approach than that taken by the federal government in the Louisiana case.[193] O'Connell has also discussed the subject. He cautions that when without the inclusion of tributary bays an indentation into the coast would be a mere curvature, the application of Article 7(2) would be difficult. He implies that, although each case will have to be determined on its own geography, the Convention requires that all waters within the closing line must be landlocked and care should be taken before including tributary bays to aid the qualification of an area that would, in their absence, be no more than a curvature of the coast.

191. 394 U.S. at 51. 1 O'Connell, *supra*, at 400.

192. *United States v. Louisiana*, 394 U.S. at 52-53. The Court applied the same reasoning to West Bay. *Id.* at 53. O'Connell seems to interpret this decision as support for the proposition that the low-water line is to be followed into subsidiary bays when making semicircle test measurements. 1 O'Connell, *supra*, at 400. In fact, the Court deals with that issue separately, concluding that that determination depends upon the nature of the opening in the absence of islands.

193. In Hodgson, *Toward a More Objective Analysis*, *supra*, at 6, he suggests that "[t]o determine the unique character of a bay, it is necessary to isolate all water surfaces which do not conform to the general definition of a bay and are geographically isolated from it or which do not conform with those of other categories of features, i.e., rivers, canals, estuaries, etc. These hydrologic or hydrographic types are then geographically detached from the specific bay under examination. Rivers, lagoons, subsidiary bays, channels and the like should be separated . . . ."

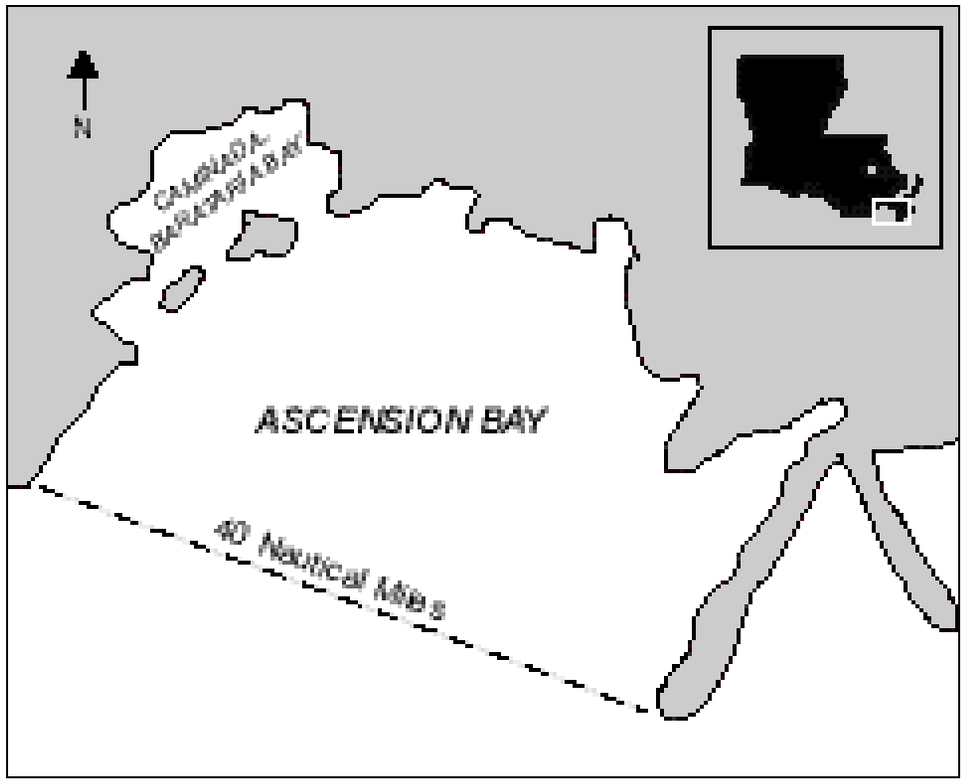

Figure 50. Ascension Bay, Louisiana, with adjoining Caminada and Barataria Bays.

The entrance to San Francisco Bay provides a graphic example of the issue. If the Golden Gate and all waters to the east are ignored, there is a more seaward indentation into the coast with identifiable headlands. That indentation alone will not meet the semicircle test. But, by including the clearly inland waters of San Francisco Bay, the test is met. (Figure 51) Apparently even California recognized that such inclusion would be inappropriate when it agreed to a Supreme Court decree limiting inland waters in the area to those landward of the Golden Gate.[194]

The Supreme Court of Nova Scotia considered the issue in *Re Dominion Coal Company and County of Cape Breton*, where it concluded that an area known as Spanish Bay, seaward of Sydney Harbor and the estuary entrance to Bras D'Or Lakes, was a mere curvature of the coast unless the inner water bodies were included. It determined that they should not be and did not enclose the whole of Spanish Bay.[195]

194. *United States v. California*, 432 U.S. 40, 41 (1977).

195. 40 D.L.R.2d 593 (1963). See also, 1 O'Connell, *supra*, at 402.

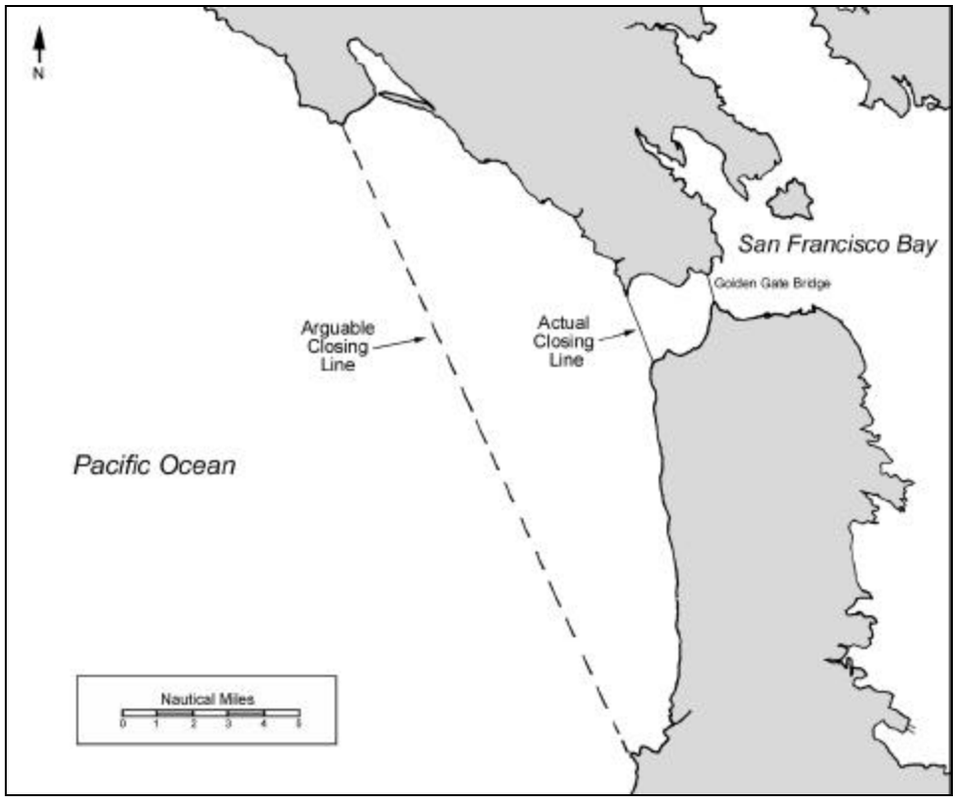

Figure 51. Entrance to San Francisco Bay, California. The area seaward of the Golden Gate would arguably be inland water if San Francisco Bay could be used to meet the semicircle test.

Islands within the Indentation. Article 7(3) provides, in part, that "[i]slands within an indentation shall be included [for semicircle test purposes] as if they were part of the water area of the indentation." This provision has its genesis in the original formulation of the semicircle test, which employed a band within the indentation the width of one-fourth the length of the closing line. The originators of that scheme thought it too complicated to deal with islands separately, so suggested that they be ignored. Under the semicircle test as it has evolved in Article 7, islands would not create the same complication. Nevertheless, the drafters determined that the area taken up by islands within an indentation should be treated as if it were water for purposes of the semicircle test. As Beazley points out, there is a certain logic to this approach because the existence of islands "increases the internal character of the waters."[196] Although not

196. Beazley, *supra*, at 21.

mentioned in the Convention, we must assume that low-tide elevations are to be treated as islands for this purpose.[197]

There is, however, one instance in which an island should be considered as land area. Technically, under the Convention, an island is any "naturally formed area of land, surrounded by water, which is above water at high tide."[198] Yet the Supreme Court has concluded that, in certain limited circumstances, islands may be treated as part of the mainland.[199] This may occur when an island is separated from the mainland by a narrow channel. Although the situation arose in the context of the canal-riddled marshlands of the Mississippi delta, even Long Island, New York, has since been ruled part of the mainland, and therefore not an island, by the Court.[200] To be consistent, islands within an indentation should be subjected to the same scrutiny. If they are legally part of the mainland, under the criteria adopted by the Court, then they should not be treated as islands for purposes of the semicircle test. That is, they should not be included as part of the "water" area of the indentation.

The Court has not, to date, had occasion to consider this application of its "island part of mainland" doctrine. The issue arose before the special master in *United States v. Louisiana* but on a matter that was ultimately decided on other grounds. The state contended that a closing line should be drawn across Bucket Bend Bay, on the east side of the Mississippi delta, with termini on offshore mudlumps. The United States argued that the mudlumps are inappropriate headlands since they are not realistically part of the mainland and, in addition, that the area enclosed by such a line did not meet the semicircle test. In fact, the area measurement was extremely close and the federal contention rested upon the exclusion of the area of an "island" within the indentation which runs parallel to the mainland and is separated from it by the narrowest of channels. (Figure 52) Louisiana took the position that the "island part of mainland" doctrine is properly related only to headland selection and that all islands within the indentation, no matter how closely associated with the land are to be treated as water. As it turned out, the special master accepted the federal argument that the mudlumps were inappropriate headlands and the interior island question became moot. However, there is no reason to believe that the Court would treat an island as mainland for headland purposes and as water in applying the semicircle test.

197. *Id.* at 18.

198. Article 10(1).

199. *United States v. Louisiana*, 394 U.S. 11, 62-63 (1969).

200. *United States v. Maine, et al. (Rhode Island/New York)*, 469 U.S. 504, 512-520 (1985).

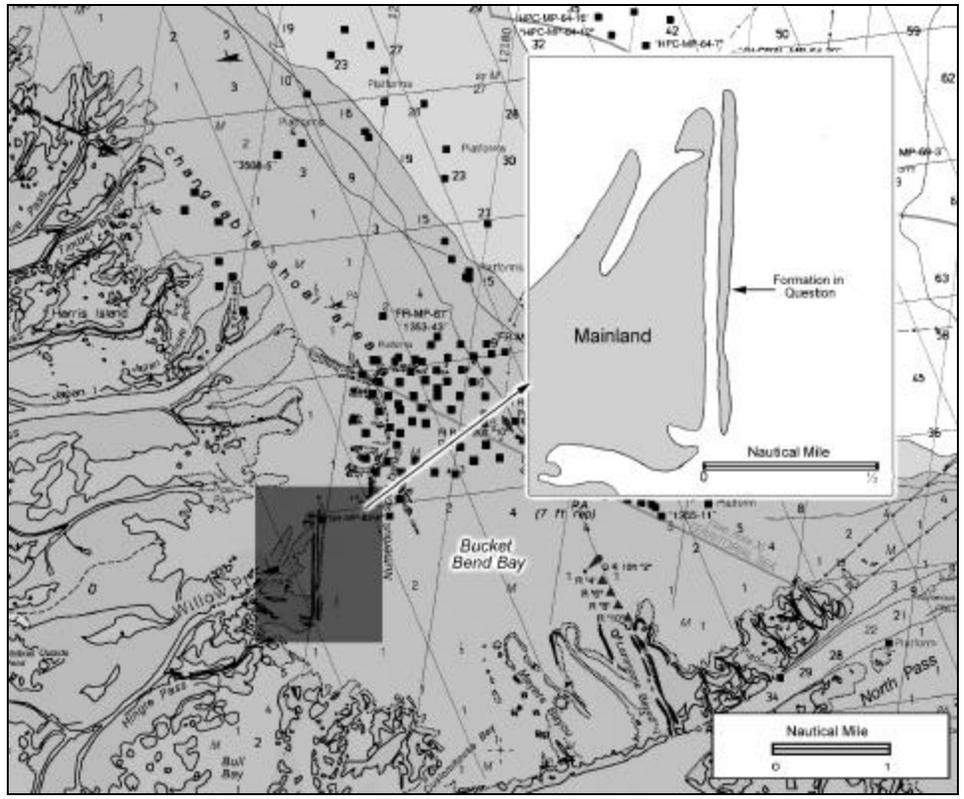

Figure 52. Bucket Bend Bay, Louisiana. Whether or not the formation in the inset is legally assimilated to the mainland may affect the outcome of the semicircle test as applied to Bucket Bend Bay. (*Based on NOAA Chart 11352*)

Clearly the Court has rejected Louisiana's argument that the island assimilation principle is only applicable to the matter of headland selection. As discussed above, it did not agree with the state's contention that outer-Vermilion Bay is part of a larger indentation because it is attached to Vermilion Bay only by a narrow passageway. (Figure 53) Yet that passage is between Marsh Island and the mainland and the Court decided at the same time that islands separating water bodies would not be allowed to defeat the semicircle test.[201] Thus, the Court must have been treating Marsh Island as part of the mainland in its rejection of the outer-Vermilion Bay claim or it would have ignored the island as it did those at the entrance to Caminada-Barataria and West Bays. When applying the terms of the Convention, a land area must be island or mainland for all purposes.

201. *United States v. Louisiana, supra*, 394 U.S. at 52-53.

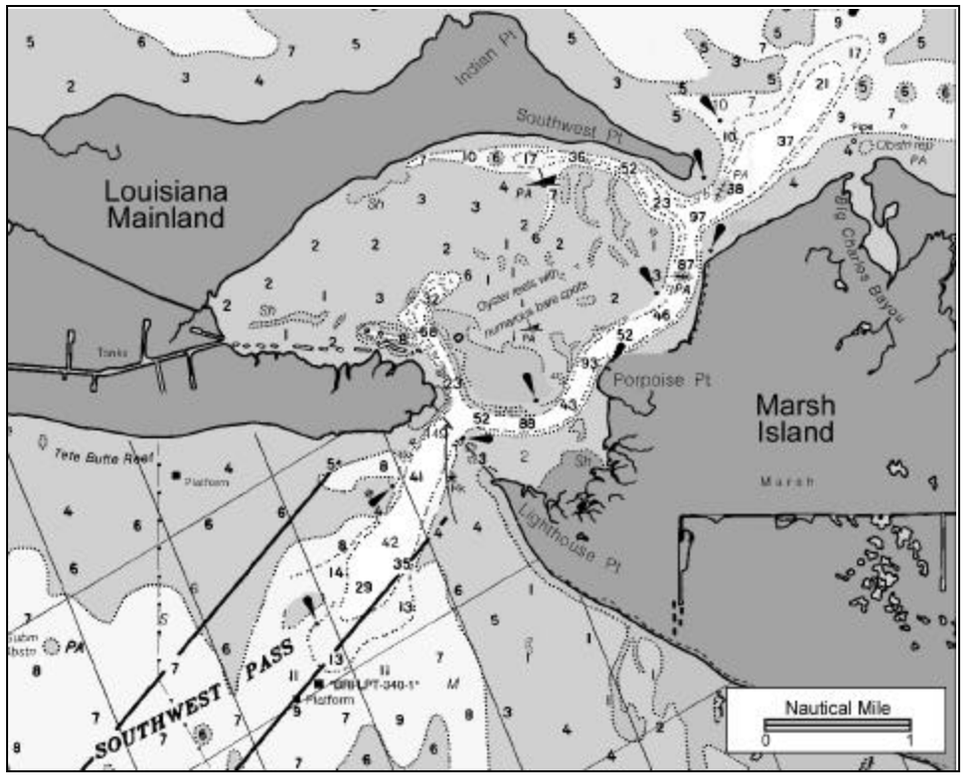

Figure 53. Marsh Island, Louisiana. The channel between the island and the mainland prevents Marsh Island from being assimilated to mainland Louisiana. (*Based on NOAA Chart 11349*)

Artificial Islands and Low-Tide Elevations within the Indentation. Artificial islands within an indentation create an entirely unconsidered situation. Article 7 specifically provides that the area of "islands" shall be treated as water for purposes of the semicircle test. Just as specifically, Article 10 requires that islands be "naturally formed." Query whether a spoil bank within the indentation is counted as water area or as land. One can argue that by specifically including islands as water area, and ignoring other features, the drafters must be assumed to have intended no other exceptions. Yet, as Beazley points out, it seems improper to treat low-tide elevations differently for this purpose. Like low-tide elevations, artificial islands certainly do not detract from the landlocked nature of the indentation. Article 7(2) speaks in terms of measuring the "indentation," not the "water area." Thus, the better argument seems to be that low-tide elevations and artificial islands within the indentation are not to be subtracted from the area measurement save in the rare instances in which

they should be treated as part of the mainland because of their adjacency and under the same criteria as would be applied to natural formations.[202]

Islands in the Mouth of the Indentation. Although a bay must be an indentation into the mainland, and may not be formed by islands along an otherwise straight coast, islands in the mouth of an indentation may enable that water body to meet the semicircle test when otherwise it would not. This can occur in either of two geographic circumstances.

First, the islands may reduce the length of the closing line, thus reducing the size of the semicircle whose area must be matched by the indentation. The Caminada-Barataria, Louisiana, complex is an example. (Figure 54) Article 7(3) provides that "[w]here, because of the presence of islands, an

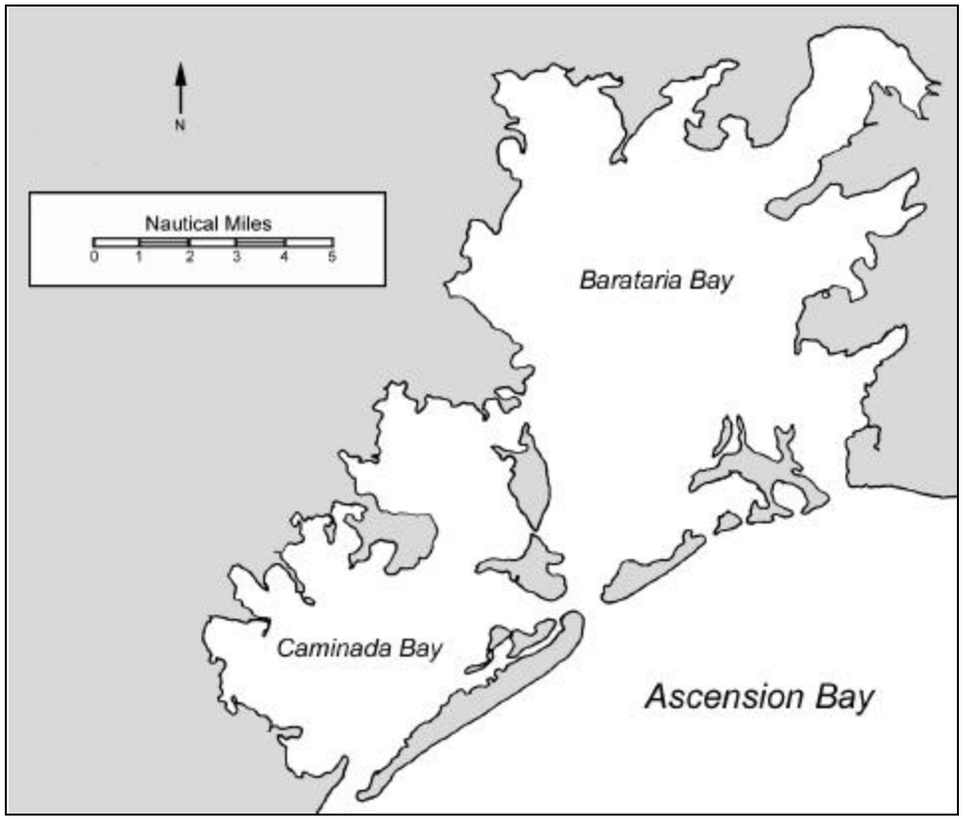

Figure 54. Caminada-Barataria Bay, Louisiana, with multiple mouths formed by islands

202. Of course, artificial and natural features are not treated identically for purposes of coast line determination. Once severed from the mainland, an artificial structure becomes a man-made island and loses its status as part of the coast line. 394 U.S. at 41 n.48. However, nothing in the Convention seems to compel the conclusion that artificial islands should be treated as mainland rather than islands when making semicircle calculations.

indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths."[203]

This provision is intended to enhance the likelihood that a particular indentation will qualify for bay status when its waters are landlocked not only by the mainland but by islands between the mainland headlands. In the absence of such islands the hypothetical would have a diameter equal to the distance between the mainland headlands. But with islands creating multiple mouths, that distance is typically reduced, thereby reducing the depth that the indentation must penetrate into the mainland in order to meet the semicircle test.

Second, the islands may lie seaward of a direct line between mainland headlands, thereby enclosing more water area than would lie within the mainland to mainland closing line.[204] (Figure 55) That additional water area, in a close case, might be enough to enable the indentation to meet the semicircle test.[205]

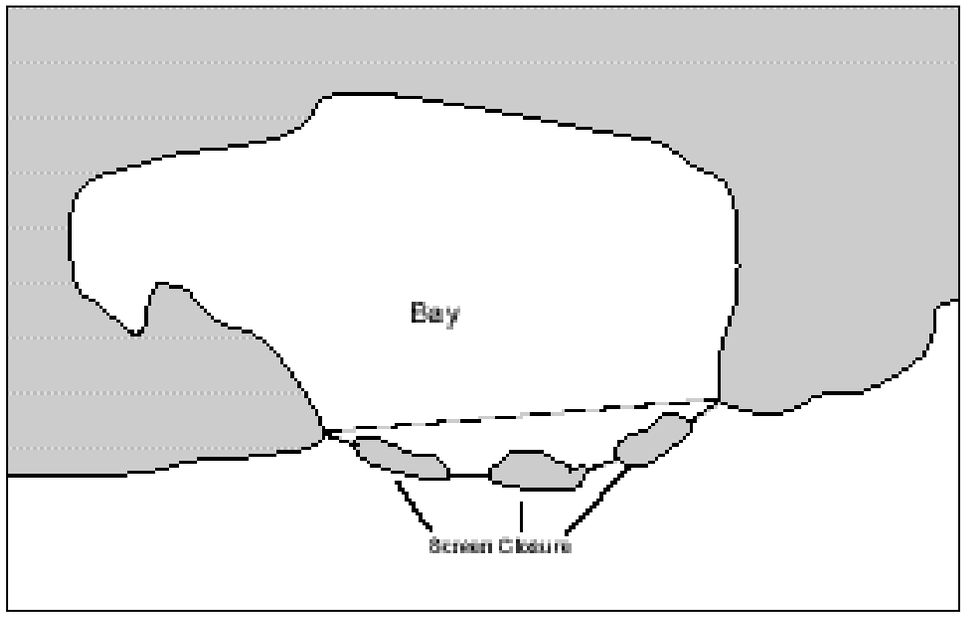

Figure 55. Multiple mouths to a juridical bay. The multiple mouths formed by these screening islands are seaward of a direct line between mainland headlands.

203. Determining whether particular islands actually create multiple mouths to an indentation is a separate, and sometimes hotly contested, issue.

204. Again, just which seaward islands create multiple mouths is discussed below.

205. Scammon Bay, Alaska, appears to be an example. See Coastline Committee Minutes of September 14, 1970.

The existence of islands may have a third effect that is unrelated to the semicircle test. Article 7(4) provides that a juridical bay's closing line may not exceed 24 miles in length. Where islands create multiple mouths their combined length may fall within that limitation even though the mainland headlands are more than 24 miles apart. (Figure 56) In such cases the closing lines will run from the mainland, from island to island, and across to the opposite mainland, so long as the segments do not total more than 24 miles.

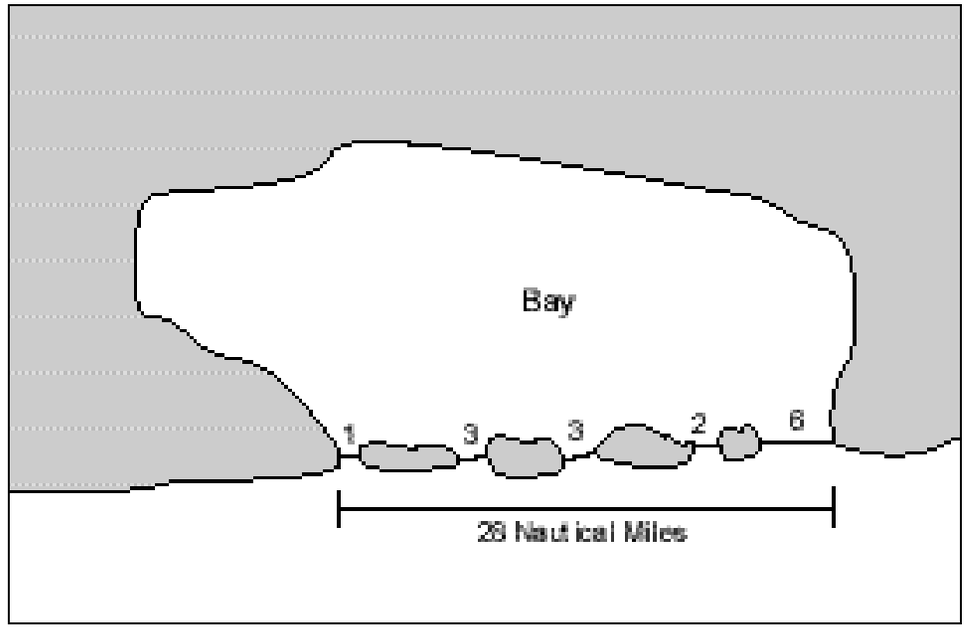

Figure 56. Multiple mouths to a juridical bay. The multiple mouths formed by these screening islands total less than 24 miles although the mainland headlands are more than 24 miles apart.

What once may have been in doubt but now is clear is that the semicircle drawn from the midpoint of the mouth of the indentation may intersect land so long as additional water pockets are available to offset the area of land that falls within that semicircle. Early graphic examples of how the test is applied tended to show a semicircle that never crossed land. See, for example, 1 Shalowitz, *supra*, at 37 figure 4. Other geographers have used examples in which the semicircle crosses the interior coastline on occasion. See, for example, Pearcy, *supra*, at 7 figure b; Beazley, *supra*, at 13 figure 2b; and Hodgson, *Special Circumstances*, *supra*, at 5 figure 1. O'Connell correctly points out that nothing in Article 7 requires that the circumference of the semicircle always lie in the water. 1 O'Connell, *supra*, at 396.

This then is how the semicircle test has been applied by the Supreme Court and its masters. It is a minimum test, to be applied after an indentation has qualified under the more subjective criteria of Article 7(2). Its purpose is to measure a given indentation and not every subsidiary feature that might be reached by following the low-water line or moving inland to the limit of tidal effect. Whether an adjacent bay or cove is included in the area measurement will depend on the nature of the passage connecting the water bodies.[206] However, islands will be ignored for that determination as they are for measuring water area. Finally, islands that create multiple mouths to the indentation may reduce the interior area required to meet the test.

The federal government has attempted to employ these principles in applying the semicircle test to innumerable indentations along the coast of the United States.[207] Although it is an objective test, its application involves a number of subjective determinations and technical calculations.[208]

Headlands and Natural Entrance Points

Article 7(3) of the 1958 Convention describes a bay as the area lying within a line joining "natural entrance points." But no additional guidance is provided to assist in the identification of such points. Actually locating the termini of a bay closing line is often the most difficult problem associated with applying the principles of Article 7.

Professor Prescott notes that the process of determining a proper closing line involves three separate issues. "First, it is necessary to select the natural entrance points to the bay, which are specifically mentioned in Article 10 [of the 1982 Treaty]. Second, it is necessary to choose a particular point on those entrance points that will act as termini for the baseline. Third, decisions must be made about how to deal with islands in the mouth of the bay."[209] We deal with the first and second of those issues here. The third is the subject of a separate discussion below.

Although the literature and judicial decisions do not always distinguish between "headlands" and "natural entrance points," it would seem that the delimitation of bay closing lines is aided by such a distinction. Thus, we

206. Sohn and Gustafson, *supra*, at 44.

207. See Coastline Committee Minutes of July 27, 1970; August 3, 1970; August 31, 1970; September 14, 1970; October 5, 1972; December 17, 1976; October 10, 1979; July 21, 1980; March 17, 1982; April 14, 1982; and February 25, 1985.

208. Unfortunately the mariner may have difficulty determining whether a particular indentation is inland water. As O'Connell points out, seamen do not typically possess a planimeter, the basic instrument for applying the test. 1 O'Connell, *supra*, at 408.

209. Prescott, *supra*, at 53. Article 10 of the 1982 Law of the Sea Treaty is comparable to Article 7 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

will adopt that approach and use the term "headland" to refer to the promontory that serves to create the indentation at issue, or gives its waters their landlocked character. The term "natural entrance point" will be used to refer to the precise point on each headland at which the bay closing line meets the low-water line.

Shalowitz's definition of "headland" appears to provide the starting point for most subsequent analysts who have considered the issue. He concluded that a headland is generally "the apex of a salient of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in the direction of the general trend of the coast."[210] The author cautioned, however, that his definition "not be interpreted to apply to small protuberances or projections in an otherwise straight coastline . . . these protuberances must bear a definite relationship to the curvature or waterway whose status is to be determined."[211] Shalowitz saw this as logical because the waters of a bay are described as "inland," a term which connotes "within the land."[212]

The headland question arose in *United States v. Louisiana*. After the Supreme Court determined that the whole of East Bay is not inland water because the area landward of a line connecting the seawardmost extensions of its logical headlands failed to meet the minimum requirements of the semicircle test, Louisiana sought recognition of lesser bays within East Bay. It happens that East Bay is in the shape of an equilateral triangle, with relatively straight coasts. However, each of these coasts is occasionally interrupted with a minor protrusion, or bump. The state took the position that each such protrusion was the potential headland of an interior bay and claimed inland water status for all waters landward of the seawardmost pair of bumps that met the semicircle test. The federal government insisted that headlands must be sufficiently pronounced so as to enclose landlocked waters and that the seawardmost of the state's alternatives were so insubstantial as to fail to meet that requirement. The Supreme Court's special master accepted the federal reasoning and recommended that interior closing lines be drawn to headlands that he believed to contribute to the landlocked nature of waters within.[213] Thus, the headlands must

210. 1 Shalowitz, *supra*, at 63-64.

211. *Id.* at footnote 77.

212. *Id.* at 63 n.75; citing *United States v. California*, 332 U.S. 19, 30, 34 (1947).

213. The Supreme Court had already emphasized that Louisiana was not free to construct any line within East Bay that happened to meet the semicircle test. In so doing it distinguished fallback lines permitted within overlarge bays, as recognized by Article 7(5), on the basis that the latter lines are specifically authorized because the existence of a larger bay has been verified while in the former instance the interior bay must stand on its own and meet each requirement for juridical bay status. *United States v. Louisiana*, 394 U.S. at 53-54.

At this point a caveat is in order. As Shalowitz points out, in common usage the term "headland" implies a feature of substantial elevation. However, in the law of the sea context that characteristic is not required. The analysis here is two dimensional. 1 Shalowitz, *supra*, at 63.

serve to separate the landlocked waters of an indentation from those of the open sea beyond.

A number of experts have attempted to describe the "natural entrance points" to an inland water body. Strohl defines them as "the points at which the coastline can most reasonably be said to turn inward to form an indentation or bay."[214] Hodgson and Alexander refer to "the point where the two dimensional character of a bay . . . is replaced by that of the 'sea' or 'ocean.'"[215]

Although the concept is relatively easy to describe, it is much more difficult to apply.[216] Prescott notes that "there is no irrefutable argument in favor of one rather than another line, and it can be assumed that a state would be entitled to select any set of entrance points which still satisfied the other conditions of this test."[217] The Convention gives little assistance. As one of the Supreme Court's special masters has opined, "[t]he matter seems to be largely subjective and to rest with the adjudicating authority."[218]

To aid in the determination, three objective tests have been developed. These are described as (1) the 45-degree test; (2) the bisector of the two tangents test; and (3) the shortest distance test.[219] Coastal geography will dictate which test is appropriate for a given indentation, but the object is always to produce a line that "separates the landlocked waters from those waters which are not landlocked."[220] The Supreme Court has recognized that these objective tests "are helpful in large part because they assist in defining what is finally a more subjective concept . . . ."[221]

We turn now to a consideration of the various tests used to locate natural entrance points.

214. Strohl, *The International Law of Bays* 68 (1963).

215. Hodgson and Alexander, *Towards an Objective Analysis of Special Circumstances*, Law of the Sea Institute Occasional Paper No. 13 (1972) at 10.

216. A good example is the infamous Thames estuary case. Commentators have suggested that although the Court of Appeal accepted the government's position as to the mouth of the estuary, neither party proposed headlands that clearly provided its natural entrance points. Churchill and Lowe, *The Law of the Sea* 32 (1983).

217. Prescott, *supra*, at 53-54. However, it seems clear that in practice, at least in the United States, bay closing lines are always drawn so as to enclose the largest area possible under the terms of Article 7.

218. *United States v. Louisiana (Alabama and Mississippi Boundary Cases)*, Report of the Special Master of April 9, 1984, at 19.

219. *United States v. Maine, et al. (Rhode Island/New York)*, Report of the Special Master of October Term 1983, at 50 n.39.

220. *Id.* at 51 quoting testimony of Dr. Robert Hodgson.

221. *Rhode Island and New York Boundary Case*, 469 U.S. 504, 522 n.14 (1985).

The 45-Degree Test

The 45-degree test has, at least in American practice, become the preferred method of locating the headlands and entrance points that separate landlocked waters from the open sea. The test was developed by Drs. Hodgson and Alexander and is founded on the premise that when the general direction of the shoreline is at an angle of more than 45 degrees to a potential bay closing line, that coast faces landlocked waters. A shoreline with a lesser angle with respect to the closing line faces the open sea, indicating that the closing line being tested encloses waters that are not landlocked.[222]

The test has the advantage of objectivity in an otherwise most subjective inquiry. Beazley has described it as the most satisfactory of the various attempts to develop criteria for determining the location of natural entrance points.[223]

To apply the test, one first selects the seawardmost pair of potential opposing headlands for the indentation under consideration and draws a line between them. Lines are then drawn from each of these headlands to the next landward headland on its side of the indentation. If the resulting angles between the closing line and the two lines drawn to the inland headlands are more than 45 degrees, the first headlands chosen are the natural entrance points to the bay. If either angle is less than 45 degrees, a more landward headland is chosen, a new closing line is drawn, and the procedure is repeated until both mainland headlands pass the test.[224] (Figure 57)

The 45-degree test has been consistently used by the Coastline Committee to delimit inland waters along the coasts of the United States that affect the outer limit of the territorial sea.[225] In some cases these lines have been challenged by states seeking more seaward closing lines. And, although the Supreme Court and its special masters have not always referred

222. As the authors explain, the natural entrance points "are the points where the direction of the shore changes from one facing on the bay, or other subsidiary features, to one facing on the sea. The primary test for determination is based on mathematics/trigonometry; the line of 45 degrees represents the dividing line or the mid-line between two lines of opposite direction." Hodgson and Alexander, *supra*, at 10.

223. Beazley, *supra*, at 16.

224. The test was discussed, with approval, by the Supreme Court in the *Rhode Island and New York Boundary Case*, 469 U.S. 504, at 522 (1985); and by its special master in his Report of October Term 1983, at 50 n.39.

225. Some of the more difficult closing lines that have been located through its application include: one on Martha's Vineyard, Massachusetts (Minutes of January 16, 1974); the northwestern portion of Harrison Bay, Alaska (Minutes of October 5, 1972); Konganevik Point, Alaska (Minutes of July 27, 1970); Roller Bay, Alaska (Minutes of July 17, 1970); Icy Bay, Alaska (Minutes of August 31, 1970); and Yakutat Bay, Alaska (Minutes of May 14, 1974).

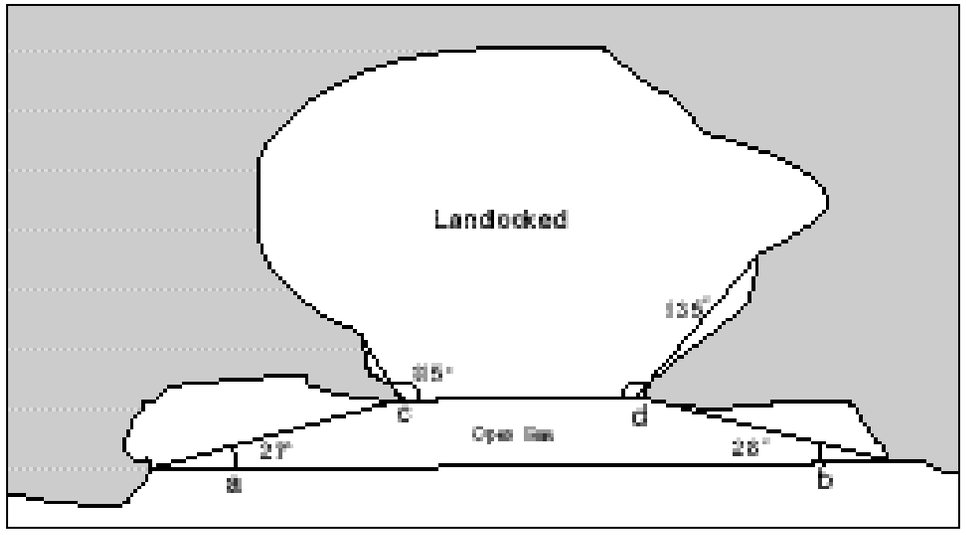

Figure 57. 45-degree test. The coastline seaward of the line "cd" faces open sea; the coastline landward of the line "cd" faces inland water.

to the test in their conclusions, the author is aware of no instance in which a more seaward line has been adopted because landlocked waters were found to have been excluded by a line developed with the 45-degree test.[226]

The test has also been used to locate the headlands and entrance points on screening islands that form multiple mouths to a bay[227] and the mouths of rivers.[228]

226. Louisiana argued strenuously that the 45-degree test should not have been employed to close numerous bays in the Mississippi River delta because it was merely a proposal, not a rule of law, and postdated the *California* decision (*United States v. California*, 381 U.S. 139 (1965), at which time, according to Louisiana, the rules must be considered to have been frozen.

The federal position in the delta was taken from the Coastline Committee's charts, which had been produced with the use of this test (Minutes of December 2, 1970). And, although without referring to the 45-degree test in his Report, the special master recommended closing lines in each case that conformed to the 45-degree rule. (Report of July 31, 1974.)

Again without reference to the test, the master rejected a closing line offered by Louisiana for Atchafalaya Bay "because the relation of Mound Point to the coast is such that a line drawn to it would include waters that cannot be viewed as 'landlocked.'" *Id*. at 53. That conclusion is easily supported by application of the 45-degree test.

More recent masters have acknowledged the use of the test *(United States v. Maine, et al. (Rhode Island/New York))*, Report of the Special Master, at 59, as has the Supreme Court, *Rhode Island and New York Boundary Case*, 469 U.S. 504, 522 (1985).

The federal government has also checked to assure that closing lines meet the 45-degree test before stipulating, in litigation, that they constitute bays. (Minutes of October 10, 1979.)

227. See, for example, Coastline Committee Minutes of April 30, 1981, regarding Timbalier Bay, Louisiana; and February 17, 1982, as to Buzzards Bay, Massachusetts. See also, Minutes of March 23, 1982.

228. For example, the test was used by Mexico and the United States to establish the mouth of the Rio Grande River during negotiations that led to a treaty establishing their joint maritime boundary 12 nautical miles into the Gulf of Mexico. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado Rivers as the International Boundary Between the United States of America and the United Mexican States, 23 U.S.T. 373, T.I.A.S. 7313 (1970).

The United States unsuccessfully urged that the test should also be used to delimit the entrance to ports. In *United States v. California*, the federal government took the position that the limits of inland waters in ports should be determined through the application of the same principles used to close bays, including the 45-degree test. The Court's special master disagreed, recommending instead that function should prevail over geography for such determinations.[229] The means of delimiting ports is discussed separately below.

Although the 45-degree test's objectivity and acceptability dictate its use in a vast majority of geographic situations, even its proponents warned that the rare situation may arise in which it should be suspended to avoid unreasonable results.[230] Hodgson and Alexander give the example of a spit extending into a bay that may cause the obvious headlands to fail the test despite the fact that the intervening shore faces bayward. In such cases, which they describe as isolated, the authors urge that the rule not be applied.[231] To date, the courts have approved lines constructed through the application of the 45-degree test, and have not been prone to find exceptional circumstances justifying its suspension.

The Bisector of the Angle Test

The Supreme Court has recognized an alternative method of locating the terminus of a bay closing line where there are no obvious headlands to which the 45-degree test can be applied. The bisector of the angle test is employed when the shores facing on the open sea and interior water body are joined by a smooth curve, or arc, rather than a pronounced headland. In such cases, the experts have long recommended that the entrance point be located by determining the general trends of the low-water lines on the open coast and inland water body, and bisecting the angle that they form.

This is done by constructing tangents to the general direction of each coast; drawing a line from the point of intersection of those tangents that bisects the angle formed by their intersection; and extending that line to the low-water mark on shore. That juncture becomes the natural entrance point of the inland water body. (Figure 58)

The method has been recommended by Shalowitz, Hodgson, Alexander, Beazley, and Prescott[232] and adopted by the Supreme Court[233]

229. *United States v. California*, Report of the Special Master of August 20, 1979, at 9.

230. Coastline Committee Minutes of July 17, 1970.

231. Hodgson and Alexander, *supra*, at 12.

232. 1 Shalowitz, *supra*, at 63-64; Hodgson and Alexander, *supra*, at 10 and 12; Beazley, *supra*, at 17; and Prescott, *supra*, at 56.

233. *United States v. California*, 382 U.S. 448, 451 (1966).

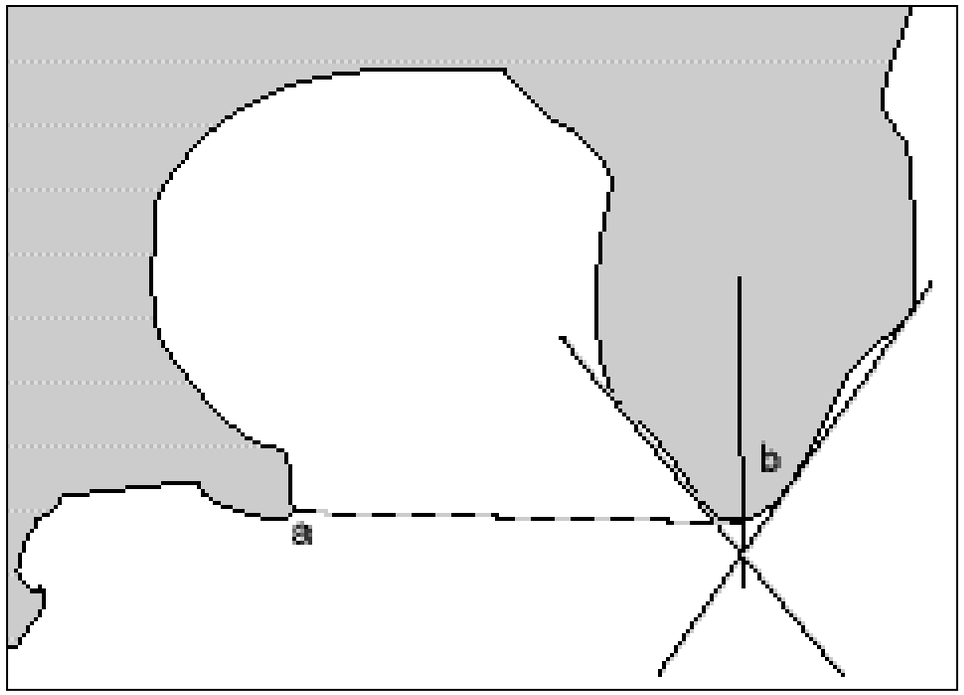

Figure 58. Bisector of the angle test. Here the bisector of the angle test is applied to establish one entrance point to a juridical bay.

and its special masters.[234] However, the masters have been careful to point out that this test is only to be applied when there are no pronounced headlands in the vicinity. Louisiana sought to maximize its claim to inland waters in East Bay by employing a version of the bisector test to establish a headland on Cow Horn Island. Special Master Armstrong concluded that the technique was "entirely inappropriate in the physical situation, as there are pronounced headlands in the vicinity."[235]

The bisector of the angle test is an alternative. It will provide an entrance point where no pronounced headland is available, but is not to be employed otherwise.

The Shortest Distance Test

A third alternative means of determining headlands is required when an indentation is formed by a distinct headland on one side but has neither a

234. *United States v. California*, Report of the Special Master of October Term 1950, at 7 and *United States v. Maine, et al. (Rhode Island/New York)*, Report of the Special Master of October Term 1983, at 50-51, citing Hodgson and Alexander and Beazley).

235. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 32.

similar headland nor a change in the direction of the coastline on the opposite shore. Strohl identified this situation in his classic work on bays and concluded that "the most logical method for drawing a closing line in such a situation would be to locate its origin on the side having the well-marked entrance point and to locate its terminus at the closest point of land on the opposite side."[236] (Figure 59)

The Coastline Committee has used this method to close Port Clarence, Alaska, from Point Spencer "to the closest point on the opposite shore in accordance with Strohl's theory."[237] And it was recognized by Judge Hoffman as one of the three objective methods of determining headlands in *United States v. Maine, et al. (Rhode Island/New York)*.[238]

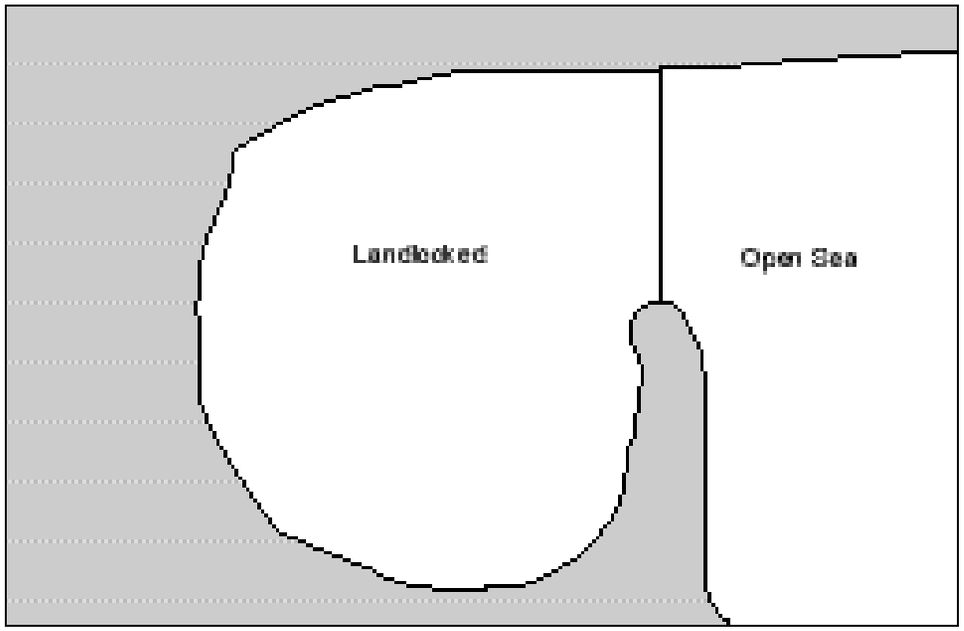

Figure 59. Shortest distance test. The shortest distance test is applied to determine where internal waters are enclosed by one distinct headland and a straight coast opposite.

The Coastline Committee also applied the shortest distance test to delimit the inland waters of San Pedro Bay, the artificial harbor that services Los Angeles. Assuming that harbors would be closed according to principles used for closing bays, the Committee first attempted to employ

236. Strohl, *The International Law of Bays* 68 (1963).

237. Minutes of September 14, 1970. See also, Minutes of December 17 and December 21, 1976.

238. Report of the Special Master of October Term 1983, at 51, n.39, citing to Strohl and the Coastline Committee's use of the method.

the 45-degree test. The breakwater made an obvious southern entrance to the harbor but the opposite coast was generally straight, having no promontory that might be adopted as a headland. The Committee concluded that the 45-degree test was therefore inapplicable and adopted the shortest distance test to close the harbor.[239] California objected to the resulting line, arguing that areas seaward of it function as part of the port of San Pedro. The special master recommended acceptance of the state's position, not because the shortest distance test might not be appropriate for bays (although he did note that it had not been sanctioned by the Court, Report at 8) but because he concluded that the limits of a harbor should be determined by the use of the water area and not solely by geography. The United States did not take exception to that recommendation and the master's proposed closing line was implemented in the Court's final decree.[240]

The shortest distance test seems an appropriate, and obvious, method of closing bays formed by a distinct headland on one side and a straight coastline opposite. Sections of the mainland coast within such a line face the opposite headland, and logically look across inland waters, while the coast beyond the line faces open sea. These fundamental considerations used to justify the 45-degree test seem equally applicable here even in the absence of features that might be used as headlands on one coast.

Other Suggested Methods

O'Connell suggests three possible methods of dealing with a featureless coastline on one side of a bay. The first he describes as "a line drawn from the headland to the immediately opposite shore."[241] He also suggests a 24-mile line and the line of the general direction of the coast. *Id.* Each presents difficulties.

A line constructed from the obvious headland to the immediate opposite shore might be the shortest line possible, but O'Connell's comments make clear that he does not consider his proposal to be limited to the shortest line. He notes, for example, that the suggestion does not dictate the location of the terminus on the featureless shore and indicates only that the line might be drawn at right angles to the general direction of the bay.

The arbitrary use of a 24-mile line seems so obviously inappropriate as to have been unworthy of inclusion. Although 24 miles was chosen as the maximum length of a bay closing line, there is no suggestion in the

239. Minutes of December 17 and December 21, 1976.

240. *United States v. California*, Report of the Special Master of August 20, 1979, at 9 and 449 U.S. 408 (1981).

241. 1 O'Connell, *supra*, at 406.

Convention that it might be employed to determine the headlands of a bay. O'Connell notes himself that "the twenty-four mile rule is subordinate to the definition of bay and is not in itself a qualification for an indentation to be a bay." *Id*. Clearly, arbitrarily drawn 24-mile lines could enclose open seas as well as inland waters.[242]

A closing line following the general direction of the coast is subject to identical objection. Each method almost guarantees that waters will be enclosed that are not landlocked. Although the length of the line would presumably be limited by the minimum requirements of the semicircle test, to make that the only limitation would be to elevate that test to the sole factor for determining "landlockedness" rather than a minimum requirement as intended and recognized by the Supreme Court.

The first of O'Connell's proposals may be appropriate in limited circumstances. The second and third would appear to violate the seminal requirement that an indentation be landlocked.

Beazley suggests that a line can be drawn from the accepted headland to a point on the featureless coast opposite such that the angle between that line and the landward portion of the coast is more than 45 degrees.[243] The proposal is novel, and is not known to have been employed anywhere, but can certainly be defended with the same logic used to support the 45-degree test and will, in most if not all cases, result in a more seaward closing line than will the shortest distance test.

Prescott proposes an alternative that seems especially well suited to situations in which a "V"-shaped bay is formed by a single promontory and a long, straight coast opposite. He opines that "[o]ne reasonable approach to this problem would be to measure the distance between the natural entrance point and the position on the coast where the headland merges with the smooth coast. The arbitrary terminus could be fixed an equal distance along the smooth coast . . . ."[244] Although we are unaware of an instance in which this method has been employed, it seems entirely appropriate and would appear to produce a line that encloses landlocked waters while excluding open seas.

As may be apparent, the possibilities for producing formulae for headland determination seem to be limited only by the number of potential geographic configurations available for consideration. And that, of course, is practically infinite. Nevertheless, the 45-degree test will provide a

242. The use of 24-mile lines to limit inland waters within overlarge bays is not comparable. Although it is not required that such lines be anchored on interior headlands, that is because the entire indentation has already been identified as landlocked to its most seaward headlands.

243. Beazley, *supra*, at 17.

244. Prescott, *supra*, at 54 and 56.

solution in a majority of cases. Most others will be resolved by the bisector of the angle or the shortest distance test. The small percentage that seem inappropriate for any of these methods will be dealt with on a case-by-case basis with the help of geographers who understand the objective of distinguishing landlocked waters from open seas.

Headland Determination in Double-Headed Bays

Adjacent bays along a deeply indented coast may present a geographic situation in which none of the previously described methods for determining entrance points seems satisfactory. Geographers have denominated this feature the "double-headed bay." It is typically characterized by a single promontory that separates adjacent indentations. When such a promontory does not extend as far seaward as the non-shared headlands, applications of the already discussed tests would dictate its use as the shared headland of two separate bays. Yet commentators have felt that in some such cases that result excludes more seaward waters that are landlocked. In that instance, a line is drawn between the two extreme headlands, closing both indentations as a single bay without reference to the central, common headland.[245]

Southern Harrison Bay, Alaska, provides a good example and so far as we know is the only double-headed bay whose status has been considered by the courts. It has obvious headlands on the east and west but is divided by a bulge in the middle that might be considered a separate headland for two smaller adjacent bays, or ignored, resulting in the formation of a single larger bay. The United States urged the former approach in *United States v. Alaska*, Number 84 Original, contending that the interior bulge prevents waters seaward of it from being "landlocked." Alaska argued the contrary. The parties agreed that the waters enclosed by the state's proposed closing line meet the semicircle test.[246] (Figure 60)

The state then went on to test "landlockedness" through the traditional methods for evaluating individual bays. Its witness, Dr. Prescott, calculated "depth of penetration" by three separate methods, each time measuring into the deepest of the adjacent admitted bays. The United States objected, contending that using the smaller subsidiary bays in that fashion shed no light on the real question, whether the waters seaward of the central bulge were landlocked.

245. Hodgson, *Toward a More Objective Analysis, supra*, at 12.

246. The state argued that this was enough, that any body meeting that test is *ipso facto* an Article 7 bay. The United States and special master disagreed with that interpretation, Report at 199, as the Supreme Court had twice before. *United States v. Louisiana*, 394 U.S. 11 (1969) and *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985).

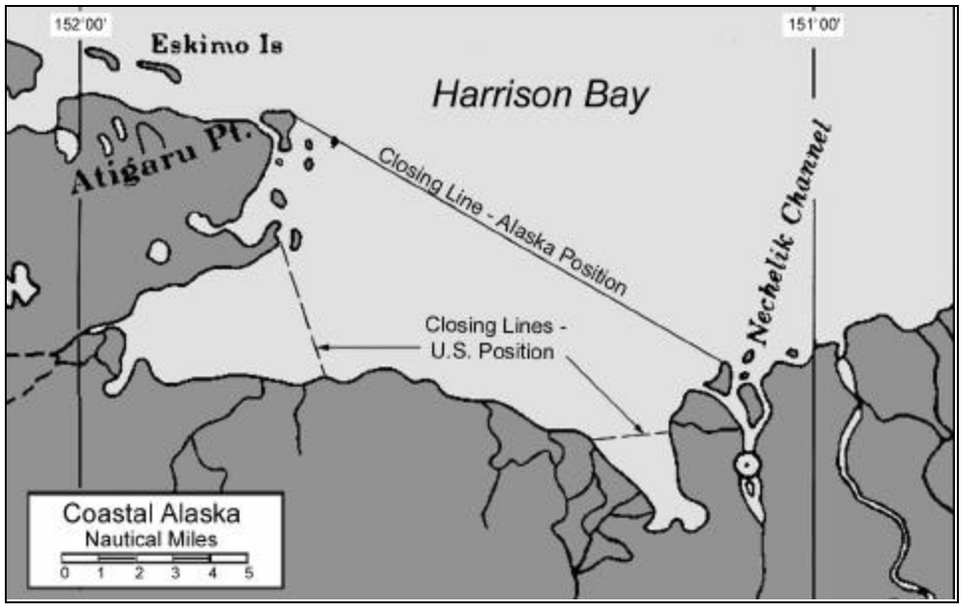

Figure 60. Southern Harrison Bay, Alaska. The state and federal contentions are shown for this double-headed bay ruled to be a single identation by the Supreme Court's special master. (*Based on NOAA Chart 16004*)

Nevertheless, relying on Dr. Prescott's analysis and comparisons with other bays, the special master concluded that the entirety of south Harrison Bay is landlocked. Report at 226. The United States did not take exception.[247]

Clearly this procedure represents a most subjective deviation from the primary methods discussed above. As such, it may invite those interested in expanding the limits of inland waters to seek its application in inappropriate circumstances. Nevertheless, it is thought that the limited number of situations in which it may be even arguably applicable minimizes the likelihood of such mischief.[248]

Artificial Headlands

Article 7(3) of the 1958 Convention refers to the "natural entrance points" of a juridical bay. This use of the word "natural" has caused at least

247. The federal Coastline Committee has since amended the official charts of the United States to reflect the master's recommendation. Minutes of December 17, 1997.

248. The Coastline Committee closed Pamlico Sound, on the Atlantic coast, as a double-headed bay. Minutes of December 7, 1970. Other areas, including Shelikof/Gilmer Bays and Tenakee Inlet/Freshwater Bay (all in Alaska) have been considered as potential double-headed bays and rejected. Minutes of September 20, 1971.

two commentators to ask, albeit rhetorically, whether international law requires that the headlands to bays be naturally formed, as islands and low-tide elevations must be, if they are to have boundary consequences.

Beazley reports that "[t]here is reason to believe that the insertion of this adjective was intended to exclude the use of 'artificial' entrance points."[249] He then goes on to suggest that the court's analysis in the *Estuary Radio* case has precluded that interpretation, at least in the United Kingdom. *Id*. According to Hodgson, "[t]he concept of 'natural' entrance points does not necessarily require that the points be, in effect, created by natural forces or processes. Rather, the points are those at which the nature of a bay is first encountered."[250] He went on to explain that "under certain conditions, manmade points, e.g., jetties, breakwaters, etc., could be utilized."[251]

Experts testifying before the special master in *United States v. Maine, et al. (Rhode Island/New York)* accepted man-made harborworks as potential termini of bay closing lines.[252] However, the particular harborwork under consideration there, as a potential entrance point to the alleged inland waters of Block Island Sound, was rejected by the master, not because it was artificial, but because a line drawn to it would have enclosed waters that do not constitute an "indentation into the coast."[253] In so doing, the master found it unnecessary to decide whether artificial harborworks might ever be used as headlands to a bay.

Nevertheless, the question would seem to have been conclusively resolved by the Supreme Court in *United States v. Louisiana*, Number 9 Original, and by implication in *United States v. California*, Number 5 Original. Bays formed by the various artificial extensions of Mississippi River passes at the southern tip of the delta are productive areas of petroleum production and presented hotly contested issues in the litigation. For its part, Louisiana argued that these artificial extensions could not qualify as "natural" entrance points and were, in fact, part of the river and not the bays. The state pointed out that these jetties had not been employed in constructing the Chapman Line, a preliminary description of the Louisiana coast prepared for use in the litigation prior to the Supreme

249. Beazley, *supra,* at 16.

250. Hodgson, *Objective Analysis, supra*, at 20.

251. *Id*.

252. Jean Gottman specifically opined that Article 8 of the Convention allows closing lines to be drawn to harborworks, transcript of January 12, 1982, at 55, 69-70, and Robert Smith agreed that such use was not inconsistent with the Convention, transcript of November 10, 1981, at 130. See Report of the Special Master, at 58 n.45.

253. In so doing, the master specifically concurred with the Baseline Committee, which had rejected a Block Island Sound closing line for the same reasons. Report of the Special Master, at 59.

Court's adoption of the 1958 Convention's principles for Submerged Lands Act purposes.[254]

Dr. Hodgson, testifying for the United States, stated that the artificial passes of the delta were indeed headlands of indentations into the coast.

However, it would appear that by the time of the special master proceedings, the issue had already been resolved, at least by implication, by the Supreme Court. In its 1969 opinion in the case, the Court considered the juridical status of the entirety of East Bay. In so doing it recognized the tips of the artificial jetties as the "seawardmost headlands" of the feature,[255] but went on to conclude that East Bay did not qualify as a bay because of its failure to meet the semicircle test. The special master interpreted this analysis, properly it would seem, to suggest that in all respects other than the semicircle test, East Bay would qualify under the Convention's criteria.[256] That conclusion is consistent only with a determination that the artificial harborworks being discussed would qualify as headlands to the juridical bay.

San Diego Bay presents a similar circumstance. Although the western headland to that indentation is the massive natural promontory known as Point Loma, its eastern entrance is an artificial, and insubstantial, jetty extending seaward from the mainland. (Figure 61) The Supreme Court has decreed that "[t]he inland waters of San Diego Bay are those enclosed by a straight line from the seaward end of Point Loma . . . to the point at which the line of mean lower low water intersects with the southern end of the entire Zuniga jetty."[257]

That decree followed special master proceedings before Judge Arraj in which the United States had argued that because the jetty did not extend above water for its entire length, it should not be considered a headland beyond the portion that did. The master recommended that the entire jetty be treated as a headland. The United States did not take exception to that recommendation, and the decree quoted above was entered as part of a description of the California coast line.[258] Sohn and Gustafson cite other

254. In fact, the Chapman Line was drawn using pre-Convention principles and its closing lines were not ultimately used for any portion of the Louisiana coast except where they did conform to the later-adopted principles or were the subject of a stipulation between the parties, as in the case of Chandeleur Sound.

255. *United States v. Louisiana*, 394 U.S. 11, 53-54 (1969).

256. Report of July 31, 1974, at 29.

257. *United States v. California*, 449 U.S. 408 (1981).

258. Although it might be argued that San Diego Bay is in fact a port, and not subject to the closure rules of Article 7, the parties did not litigate the question on that theory. Clearly its entrance was being treated as a bay closing line, as referred to by the master (Report of August 20, 1979, at 14) and the Court (*United States v. California*, 447 U.S. 1, 3 (1980)), not merely as the entrance to a harbor, as was the case at San Pedro.

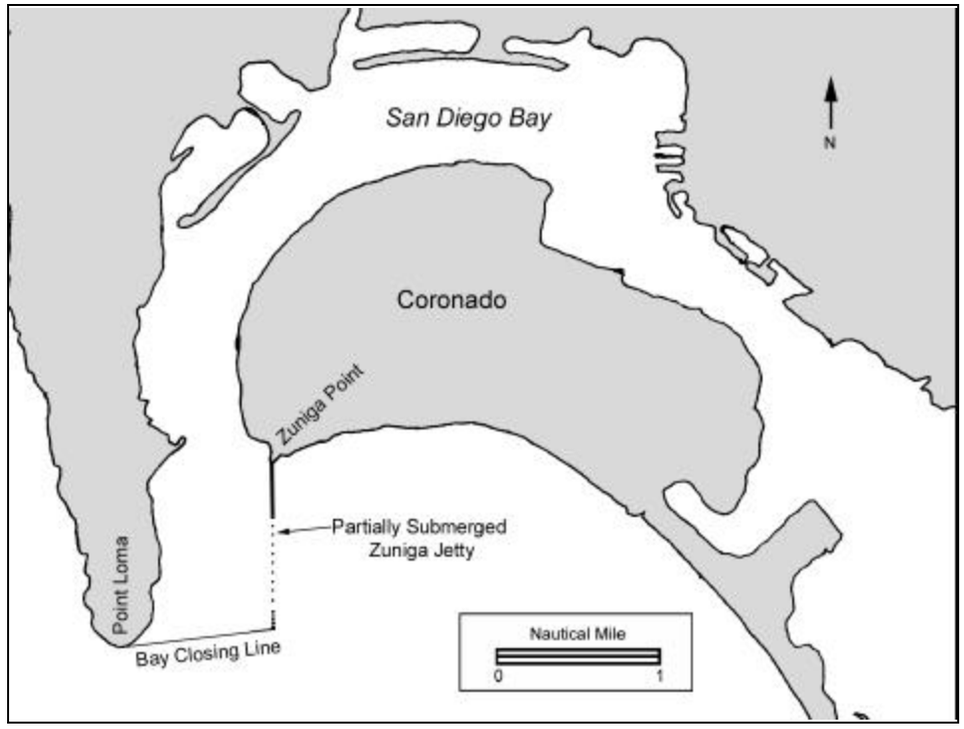

Figure 61. San Diego Bay, California, with closing line from Point Loma to Zuniga jetty.

California examples, arrived at by agreement but effectuated through Court decree, in which jetties serve as headlands to bays.[259]

The Coastline Committee has employed artificial harborworks as headlands to bays. One example is in the area of Fisher Island, Florida, where a breakwater was determined to be a headland of Biscayne Bay.[260]

The matter would appear to be resolved. The reference to "natural entrance points" in Article 7 has not been read to mean "formed by nature" as has the term "naturally formed" in Articles 10 and 11. Rather, it is understood to refer to the feature that "naturally" forms the indentation, or gives the waters within their landlocked character. A number of bays in the United States have been recognized by the government and the Supreme Court to have artificial headlands.

259. Sohn and Gustafson, *The Law of the Sea*, *supra*, at 45. Citing *United States v. California*, 432 U.S. 40 (1977) in which the closing lines of Humboldt Bay, Port Hueneme, the Santa Ana River, and Agua Hedionda Lagoon are described as running from "the seaward ends of the jetties located at their mouths."

260. Minutes of December 2, 1970. See Minutes of August 3, 1970, and November 18, 1970, for additional examples.

Islands as Headlands

Bays are indentations into the mainland. As such, one would expect that the headlands of a bay will be promontories of the mainland coast. As the Supreme Court has said, "the general understanding has been — and under the Convention certainly remains — that bays are indentations in the mainland, and that islands off the shore are not headlands but at the most create multiple mouths to the bay."[261] Nevertheless, situations exist in which it has been considered unreasonable to exclude a land form from consideration as a headland simply because it is technically an island under the definitions of the Convention.

The General Proposition

Article 10 of the Convention on the Territorial Sea and the Contiguous Zone defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide." It is not uncommon to find a portion of the coastline that is composed of land forms that are surrounded by water at high tide, and are therefore technically islands and not available for consideration as headlands under a strict interpretation of the Convention. Yet such islands may be so related to each other and to the true mainland that they are thought of as part of the mainland rather than as offshore features. The distinction may be critical in determining whether a juridical bay exists in the vicinity. If islands, the features may not serve as headlands to a bay. If mainland, they may. The area of inland water may be greatly expanded in the former situation.

A number of publicists have considered the issue. Samuel W. Boggs recognized that "some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland."[262] In one instance, Boggs suggested that an island should be considered part of the mainland if the water area separating it from the true mainland were less than the area of the island itself.[263] Etzel Pearcy, Boggs' successor as geographer at the Department of State, acknowledged the problem after the Convention was negotiated,

261. *United States v. Louisiana*, *supra*, 394 U.S. at 62.

262. Boggs, *Delimitation of Seaward Areas Under National Jurisdiction*, 45 Am. J. Int'l L. 240, 258 (1951).

263. *Id.* This method has been considered most appropriate where an island of some size parallels the mainland coast. As Pearcy points out, the principle has not been generally adopted but has probably been made less important through the implementation of straight baseline systems under Article 4 of the Convention. Pearcy, *Geographical Aspects of the Law of the Sea*, 49 Annals of the Association of American Geographers 1 (1959).

writing that "[i]slands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland."[264] He gave as examples: Bubiyan in the Persian Gulf off the shore of Kuwait; and Tierra del Fuego, off the tip of South America.

Aaron Shalowitz, while involved in efforts to establish a federal position for coast line delimitation for *United States v. Louisiana*, opined that "[t]he coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters,[265] or they form an integral part of the land form."[266]

Yet another State Department geographer revisited the issue in 1973. Robert Hodgson wrote that "[t]o be used as headlands . . . [islands] also should form a natural extension of the two dimensional coastline formation as viewed on a nautical chart."[267] Hodgson later described such islands as those which, regardless of size, are so situated as to be linked geographically to the land."[268]

O'Connell has put it slightly differently, saying that "[w]hen there is an island or drying rock which forms the obvious turning point of bay and coast, it is logical that it should be used as the point of departure [i.e., a headland or entrance point], and not as an island within the mouth, provided it is sufficiently closely linked with the mainland so as not to have a 'mouth' to the bay intermediate between it and the mainland."[269]

Each of these experts recognized that in limited circumstances islands might be so closely related to the mainland as to justify their treatment as part of it, thereby creating potential legal significance not generally available to islands such as their use as headlands to a bay.[270] It is not, therefore,

264. Pearcy 1959, *supra,* at 9.

265. The situation is now covered by Article 4 on straight baselines.

266. Memorandum of April 18, 1961, excerpted in 1 Shalowitz, *supra*, at 161. This suggestion was later quoted by the Supreme Court in its consideration of the issue. *United States v. Louisiana, supra*, 394 U.S. at 66.

267. Hodgson, *Islands: Normal and Special Circumstances* 40 (1973).

268. *Id.* at 53.

269. 1 O'Connell, *supra*, at 413. O'Connell's concluding proviso suggests that one factor in determining the island or mainland status of a feature will be the nature of the water area separating it from the true mainland: Is it large enough to be considered a separate "mouth" to the indentation? The mere existence of a waterway does not, however, preclude mainland status. The Supreme Court has said much the same thing in noting "[t]hat the area of a bay is delimited by the 'low-water mark around the shore' does not necessarily mean that the low-water mark must be continuous." *United States v. Louisiana, supra*, 394 U.S. at 61.

270. It bears repeating that this discussion cannot be used to justify an argument that true islands may, in conjunction with the mainland, create inland waters. That approach may be appropriate under Article 4 of the Convention, but not Article 7. *United States v. Louisiana, supra*, at 67. For a contrary approach, see Prescott, *supra*, at 57 and 59.

surprising that the Supreme Court took a similar approach when presented with the issue.

The question first arose in *United States v. Louisiana* because of the nature of the Mississippi River delta. Since the delta is composed of marshland, crisscrossed by waterways, what uplands exist are surrounded by water at high-water datum and, under the Convention, are technically islands. (Figure 62) As such, under generally applicable principles, an indentation formed by two or more of these islands is not technically a bay because it is not an indentation into the mainland.

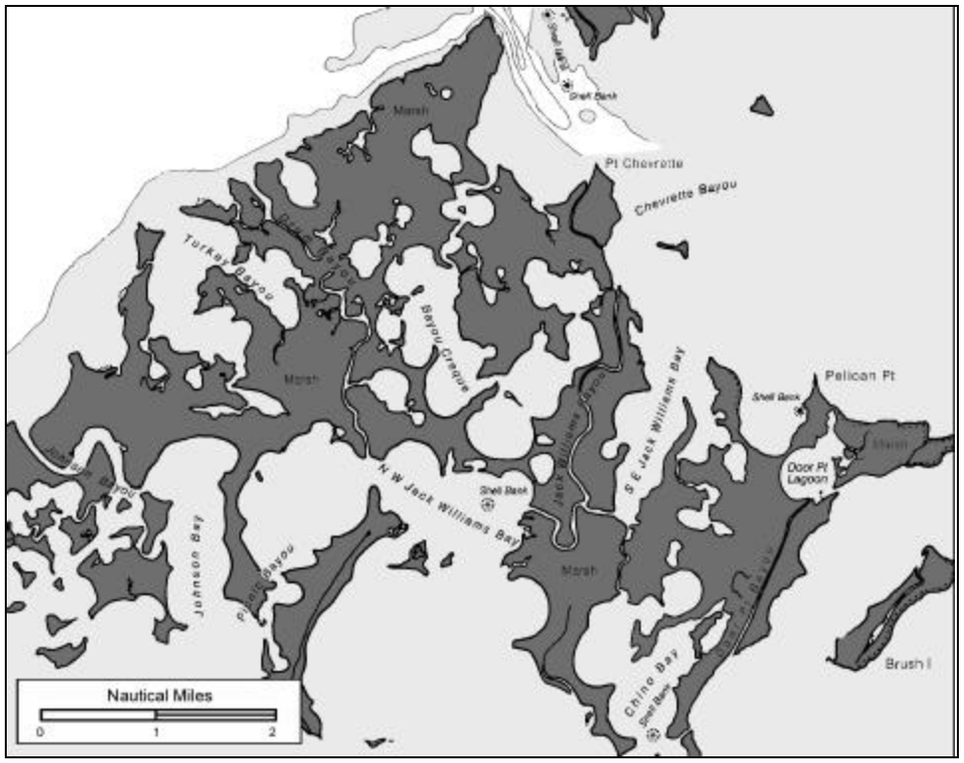

Figure 62. Saint Bernard Peninsula, Louisiana, near the western end of Mississippi Sound. This is typical of the Mississippi River delta, treated as mainland although technically an island archipelago.
(*Based on NOAA Chart 11371*)

Neither party took the extreme position that none of these islands should be considered part of the mainland, but there was great disagreement on which formations should be treated as such. As the Supreme Court noted in a later decision, "[t]he Convention addresses the problems created by islands located at the mouth of a bay . . . but does not

address the analytically different problem whether islands may be treated as part of the mainland to form an indentation."[271]

The Court acknowledged that "[i]n most instances and on most coasts it is no doubt true that islands would play that restricted role in the delimitation of bays [i.e., forming multiple mouths]. But much of the Louisiana coast does not fit the usual mold. It is marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands."[272] With respect to the typical marshland of the St. Bernard peninsula, the Court concluded that although the portions of sea marsh were surrounded by water, they were not "true" islands. *Id.* at 63.

The Court then reviewed many of the authorities discussed above, determined that although "the area of a bay is delimited by the 'low-water mark around the shore'" that does not necessarily mean "that the low-water mark must be continuous." *Id*. at 61. Citing Pearcy, the Court concluded that "islands may be so closely assimilated to the mainland as to be part of it and in such cases an island may form the headland of a bay."[273]

This the Court characterized as a "common-sense" approach to application of the Convention's principles, *id.* at 64, and concluded that it could be applied whether one were dealing with a single island or a group of islands adjacent to the coast.[274]

The greater problem, of course, is determining which insular formations should be treated as part of the mainland. On this the Court attempted to give some objective guidance. Relying, to some extent, on the publicists discussed above, the Court concluded that "the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast."[275]

At the same time, the Court was careful to explain that "the general understanding has been – and under the Convention certainly remains –

271. *United States v. Maine, et al. (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 517 (1985).

272. *United States v. Louisiana, supra*, 394 U.S. at 62-63.

273. *Id*. at 65 n.85; citing Pearcy, *Geographical Aspects of the Law of the Sea, supra*, at 9. Clearly the "low-water line" of a bay will not be continuous in numerous instances unrelated to the islands problem. Many bays have rivers running into them and that interruption in the low-water line cannot be said to detract from the body's status as a bay. The Court was dealing here with an entirely different problem, that being the disruption of the low-water line by a waterway that returned to the Gulf of Mexico, thereby creating an island of what would normally be considered mainland.

274. *Id*. at 64. See also, *United States v. Maine, et al.*, 469 U.S. 504, 517 (1985).

275. *United States v. Louisiana, supra*, 394 U.S. at 66. To this list the Court appended the note "[t]his enumeration is intended to be illustrative rather than exhaustive." *Id*. at n.86. See also, *id*. at 65.

that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay."[276] The Court also cautioned that "[o]ur discussion of these authorities should not be taken as suggesting that, under the Convention on the Territorial Sea and the Contiguous Zone, every Mississippi River delta mudlump or other insular formation is part of the coast."[277] At the same time, the Court added another factor to be considered in evaluating the status of a particular formation, saying "[w]e do believe, however, that the origin of the islands and their resultant connection with the shore is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered part of it." *Id.*

The Court's Factors

Neither political geographers nor the Court and its masters have written much to explain how the just listed factors should be applied to determine whether a particular feature is an island or mainland for headland selection purposes. Nevertheless, it is useful to review what is available before turning to examples of their application.

SIZE. The first factor listed by the Court is the "size" of the feature being considered for mainland status. Unfortunately there is no context to indicate whether it is a larger feature that is more likely to qualify or a smaller one. The Court seems to have adopted that criterion from Boggs, a Department of State geographer. *United States v. Louisiana*, 394 U.S. 11, at 65 n.85 (1969). Two of Boggs' successors suggest that a smaller feature is more properly considered part of the mainland, writing that "under normal conditions, the islands used as headlands will be relatively small so as not to dwarf the true proportion of the original bay feature and, hence, change its entire character." Hodgson and Alexander, *Islands: Normal and Special Circumstances*, *supra*, at 40. However logical Hodgson's reasoning at the time, subsequent adjudications suggest that size has played little, if any, role in the determination. Small mudlumps along the Mississippi River passes have been rejected for mainland status. Some larger features have been treated as part of the Louisiana mainland, while others have not. As to "dwarfing the true proportion of the original bay," the Court's determination that Long Island is part of the mainland turns the concept on its head. Long Island is not only enormous, it forms an indentation that would not even exist in its absence. Size alone does not seem to have proven a useful criterion.

276. *Id.* at 62. See also: *United States v. Maine, et al.*, 469 U.S. 504, 519 (1985) where the proposition is reaffirmed by the Court.

277. 394 U.S. at 65 n.84.

DISTANCE FROM THE MAINLAND. Ten years before the Supreme Court considered the issue in *United States v. Louisiana*, then State Department Geographer Etzel Pearcy opined that islands might be considered part of the mainland when they are "separated from the mainland by so little water that for all practical purposes the coast of the island is identified as part of the mainland." Pearcy, *supra*, at 9. His predecessor, Samuel Boggs, had proposed a formula that would base the determination on the relative sizes of the island and intervening waters. He recommended that lines be drawn tangent to the ends of the island axis that relates to the mainland coastal direction. Parallel lines should then be constructed from the ends of the island to the mainland enclosing the minimum area of water. The water and land areas would then be measured and if the island were larger, it would be treated as mainland. Hodgson and Alexander, *supra*, at 53. Hodgson and Alexander agreed that the island's area should exceed the water area, without proposing a formula for making that determination. *Id.* at 40. As Pearcy noted in 1959, no principle had been adopted for making such determinations. Pearcy, *supra*, at 9. That is still true.

Although numerous "islands" have now been adjudicated as part of the mainland or not, we are unaware of any case in which a court or master has relied upon a calculation of land to water ratio to support the conclusion.

DEPTH AND UTILITY OF INTERVENING WATER. It seems apparent that when the Court enunciated this principle in 1969 it focused on the water that separates the feature in question from the true mainland, suggesting that if that water area were a useful navigation channel it would prevent the island's treatment as mainland. The United States urged that view in arguing that Long Island, New York, is, true to its name, an island and not part of the mainland. *United States v. Maine, et al. (Rhode Island/New York)*, Report of the Special Master, at 40. (Figure 63) The government pointed out that the waters separating Long Island from the mainland supported substantial commercial navigation and had done so from earliest times. *Id*. The special master nevertheless determined the island to be part of the mainland and the Court concurred, rejecting the federal exception to the master's recommendation on the point. In so doing the Court stated that its conclusion "is buttressed by the fact that . . . the enclosed water is used as one would expect a bay to be used." That is, ships enter Long Island Sound on their way to port. Those merely traversing that portion of the coast remain seaward of the island. *United States v. Maine, et al. (Rhode Island/New York)*, 469 U.S. 504, 519 (1985). In so reasoning, the Court seems to twice deviate from its original approach.

To begin, we recall that the purpose of this inquiry is to determine whether a water body that separates two areas of upland is so insignificant that it should be treated as a land bridge itself and the actual uplands

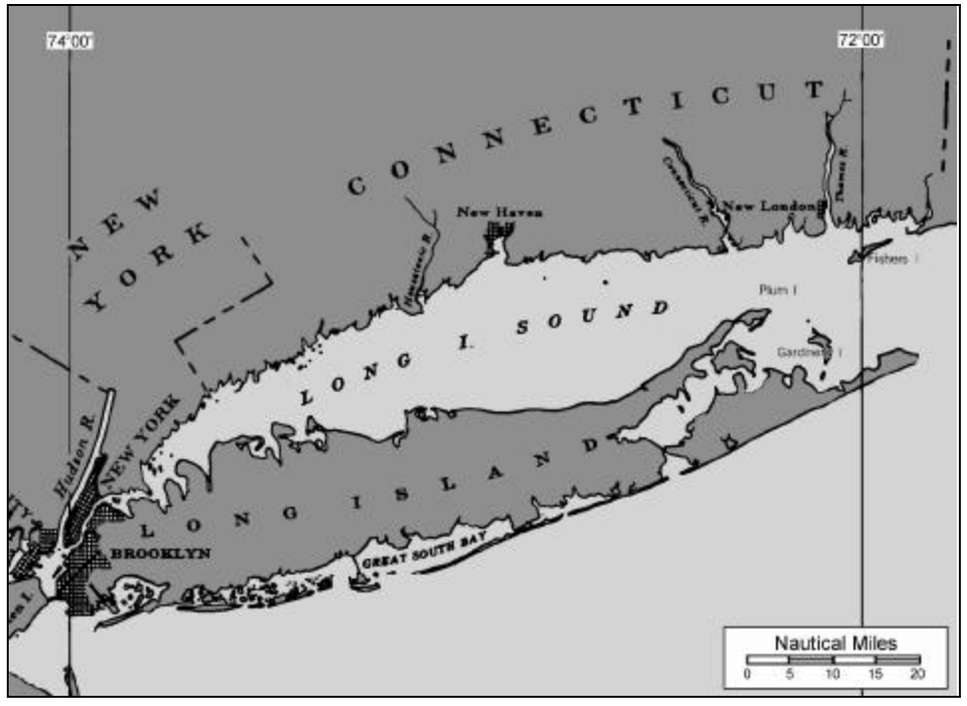

Figure 63. Long Island Sound. (*Based on NOAA Chart 13003*)

considered to be one. Nevertheless, the master and the Court used navigability to "buttress" their conclusion that a water body should be treated as land. Their reasoning suggests that if Long Island were surrounded by shallow or narrow waters, not well suited to use by vessel traffic, the island would be less closely attached to the mainland. This seems to be the opposite of their intent in 1969. Second, two separate water bodies are involved in any such analysis. First is the channel that divides the mainland and island in question. Second is the embayment that is created if the island is accepted as a headland. In the *New York* case the issue was whether Long Island Sound is a juridical bay. It is a bay only if Long Island is somewhere "attached" to the mainland to form the southern headland. In considering whether a bay exists, the Court focuses, in part, on the Sound itself (concluding that it is used like a bay) rather than the juncture at which the island might be said to be connected to the actual mainland.

SHAPE AND ORIENTATION. Dr. Hodgson, the State Department geographer, took the position that to justify treating an island as mainland, its shape and orientation to the actual mainland should be such that the intervening waterway takes the form of a channel rather than a bay. He

proposed a formula for determining the extent to which a water area would be "channel-like," which involves measuring the distance from island to true mainland at both ends of the water area, computing the average width by dividing their total length in half, measuring the distance between those two lines (that is, the length of the intervening waterway), and calculating the ratio between the length and width. If the water area were three times as long as its average width, he suggested, it was sufficiently "channel-like" to justify treatment of the island as part of the mainland. Hodgson, *Toward a More Objective Analysis*, *supra*, at 17-20.

The Supreme Court applied this criterion in its analysis of Long Island's relationship with the mainland. Focusing on the narrow separation between Long Island and the mainland, the Court described the waterway as "narrow and shallow," with a rapid current which, at least prior to man's intervention, made passage from Long Island Sound, around the western end of the island, extremely hazardous. *United States v. Maine (Rhode Island and New York Boundary Case)*, *supra*, at 518. Although Hodgson's formula was not mentioned, the Court's emphasis on "riverine" character is consistent with his recommendation.

From there, however, the Court returned its focus to the resulting bay, Long Island Sound, rather than the channel to be treated as mainland. It compared the shape and orientation of the island's north shore with the opposite mainland coast and concluded that "the large pocket of water in Long Island Sound is almost completely enclosed by surrounding land." *Id.* at 519. As discussed above, this seems irrelevant to the sole question before the Court, whether Long Island is to be considered part of the mainland. That question is answered by an analysis of the water at the western end of the island. If it is determined that western Long Island is, for legal purposes, attached to the mainland, then the island becomes eligible as a headland to a juridical bay known as Long Island Sound. Only then does one ask whether the waters of that indentation are "landlocked." Since the parties agreed that a juridical bay exists if Long Island is part of the mainland, we must assume that the Court included its discussion of the orientation between the 118-mile parallel coasts within the Sound as somehow relevant to the issue before the Court, but its relevance is not apparent.

ORIGIN OF THE LAND FORMS. Although the Court did not mention "origin" in its primary list of factors to be considered for mainland status, it clearly intended its inclusion. It said, with respect to the Louisiana coast, that "the origin of the islands and their resultant connection with the shore is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered part of it." *United States v. Louisiana, supra*, at 65 n.84.

Dozens of land forms were at issue in the subsequent Louisiana litigation before Special Master Armstrong. In almost every case the state

was contending that the features were part of the mainland and the United States argued that they were not. In most cases mainland status would have created a bay where none would otherwise have existed (as was also the case with Long Island) or would have extended seaward the waters of an already acknowledged bay. The parties offered voluminous geologic evidence of origin. In the end the master typically concluded that the islands did not qualify as mainland, with little explanation. For example, with respect to mudlumps claimed by Louisiana to extend the bounds of Bucket Bend Bay, Mr. Armstrong said "[a]pplying the test outlined by the Court . . . neither the size, distance from the mainland, depth and utility of the intervening waters, shape of the low-water elevations, or their relationship to the configuration or curvature of the coast indicate that they should be assimilated to and treated as part of the mainland." Report at 37.[278] The master did acknowledge that the mudlumps' fluvial origin might bolster mainland status if the Court's other criteria were met. He found that they were not. In no instance in the Louisiana case did origin contribute to the determination that an island should be treated as part of the mainland. All of the master's recommendations on the issue were adopted by the Court. *United States v. Louisiana*, 420 U.S. 529 (1975).

Island origin was also considered in two subsequent Supreme Court actions. In the *Rhode Island and New York Boundary Case* the Court noted that "Long Island and the adjacent shore also share a common geological history, formed by deposits of sediment and rocks brought from the mainland by ice sheets that retreated approximately 25,000 years ago." 469 U.S. at 519. This statement by the Court makes clear that the "origin" element applies to any island being considered for mainland status, not just those in the Mississippi River delta for which the exception was originally adopted.

Special Master Maris, in *United States v. Florida*, Number 52 Original, determined that the eastern end of Florida Bay, a water body formed by the mainland Everglades on the north and the upper Keys on the south, comprised a juridical bay because the upper Keys "constitute realistically an extension of the mainland" under the criteria set out in the *Louisiana* case. Report of December 1973, at 39. Judge Maris went on to explain that the lower Keys might also be considered a further extension of the mainland, producing an even more seaward mouth of Florida Bay, "being basically

278 . The master explained that "Louisiana has introduced a substantial amount of evidence as to the nature and origin of mudlumps, showing that they result from hydraulic forces generated by river action. From this the conclusion is urged that they are fluvial in nature, and therefore should be assimilated to the mainland, wherever located and whatever their size. This, however, does not necessarily follow. Unless the mudlumps, like other islands or low tide elevations, meet the five specific tests of size, distance from the mainland, depth and utility of the intervening waters, shape and relationship to the configuration or curvature of the coast, their nature and origin is immaterial, although a non-fluvial origin might be a negative factor if all of these tests were met." *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 38-39.

part of the same partly submerged limestone reef as the upper Keys." However, he concluded that the intervening Moser Channel, a navigable waterway of 10- to 15-foot depths, prevents such a conclusion. *Id.* at 47.

We note that Judge Maris proposed an arguable extension because of the lower Keys' common origin with the upper Keys, not the actual mainland. His mainland determination for the upper Keys does not, apparently, rely upon any similarity of geologic origin with the actual mainland. That process would seem to expand on the Court's original proposal. However, the Court never had occasion to deal with the question because the parties stipulated that there is no juridical bay in eastern Florida Bay and the issue became moot. Stipulation of December 11, 1975.[279]

The Court's Five Criteria Provide a Minimum Test

After listing the five geographic criteria for island assimilation, the Supreme Court explained that the list "is intended to be illustrative rather than exhaustive." 394 U.S. at 66 n.86. Special Master Armstrong, in applying the test, concluded that the foregoing "appears to be intended to leave open the question of whether islands or low-water elevations which meet the five suggested specific criteria may nevertheless fail to qualify as parts of the mainland rather than to suggest that islands or low-water elevations which fail to meet one or more of these specific tests may nevertheless be so assimilated." Report of July 31, 1974, at 37. He followed that understanding in evaluating the status of specific features, reasoning that "unless the mudlumps, like other islands or low tide elevations, meet the five specific tests of size, distance from the mainland, depth and utility of the intervening waters, shape, and relationship to the configuration or curvature of the coast, their nature and origin is immaterial, although a non-fluvial origin might be a negative factor if all of these tests were met." *Id*. at 38-39. He then concluded that "while the mudlumps here in question might meet the last three of these specific tests, they fail to meet the first two, and therefore cannot be considered as extensions of the mainland." *Id.* at 39.

Other Considerations

Litigants have offered a number of other criteria that they believed are relevant to island assimilation. They include the following.

279. Political geographers would probably deny the significance of geologic origin for any coastline delimitation. They typically prefer criteria that can be applied by the mariner to a nautical chart so that he can determine, with the tools at hand, when he enters a nation's jurisdiction. Dr. Hodgson has written, for example, that an "island must be viewed from the chart representation, and interpretation as to geological or historical association should not be considered relevant. The two-dimension representation is the evidence available to the mariner and he must rely on these data." Hodgson, *Toward A More Objective Analysis*, *supra*, at 17. Although reasonable, this concern would seem to be met if the Court continues to treat all of the primary criteria as necessary to produce mainland status, as Mr. Armstrong and Judge Maris clearly did, and origin to be merely an additional basis for inclusion if the former criteria are met.

CONNECTION TO THE MAINLAND BY BRIDGES. In the *Alabama and Mississippi Boundary Cases*, testing the jurisdictional status of Mississippi Sound, the states contended that Dauphin Island should be assimilated to the mainland at least in part because it is connected to the mainland by a highway bridge. Special Master Armstrong concluded that "the mere fact that it is connected to the mainland by a bridge or other artificial structure does not standing alone make Dauphin Island a part of the mainland." Report of April 9, 1984, at 13. Nevertheless, the master noted that when taken with other factors, the bridge connection might be indicative of mainland status. *Id.* He then purported to test Dauphin Island against the Court's five specific criteria and added some geologic history for good measure. He concluded that Dauphin Island should be treated as mainland.

That analysis supported the master's finding for the states that Mississippi Sound is a juridical bay. In addition, he recommended that the Sound be recognized as a historic bay, an alternative basis for the states' claim. The United States took exception to both recommendations. The Court adopted the master's historic water recommendation, making it unnecessary to deal with the assimilation issue. 470 U.S. 93 (1985). Thus, the case shed no judicial light on the significance of a bridge.

Long Island is, of course, connected to the mainland by a number of bridges. The special master referred to the potential relevance of bridges in the *Rhode Island and New York Boundary Case*. Report of October Term 1983, at 39 and 41. He does not, however, seem to have placed any substantial reliance on that connection.[280]

Finally, the Florida Keys must be considered. All of those primary islands from Key West eastward are connected to each other and the mainland through a series of bridges and causeways. It is there that a State Department geographer, G. Etzel Pearcy, had suggested, without explanation, that a juridical bay could be formed by the islands. *United States v. Louisiana*, 394 U.S. at 71-72 n.95 (1969). Nevertheless, not even Florida argued that the Keys should be considered part of the mainland. The master's determination that the upper Keys should be assimilated to mainland was not based on any contention of the parties and, when the issue was returned by the Court to the master for further consideration, the parties stipulated that no such juridical bay existed in eastern Florida Bay.

It would now seem to be established that Pearcy's suggestion, and the Florida example, provide no precedent for future contentions for island assimilation based upon the existence of a highway that connects a feature to the mainland.

280. In both instances the masters were referring to Dr. Pearcy's suggestion that the Florida Keys might be considered part of the mainland because of the highway connecting them and the mainland. That opinion would seem to be now moot. The Florida coastline has since been litigated and a Supreme Court decree entered that precludes that interpretation.

PROXIMITY TO INLAND WATERS. It would seem that the essential element in assimilating an island to the true mainland is its proximity to that "mainland." But some have suggested that because inland waters, such as bays, rivers, and ports, are legally treated as mainland, an island is a part of the mainland if it is adjacent to inland waters. The suggestion is intriguing.

It first arose in the *Louisiana Boundary Case*. At least twice Louisiana argued that islands lying near, or abutting, inland waters should be assimilated to the mainland and become available to serve as bay headlands. In the first instance, involving Garden Island and Redfish Bays, the parties agreed on the location of a potential bay closing line. However, it happened that mudlump islands lay slightly seaward of that line, although some distance from the nearest upland of the mainland. Louisiana contended that the conceded inland waters of the bay must be treated as mainland and the Supreme Court's five criteria applied to the water areas between the mudlumps and conceded closing line.[281] As a consequence, the state urged, the mudlumps would be assimilated to the mainland and the minimum closing line could be moved seaward, using the new mudlumps as headlands. The process could continue indefinitely, leapfrogging from mudlump to mudlump.

The United States contended that although the mainland and inland waters share certain jurisdictional characteristics, the Court was clearly referring to uplands when it used the term mainland in its assimilation discussion.

The special master accepted the federal position, saying that "it seems apparent that when in its opinion the Court used the term 'mainland,' it used it to refer to an existing body of land and not to inland waters. Otherwise, a small island lying many miles from the nearest solid land might by virtue of its proximity to a bay closing line be considered an extension of the mainland." Report at 42. He explained that "while for some purposes inland waters may be considered a part of the mainland, they are nevertheless waters and not land, and therefore land bodies lying adjacent to them are not assimilable to them as such, but retain their characteristics as islands." *Id*.

The master was consistent when Louisiana raised the same theory at Caillou Bay. There the Isles Dernieres fringe the mainland coast. On their eastern end these barrier islands screen the mouth of an acknowledged inland water body, Lake Pelto. From there they run west, beyond the limits

281. Or, as the special master explained the state position, "Louisiana insists, however, that once the closing line conceded by the United States is drawn, the waters within that closing line become inland waters and therefore constitute a part of the mainland, and that the relationship of the remaining islands to those inland waters therefore is in reality a relationship to the mainland which is sufficient to constitute them an extension thereof." Report of July 31, 1974, at 41.

of Lake Pelto and again parallel the coast west of Caillou Boca. Louisiana denominates the body between the mainland and western Isles Dernieres "Caillou Bay." In support of its contention that the western Isles Dernieres are assimilated to the mainland, and thereby eligible to form a bay, the state pointed out that the Isles Dernieres touched inland waters, which are equivalent to mainland and should, therefore, be treated as mainland themselves. The master disagreed and Caillou Bay was determined not to be inland waters. The Court adopted that recommendation.[282]

In the *Alabama and Mississippi Boundary Cases*, the same special master, Mr. Armstrong, was presented with what appears to be the identical issue but reached the opposite conclusion. Dauphin Island, in the mouth of Mobile Bay, created the controversy. The states argued that Mississippi Sound is inland water by virtue of being both an Article 7 juridical bay and historic inland water. Their juridical bay argument depended, in part, on a determination that Dauphin Island is assimilated to the mainland. The master concluded that it is, on the primary ground that it lies adjacent to inland water and that "under the Geneva Convention internal waters are to be subsumed under the general category of mainland. If this is correct, then Dauphin Island, as it adjoins the mainland, is clearly an extension thereof; in effect, a peninsula extending westwardly therefrom and separating the Gulf of Mexico from Mississippi Sound." Report of April 9, 1984, at 14. (Figure 64) The master relied on language of the Court to explain his conclusion, stating that "it would appear as a general rule derived from Article 7 Section 3 of the Geneva Convention and the Court's interpretation thereof in *United States v. Louisiana, supra,* (394 U.S. at p. 55) that where islands lie within the mouth of a bay they are to be considered as part of the mainland for all purposes." Report at 16.

We do not believe that anything in the Convention, its history, or any court decision supports the master's interpretation. Article 7(3) speaks to one issue, the means of measuring the area of an indentation to determine whether it is larger than a semicircle whose diameter is a line drawn across the indentation's mouth.[283] Where islands lie in the entrance to an indentation it has several mouths. In the language relied upon by the

282. The Isles Dernieres have the physical appearance of a series of parallel islands fringing the coast. However, to bolster its litigation position Louisiana contended that they should in fact be assimilated to each other and are generally understood, in Louisiana, to be a single island. The United States disagreed. In a Solomon-like solution the master ruled that whenever the state or its witnesses used the term it would be taken to denote the singular. When used by the federal side, it would be understood to be plural.

283. 7(3) reads, in its entirety, as follows: "[f]or the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation."

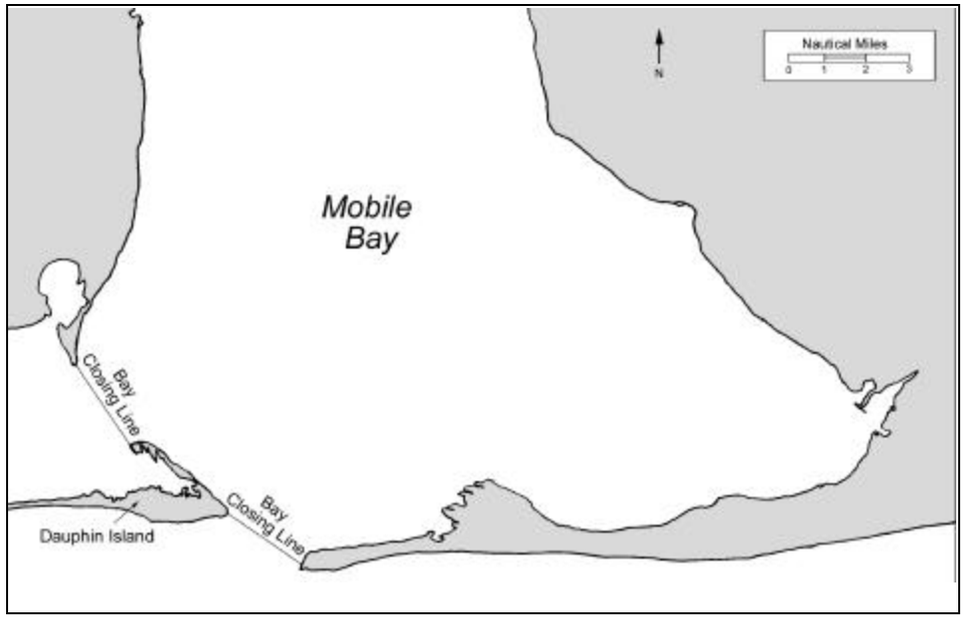

Figure 64. Mobile Bay, Alabama, with closing line through Dauphin Island.

master to justify assimilating such islands to the mainland, the Court was actually responding to Louisiana's contention that closing lines should be drawn to the "seawardmost points on the island" rather than to their natural entrance points, helping to form landlocked waters, as would be done with mainland headlands.

The Court rejected Louisiana's contention, concluding that entrance points should be selected on islands in the mouth of a bay as they are on the mainland. 394 U.S. at 56. The Court did not even hint that "where islands lie within the mouth of a bay they are to be considered as part of the mainland for *all* purposes." Report at 16. What the Court actually said was that in the case of multiple mouths "the lines across the various mouths are to be the baselines for all purposes." 394 U.S. at 55. The Court was referring, of course, to the seaward limit of inland "waters," not mainland low-water lines.

As a fallback from its unsuccessful argument that islands can never be used as headlands to bays, the federal government argued in the *Louisiana Boundary Case* that if islands are assimilated to the mainland the water gap between any island being treated as the mainland, and the true mainland, must be measured and included as part of the total closing line described in Article 7(3) for purposes of the 24-mile test (and, presumably, the semicircle rule). The Court rejected the federal position reasoning (quite logically it would seem) that "[t]hese arguments, however, misconstrue the

theory by which the headland is permitted to be located on the island – that the island is so closely aligned with the mainland as realistically to be considered an integral part of it. Thus viewed, there is no 'mouth' between the island and the mainland." 394 U.S. at 62 n.83. (Figure 65)

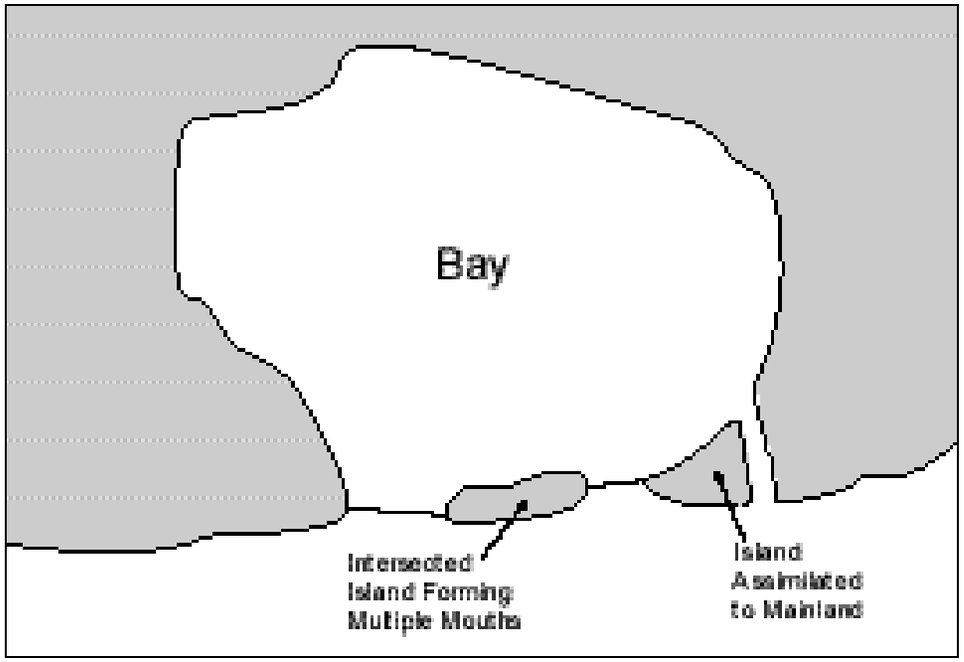

Figure 65. Multiple mouths to a juridical bay. Here the bay's eastern headland is on an island assimilated to the mainland and multiple mouths are formed by an additional island.

If all inland water is treated as mainland there would never be a "mouth" to any bay. By definition the "mouth" of a bay is the distance between the mainland headlands. If the inland water is treated as "mainland for all purposes" there is nothing to measure. Clearly the master in the *Alabama and Mississippi Boundary Cases* did not intend such an illogical extension of his reasoning but the conclusion appears to be inevitable.[284]

The United States took exception to the master's position but, finding the area to be a historic bay, the Court found it unnecessary to address the juridical bay issues. *United States v. Louisiana*, 470 U.S. at 93.

284. Another provision of Article 7(3) establishes that islands are not to be treated as mainland. It provides that for purposes of the semicircle test "[i]slands within an indentation shall be included as if they were part of the water area of the indentation." Article 7(3) clearly distinguishes between mainland and water area and, for its purpose, treats islands as water.

We believe that the better approach is to limit island assimilation to instances in which an island is in close proximity to the actual mainland, not inland waters.

Low-Tide Elevations as Headlands

The foregoing discussion has focused on the potential use of islands as headlands to bays. It should be noted that low-tide elevations will be treated as islands in similar circumstances.[285] The Supreme Court has said that "[t]he question arises with respect to low tide elevations as well as islands. We think that in this context there can be no distinction between them. Article 7(4) provides that the bay-closing line shall be drawn 'between the low-water marks of the natural entrances points.' The line is to be drawn at low-tide, and, therefore, if a natural entrance point can be on an area of land surrounded by water, it can be on a low-tide elevation as well as an island." 394 U.S. at 60 n.80. The matter is resolved.

Applications of the Court's Criteria

It would seem that the Supreme Court understood that determinations of island assimilation to the mainland would be necessarily subjective. At the same time that it set out the five criteria discussed above, it noted that "[o]ur discussion of these authorities should not be taken as suggesting that, under the now controlling Convention on the Territorial Sea and the Contiguous Zone, every Mississippi River Delta mudlump or other insular formation is a part of the coast." 394 U.S. at 65 n.84. For purposes of determining insular or mainland status in the future it is probably most helpful to look at specific examples that have either been agreed upon or adjudicated.

The issue was first dealt with by Special Master Armstrong as he considered the proper closing lines across Garden Island/Red Fish and Bucket Bend Bays, on the east side of the Mississippi River delta. Each indentation has natural headlands on what the parties agreed to be extensions of the mainland. However, more seaward of those headlands lie examples of the "mudlumps" to which the Court referred. These features tend to be small, compared to the nearest mainland and intervening waterways. (Figure 66) They appear to be separated from the mainland by waters of the Gulf of Mexico, rather than the crisscross of river-like channels that characterize the delta itself. Although created by river forces, they do

285. The Convention defines a low-tide elevation as "a naturally formed area of land which is surrounded by and above water at low-tide." Article 11(1).

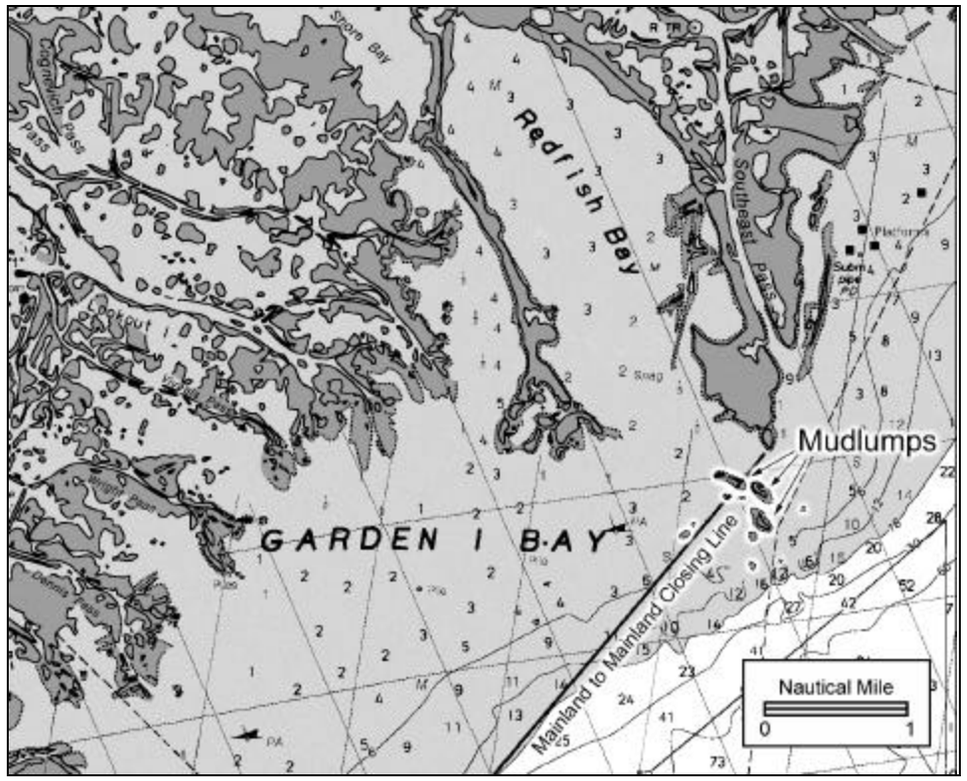

Figure 66. Garden Island Bay, Louisiana, near the southeastern corner of the Mississippi River delta. Note the mudlumps off the eastern headland. (*Based on NOAA Chart 11361*)

not appear through the same processes that create the mainland marsh. The master concluded that "[a]pplying the test outlined by the Court . . . neither the size, distance from the mainland, depth and utility of the intervening waters, shape of the low-water elevations, or their relationship to the configuration or curvature of the coast indicate that they should be assimilated to and treated as a part of the mainland." Report at 37 [referring to Bucket Bend Bay]. And, with reference to Garden Island/Red Fish Bay, simply "the islands in question do not bear the requisite relationship to the mainland at Southeast Pass to constitute extensions thereof." Report at 41. Although the explanation is terse, the example is useful if island assimilation issues arise in the future.

The next example arose in East Bay, at the southern extreme of the delta. The Court had already concluded that the whole of East Bay did not meet the semicircle requirement of Article 7 for inland water status. 394 U.S. at 53. However, the upper portion of East Bay does meet the semicircle test

and Louisiana was given the opportunity to prove that it qualified separately. To do so, the latter indentation had to meet all requirements of Article 7. The United States argued that no "well-marked headlands" appeared within the larger East Bay to enclose a reduced area of landlocked waters. Louisiana pointed to Cow Horn Island. Although denominated an "island," Cow Horn closely paralleled the eastern headland of East Bay.[286] (Figure 67) It was large in comparison to the adjacent mainland and the intervening waterway. And that waterway was narrow and defined by parallel banks rather than open water. It had, as Dr. Hodgson thought important for such determinations, a "riverine" character. As a consequence, the United States conceded that, during its existence, Cow Horn Island could be considered part of the adjacent mainland. Report at 32.[287] The "island" was employed as a headland for the lesser bay within East Bay while it was in existence. Decree at 422 U.S. 13 (1975).

Caillou Bay was described by the special master as "one of the most difficult areas involved in this litigation." Report at 49. It is a small water feature formed by the mainland on the north and the western end of a barrier island chain known as the Isles Dernieres on the south. (Figure 68) Louisiana claimed it as inland on at least three grounds. First it was claimed as historic waters. That claim was put before the master. He recommended against the state, Report at 22, and that recommendation was adopted by the Court. 420 U.S. 529 (1975). Next, Louisiana asserted that island fringes could form the perimeter of juridical bays. 394 U.S. at 67. The Court itself rejected that theory, stating that "Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Id.* And, finally, Louisiana contended that the Isles Dernieres should indeed be considered part of the mainland and eligible as a headland to a juridical bay – this despite the fact that in its discussion the Supreme Court had said that "Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed

286. It is important to note that nomenclature does not determine the status of any feature under the Convention. A bay, island, or other geographic feature will be tested against the Convention's criteria as applied by the Supreme Court, regardless of what it has been commonly called.

287. The United States nevertheless argued that Cow Horn Island did not create any distinct headland for an internal bay within East Bay. Thus, Cow Horn Island provides an example of more than the island assimilation issue. It also stands for the proposition that juridical bay status can be lost as geographic changes cause an indentation to fail any of Article 7's criteria. That, of course, is consistent with the general understanding. Both elements of the "coast line," the low-water line and inland water closing lines, are ambulatory. Finally, a formation such as Cow Horn Island should affect measurement for purposes of the semicircle test. Article 7(2) requires that to qualify as a bay an indentation must contain water area at least equivalent to that of a semicircle whose diameter is the line across the mouth of the indentation. Article 7(3) goes on to provide that "[i]slands within an indentation shall be included as if they were part of the water area of the indentation." That being so, such an "island" should first be tested against the assimilation criteria used for headlands. If it qualifies for assimilation neither it nor its intervening waterway should be included as water area. In such cases, a land form within the indentation may result in a failure to meet the semicircle test and prevent juridical bay status.

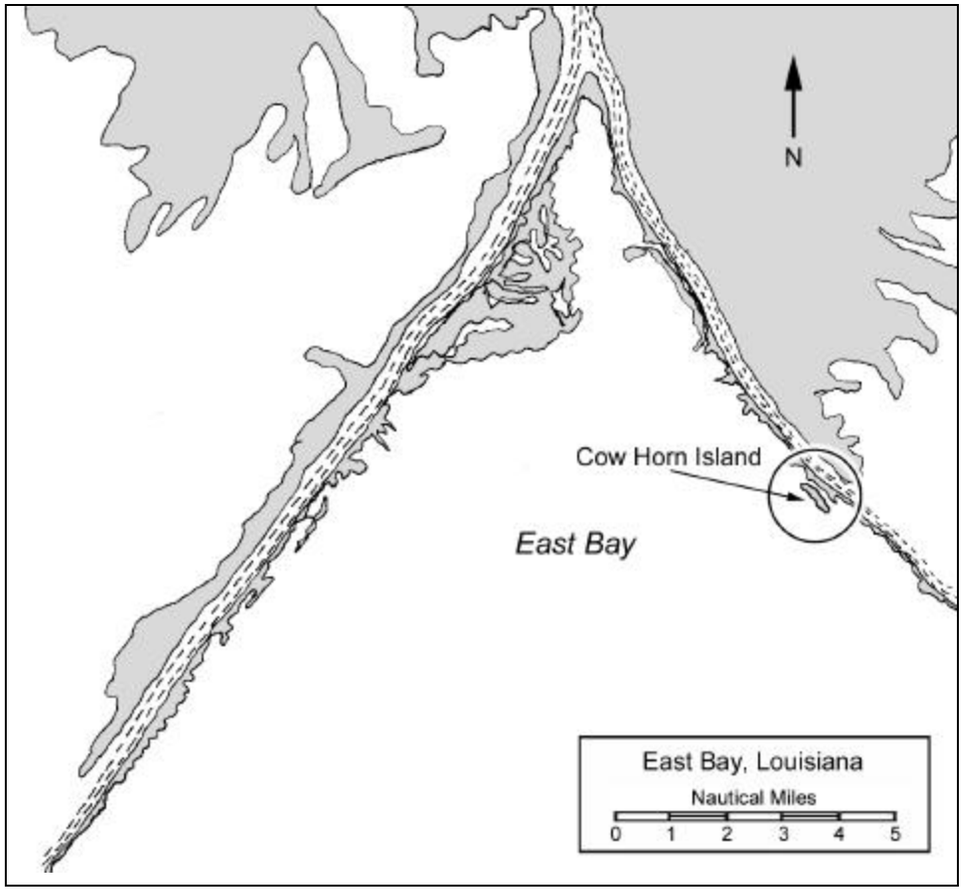

Figure 67. East Bay, Louisiana. Cow Horn Island was assimilated to the mainland and served as the eastern headland of a bay within East Bay until the island dropped below mean low water.

a part of it, and we agree that none of the islands would fit that description." 394 U.S. at 67 n.88.

The western Isles Dernieres are in fact separated from the mainland by a waterway that is more like a channel than an open water body. If the islands were a single land feature, its relationship with the mainland would weigh strongly in favor of assimilation. However, that portion of the chain that would have to be treated as a headland is itself composed of a number of islands. The gaps among these are substantial, giving the impression that they comprise a number of formations rather than a single feature bisected by channels.

The state argued that the position attributed to it by the Court was a misunderstanding. Report at 50. Nevertheless, the master pointed out that

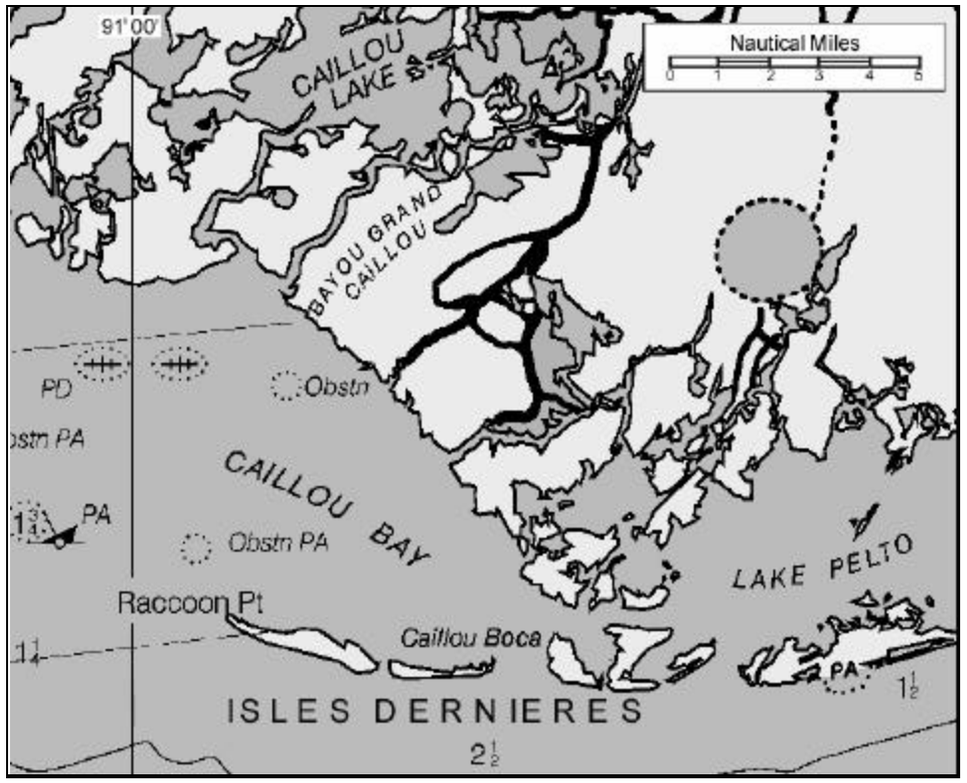

Figure 68. Caillou Bay, Louisiana. (*Based on NOAA Chart 11340)*

the Court "independently reached the [same] conclusion," *id.*, and the Court's language "appears to require a holding that there is no configuration in the area which meets the requirements of a bay . . . ." *Id.* at 51.

Interestingly, it appears that but for the Court's language, the master would have recommended assimilation of the western Isles Dernieres to the mainland. In what consequently amounts to *dicta* in his Report (but might be useful for future conflicts) he said that "[in] the absence of such a holding [by the Court] the Special Master would upon the evidence before him be inclined to hold that based upon their size, proximity, configuration, orientation and nature these islands would constitute an extension of the mainland . . . ." making Caillou Bay a juridical bay.[288] The state took exception to the master's recommendation but the Court

288. To further confuse the matter, the master seemed to base his conclusion, at least in part, on Special Master Maris's Report in *United States v. Florida*, Number 52 Original, reasoning that his opinion with respect to the western Isles Dernieres "would appear to be in accord with the view of the Special Master in the case of *United States v. Florida*, Number 52 Original, in regard to certain of the Florida Keys." Report of July 31, 1974, at 51. Unfortunately the Master's Report in Louisiana was written before the Supreme Court remanded the *Florida* case and the parties stipulated that the Florida Keys referred to did not form the headland of a juridical bay. The Court's Florida decree reflects that stipulation. 425 U.S. 791 (1976).

overruled all exceptions. 420 U.S. 529 (1975). The western Isles Dernieres are not assimilated to the mainland.[289]

Louisiana made two more unsuccessful efforts at island assimilation. Low-tide elevations west of Point au Fer and on the Shell Keys should, it contended, be treated as part of the mainland and as entrance points of Atchafalaya Bay. The master disagreed, explaining that "in each case, the size and location of the elevations makes it impossible realistically to view them as extensions of the mainland." Report at 52-53.

The Alabama and Mississippi Boundary Cases produced two assimilation questions. Isle au Pitre, at the western end of Mississippi Sound, was said to be a mainland headland to a juridical bay. The United States conceded, under the criteria set out by the Court in *United States v. Louisiana*, 394 U.S. at 66, that Isle au Pitre may be treated as mainland. Report at ll; 470 U.S. 96 (1985). The second example is more difficult to understand. There Dauphin Island, at the eastern end of Mississippi Sound, was at issue. Again the state contended that it should be assimilated to the mainland and, as mainland, formed the eastern headland of a juridical bay. Interestingly the master applied the traditional geographic tests and concluded that Dauphin Island's proximity to the mainland upland was insufficient to justify assimilation, and that a causeway between them did not add enough weight to conclude otherwise. However, the master then adopted a legal theory not previously considered relevant to the assimilation issue. He noted that Dauphin Island is adjacent to the admittedly inland waters of Mobile Bay, and then opined that because inland waters are "equivalent to mainland" Dauphin Island is clearly in contact with the mainland and becomes mainland itself.[290]

The legal approach seems suspect. The Court has not treated inland water as mainland for Article 7 purposes.[291] The United States took exception to the master's recommendation that Mississippi Sound is a juridical bay, in part on the basis of the Dauphin Island reasoning. However, the Court ruled for the states on the alternative historic waters ground and made no determination on the assimilation issue. 470 U.S. 93 (1985). Given the Convention and Court's general treatment of inland waters we think it unlikely that it will adopt the legal position that any

289. The mainland just north of the Isles Dernieres is much like the Mississippi delta. It is composed of a patchwork of land formations separated by narrow channels.

290. The master did make reference to the size, shape, and configuration of Dauphin Island, Report at 16-17. However, his conclusions that the island was "immediately adjacent to the inland waters of Mobile Bay, which are part of the mainland," *id.*, and, for that reason "there are no intervening waters," *id.*, are clearly critical to his determination that Dauphin Island is assimilated to the mainland.

291. See discussion *supra* 283-286. Nor did this special master apply the same reasoning when adjudicating the Louisiana coast line. *Louisiana Boundary Case*, Report of July 31, 1974, at 38, 41 and 42.

island touching inland waters is automatically assimilated to the mainland, if and when that issue arises again.

In *United States v. Florida*, Number 52 Original, the special master made island assimilation determinations that neither party had urged.[292] The Florida question arose in what is widely known as Florida Bay, the vast water body formed by the Everglades on the north and the Florida Keys on the south. Florida did not claim the bay as juridical, under Article 7, but as historic inland waters. The master analyzed and rejected the historic bay claim but proceeded to consider its eastern portion under Article 7. Reviewing the Court's assimilation criteria in the *Louisiana Boundary Case*, he concluded that "this area is sufficiently enclosed by the mainland and the upper Florida Keys, which constitute realistically an extension of the mainland, to be regarded as a bay which constitutes inland waters of the State." *United States v. Florida*, Report of the Special Master of December 1973, at 39.[293]

On its exceptions to that recommendation, the United States argued that the navigable gaps between any two upper Keys were too great to admit assimilation to the mainland and that the issue had not been argued to the master. On the latter basis the Court remanded the issue and Florida conceded that the area described by the master is not a juridical bay.[294] A final decree was entered accordingly. *United States v. Florida*, 425 U.S. 791 (1976).

The question of island assimilation might have arisen in the *Massachusetts Boundary Case*. There the status of Vineyard and Nantucket Sounds was at issue. The state might have argued, with respect to the former, that the Elizabeth Islands and Martha's Vineyard should be assimilated to the mainland, forming a juridical bay in Vineyard Sound. Or, it could have contended that Martha's Vineyard and Monomoy Island are assimilated to the mainland (and, possibly that Nantucket is assimilated to Monomoy) creating an Article 7 bay in Nantucket Sound. It did not. The parties agreed that Article 7 did not apply and the master agreed that the position "is in accord with the authoritative Supreme Court precedent interpreting Article 7 . . . [in which it has held that] Article 7 does not encompass bays formed in part by islands which cannot realistically be

292. As noted above, they influenced Special Master Armstrong's view of a similar issue in Caillou Bay, Louisiana, even though he felt ultimately compelled to rule otherwise because of earlier Supreme Court language in his case.

293. The master would have attributed juridical bay status to "the area between the mainland on the northwest and the upper Florida Keys on the southeast which lies east of a closing line running southwesterly from East Cape of Cape Sable to Knight Key in the Florida Keys, a distance of approximately 24 geographical miles." Report at 39.

294. Stipulation of September 1971 between Solicitor General Erwin N. Griswold and Attorney General Robert L. Shevin, attached to the Master's Report of December 1973.

considered part of the mainland." *United States v. Maine (Massachusetts)*, Report of the Special Master of October Term 1984, at 9.

In the *Rhode Island and New York Boundary Case* the Court had its first occasion to apply the criteria for island assimilation which it had set out in the *Louisiana Boundary Case* 16 years earlier.[295] The ultimate issue there was whether Long Island Sound is a juridical bay, conforming to the requirements of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. Experts for both parties agreed that "in the absence of Long Island, the curvature of the coast is no more than a 'mere curvature' and is not an 'indentation'" as required by the Convention. *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 514-515 (1985). (Figure 69) Consequently, for Long Island Sound to qualify as a juridical bay, Long Island itself would have to be treated as an extension of the mainland.

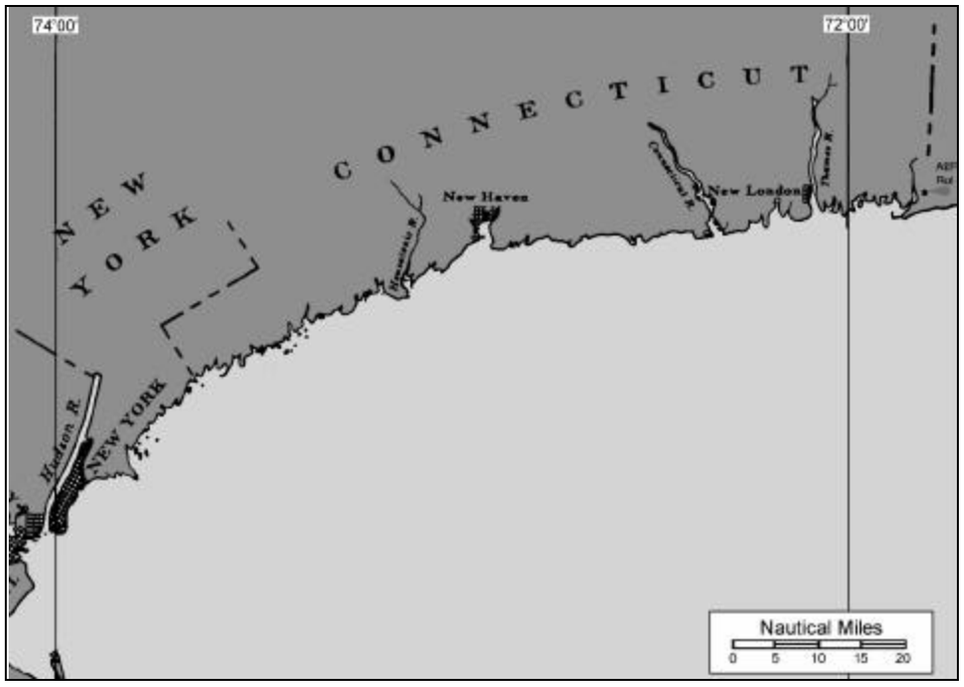

Figure 69. New York/Connecticut coastline. Without Long Island, the waters of Long Island Sound are not landlocked. (*Based on NOAA Chart 13003*)

295. Although the criteria were applied by its special masters in three prior cases, they were disposed of in circumstances that obviated the need for the Court's discussion of the assimilation issue. In *Louisiana*, the Court merely accepted the master's recommendations on bay closing lines without comment. 420 U.S. 529 (1975). In *United States v. Florida* it remanded the juridical bay question and the parties resolved the matter by stipulation. 425 U.S. 791 (1976). In the *Alabama and Mississippi Boundary Cases* the question of Dauphin Island's assimilation to the mainland was made moot when the Court adopted its master's conclusion that Mississippi Sound constitutes historic inland waters. Dauphin Island's status is irrelevant to that question. The Court did not comment on the separate juridical bay basis for the master's finding. 470 U.S. 93 (1986).

Special Master Hoffman heard extensive evidence about the relationship between the island and adjacent mainland. He pointed out that "Long Island is a large island situated along the coast and at its western end is separated from the mainland by only a narrow stretch of water." Report October Term 1983 at 45-46. That narrow stretch is, of course, the East River. When the criteria from the *Louisiana Boundary Case* are applied, the East River assimilation seems justified.

The master noted that the island is "large." That can hardly be debated. Probably more important, it is significantly larger than the East River, which separates it from the mainland.[296] Second, the intervening waterway is long, narrow, and has parallel banks. It is more "riverine" than an open body of water, thereby meeting the most critical of the assimilation factors recommended by political geographers who have considered the question. (Figure 70) Long Island lies only one-half mile from the mainland, 469 U.S. at 518, a minuscule distance compared to its 118-mile length. The Court emphasized that in its original state, the intervening waterway was as shallow as 15 to 18 feet, and not conducive to navigation. *Id*. A common geologic history, linking the island to the mainland, was also discussed. Report at 44-45 and 469 U.S. at 519. These would seem to be more than sufficient justification for assimilating Long Island to the mainland and adopting it as the southern headland of a juridical bay known as Long Island Sound.[297]

The special master reached that conclusion, Report at 45-46, as did the Court. 469 U.S. at 519. The Court described its analysis as the "realistic approach" to the assimilation question, as intended by the Louisiana decision. *Id*. at 517.

The federal government's "Coastline Committee," the interagency group that applies the Convention's rules to establish the United States' limits of maritime jurisdiction, has often looked at the assimilation questions. Its decisions may also be useful in evaluating future situations. For example, it concluded that the Seahorse Islands, which screen the mouth of Peard Bay on the north slope of Alaska, should be assimilated to each other and a separate island between them and the mainland should be assimilated to the mainland.[298] Kulgurak Island, a short distance east, was also

296. The "mainland" referred to is mostly Manhattan Island which, although named an island, is certainly part of the mainland being separated from the Bronx only by the Harlem River.

297. Nevertheless, both the master and the Court went on to rely on the bay-like nature of Long Island Sound itself as further justification for assimilation. As discussed above, that factor may go beyond what the Court intended in 1969 but, in this case, does not appear to produce an improper result. See Report at 45-47 and 469 U.S. at 519.

298. The Committee has dealt with adjacent islands just as it has an island and the mainland, assimilating them to each other where like circumstances would have justified assimilation to the mainland. Although the Court has not spoken to this particular situation, it would seem to be required given the rules for mainland assimilation.

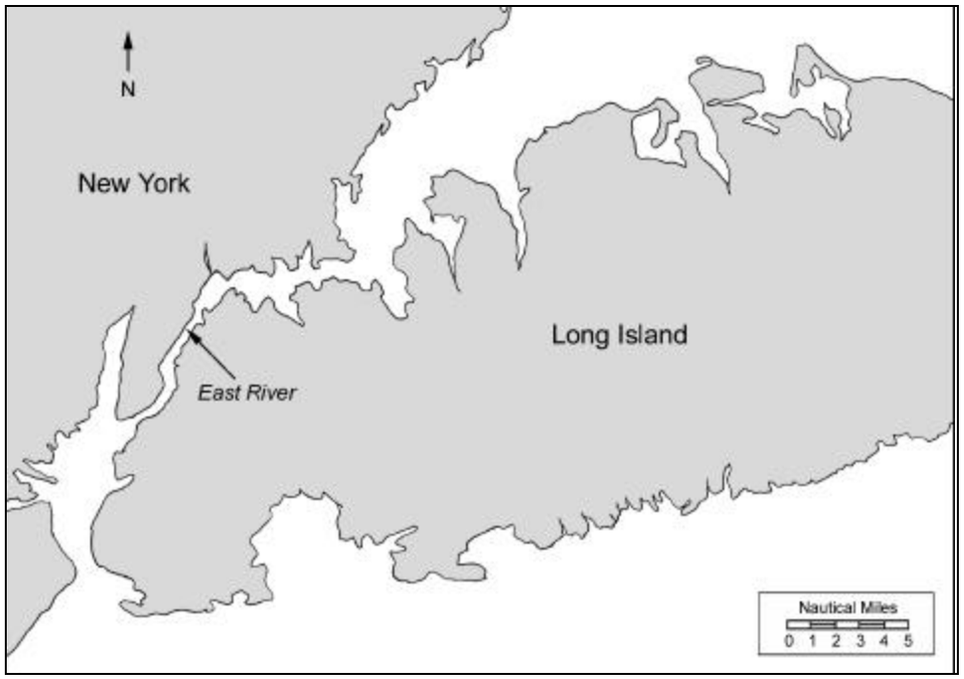

Figure 70. East River, New York. The river separates Long Island from the mainland to the northwest.

assimilated. Minutes of July 27, 1970. In considering the Texas coast, the Committee concluded that Matagorda Island is assimilated to the mainland, as are Padre and Mustang Islands. Minutes of August 17, 1970. A small island off North Cape, near Whale Bay, Alaska, was assimilated to the mainland because of its configuration, and the depth and breadth of the intervening channel. Minutes of September 14, 1970. A small island south of the eastern mainland-headland of Narragansett Bay was also assimilated. Minutes of November 9, 1970.

The Committee seriously considered the Long Island example before concluding that it should not be assimilated to the mainland. Minutes of January 4, 1971. Following the Supreme Court's decision in the *Rhode Island and New York Boundary Case*, the Committee adopted the Court's position and amended the official United States charts. Minutes of May 28, 1985. Kruzof Island was determined to be assimilated to the adjacent Partofshikof Island (near Sitka Sound, Alaska), but not with the mainland because the channel separating them from the mainland is too broad, deep, and important for navigation. Minutes of September 20, 1971. A spoil "island" off the coast of Florida, separated from the mainland by a passage of only 35 feet width, was assimilated to the mainland because of the substantial size of the feature and the "narrowness" of the intervening waterway.

Minutes of April 25, 1972.[299] Finally, the Committee considered a proposal by the State of California that a reef and string of islands off its northern coast be assimilated to the mainland and treated as the southern headland of an indentation that it denominated "Pelican Bay." The Committee rejected the proposal on the formations' general relationship to the coast and the nature of intervening waters. Minutes of December 17, 1976.

Despite the foregoing "the general understanding has been – and under the Convention certainly remains – that bays are indentations in the mainland, and that islands off the shore are not headlands but at the most create multiple mouths to the bay." 394 U.S. at 62.[300] Nevertheless, situations occur in which it would be unreasonable to exclude a land formation from mainland status just because it is surrounded by water. The Supreme Court has said, quoting Shalowitz, that "with regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." 394 U.S. at 66 n.85. A "common sense approach" will be followed. 469 U.S. at 517.[301]

Reviewing the examples already adjudicated, it would seem fair to conclude that the nature of the intervening waterway may be the most significant of the Court's criteria. If it is long and narrow, rather than broad, assimilation is more likely to be justified. The same is true the larger the island in comparison to the breadth of the intervening waterway. The more navigable the intervening waters, the less justification for assimilation. Common geologic origin has been used to bolster assimilation, but does not appear to be a major factor.

In the case of Long Island, the nature of the water body created by assimilation was also considered by the master and the Court as evidence that assimilation is appropriate. We are concerned that focus on that area of water, rather than the stretch that is ultimately going to be ignored, may be inappropriate.

In sum, the decision will be subjective. The trier of fact will determine, as the Supreme Court has suggested, whether islands are "so integrally

299. This example also makes a separate point. Typically an artificial island is not part of the coast. Article 10 of the Convention provides that the territorial sea is measured from an island, but defines island as a "naturally formed" area of land. Man-made extensions of the natural coast are, however, treated as part of the coast. The question thus becomes, is a spoil bank that is surrounded by water to be treated as an artificial island even though its relationship to the mainland is such that, if naturally formed, it would be assimilated? The Committee clearly assumed that assimilation is appropriate. The Supreme Court dealt with the issue in the *Louisiana Boundary Case*, where it said that if a spoil bank were surrounded by water at low tide it would not be treated as part of the coast line, but if "an extension of the mainland" it would be. The Committee obviously interpreted the latter provision to include "constructive" extensions of the mainland under the criteria set out later in the same opinion. 394 U.S. at 41 n.48.

300. Reaffirmed, most recently, at *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 519 (1985).

301. See also: 4 Whiteman, *supra*, at 169 and 1 O'Connell, *supra*, at 413.

related to the mainland that they are realistically parts of the 'coast' with the meaning of the Convention." 469 U.S. at 517.

Islands in the Mouth of a Bay

Although a juridical bay must be an indentation into the mainland, with mainland headlands enclosing landlocked waters, islands in the mouth of a bay may help determine which waters are landlocked. The mouth of a traditional bay, in the absence of islands, is a line between its mainland headlands. Where islands are present, that line may be altered.

Article 7(3) of the Convention provides that "where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths."[302] As the Supreme Court has recognized, "the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation." *Louisiana Boundary Case*, 394 U.S. at 56, quoting *Commentary of the International Law Commission* 2 Y.B. Int. L. Comm'n 296 (1956).

The General Proposition

Islands may create multiple mouths to a bay in three circumstances. First, an island or islands may be intersected by a direct line between the mainland headlands. Second, an island or group of islands may, although not intersected, so clearly affect the nature of the waters both landward and seaward, that the gaps between islands should be considered mouths to the indentation. Finally, an island may be so closely related to the mainland that it should be assimilated to it.[303] It may then serve as the "mainland" headland.

INTERSECTED ISLANDS. Islands that lie directly in the mouth of a bay, that is, are intersected by the mainland-to-mainland closing line, provide the easiest example of multiple mouths. (Figure 71) The mouths are lines connecting the natural mainland headlands to headlands on the intersected islands and similar lines connecting adjacent islands. The headlands are selected just as mainland headlands would be. 394 U.S. at 56. Lines drawn to natural entrance points on the islands may exclude some waters that

302. Although the Article 7(3) reference is to application of the semicircle test, it is understood that the lines referred to are separate mouths for all purposes.

303. This circumstance is also discussed above with respect to headland selection.

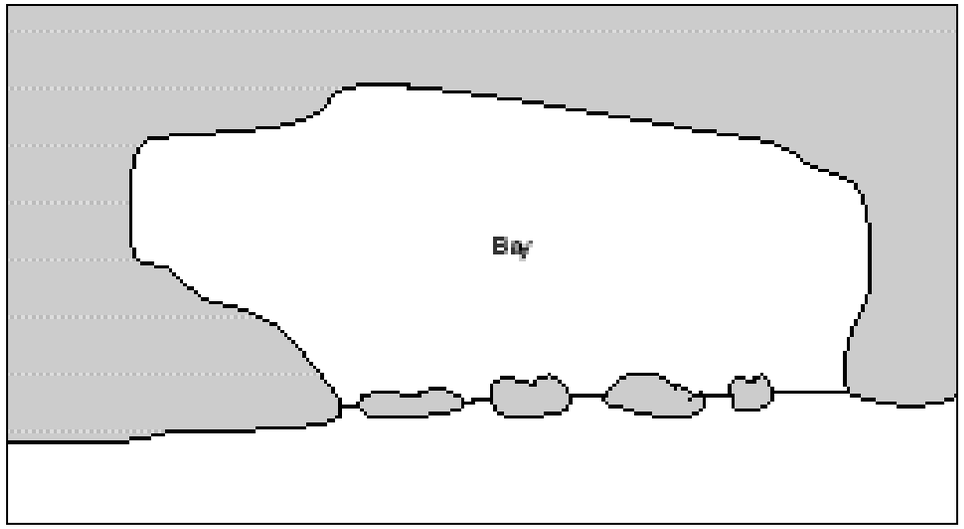

Figure 71. Multiple mouths to a juridical bay. Multiple mouths to this bay are formed by screening islands that are intersected by a straight line between mainland headlands.

would have been enclosed by a direct headland-to-headland closing line, or they may include more water area, but their selection is "not optional." *Id.* at 57 n.77.[304]

SCREENING ISLANDS. As the Supreme Court has noted, "Article 7(3) contains no requirement that the islands be intersected by a mainland-to-mainland closing line; rather it speaks only of multiple mouths 'because of the presence of islands.'" *Id.* at 59 n.79. "[w]here . . . a string of islands covers a large percentage of the distance between the mainland entrance points, the openings between the islands are distinct mouths outside of which the waters cannot sensibly be called 'inland.'" *Id.* at 58.

The primary question was answered; islands need not be intersected to form multiple mouths. But two questions remained to be resolved on a case-by-case basis. Those are, what is "a large percentage of the distance between the mainland entrance points" and how far seaward or landward of the mainland-to-mainland closing line can the islands lie and still constitute separate "mouths" to the original indentation? Drs. Hodgson and Alexander concluded that "[i]f the islands serve to block more than one-half of the opening of a bay, they may be judged to 'screen' the mouth of the bay from the sea. Since the greater condition, i.e., more than half, of

304. Louisiana argued, unsuccessfully, that closing lines should be drawn to the "seaward most" points on intersected islands, rather than to natural entrance points on the islands. The Court pointed out that just as the presence of islands tends to link the landward waters more closely to the mainland, islands also tend to further separate more seaward waters from the indentation itself. *Id.* at 58.

the mouth is represented by islands, it should be considered to be the dominant geographic characteristic of the mouth and serve to enclose the water within the bay; these islands screen the bay from the sea."[305]

The federal government has followed this position in its delimitation of the United States' coast line. *Rhode Island and New York Boundary Case*, Report of the Special Master, *supra*, at 54. However, there have been few occasions for the Supreme Court or its masters to consider it. Most prominent was Rhode Island's contention that Block Island forms two separate mouths to the combined Long Island and Block Island Sounds. Apparently ignoring the Supreme Court's admonition that screening islands had to cover a "large percentage" of the opening, the state emphasized that mariners had to pass the island to enter the bays and would consider themselves landlocked when they had done so. Without reference to the 50 percent principle, the special master concluded that Block Island does not form part of the closing line for several subjective reasons. *Id.* at 60.[306]

Also unanswered is the question – 50 percent of what? Do the islands need to "screen" one-half of the distance between the mainland headlands or of the total closing using the islands? Logic would seem to suggest the latter. If the islands form multiple mouths, the mainland-to-mainland closing line becomes irrelevant. The "openings" of the bay are now the gaps between islands (and the most landward islands and the mainland). It would seem to be the total length of these lines, compared to the length of the intervening islands, that establishes the landlocked nature of the enclosed waters.[307]

It is established that multiple mouths may be created by islands that do not lie upon the mainland-to-mainland closing line. (Figure 72) Unanswered is the question of how far away may they be located and still be said to form multiple mouths to the indentation. Neither the experts nor the judicial decisions provide much help.

The answer may depend, in part, on whether the screening islands lie seaward or landward of the mainland closing line.[308] In the case of a

305. Hodgson and Alexander, *Toward a More Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls* 17 (1972); reiterated at Hodgson, *Islands, Normal and Special Circumstances* 40 (1973). See also: Bowett, *The Legal Regime of Islands In International Law* 31 (1979).

306. These include: the island's location "well outside" the actual indentation; lines to the island would enclose waters that are not landlocked; and the island is "too far seaward of any mainland-to-mainland closing line . . . ." Report at 60.

307. We refer to the "length" of the islands only for convenience. It would seem that the proper "island measurement" for this purpose would be a straight line between its natural entrance points. Many islands would be slightly longer than such a line, but their portions extending beyond natural entrance points would do nothing to enclose landlocked waters and would seem inappropriate for this measurement.

308. All political geographers have assumed that screening islands may move bay closing lines seaward of what would constitute inland waters in their absence. The Supreme Court has said that the reverse is also true. *Louisiana Boundary Case*, 394 U.S. at 58 and *Rhode Island and New York Boundary Case*, 469 U.S. at 523.

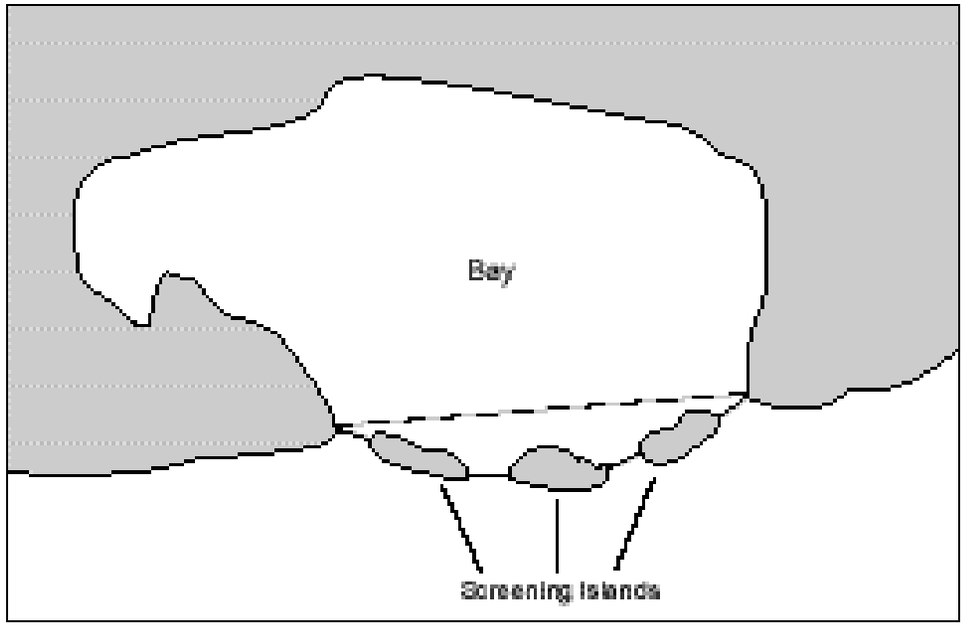

Figure 72. Multiple mouths to a juridical bay. Here multiple mouths are formed by screening islands that are seaward of a straight line between mainland headlands.

seaward screen, the logical approach would seem to be to calculate the land-to-water ratio as suggested above, i.e., measuring the water gaps and island stretches and comparing the two. If there is more land than water, and the water crossings do not total more than 24 nautical miles, the islands should be considered to create multiple mouths.[309] The combined 50 percent and 24-mile rules assure that enclosed waters will be landlocked. Islands that are so far offshore as to seem inappropriate as candidates to form multiple mouths will fail these tests.[310]

Screening islands that lie landward of the mainland headlands create a different problem. (Figure 73) If they are in the vicinity of the mainland-to-mainland closing line they clearly create multiple mouths (assuming that they screen more than 50 percent of the closing). However, it seems unreasonable here to insist that they form multiple mouths to the primary

309. The 24-mile maximum is a separate requirement of the Convention. Article 7(4) provides that "[i]f the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."

310. Prescott has suggested that "it is uncertain how far inside or outside a bay they can be located before this provision does not apply." *The Maritime Political Boundaries of the World*, 56 (1985). Shalowitz opined that "[t]he best solution would be to consider each case on its merits and apply a rule of reason." 1 Shalowitz, at 225. We believe that the combination of the 50 percent and 24-mile principles solves the problem.

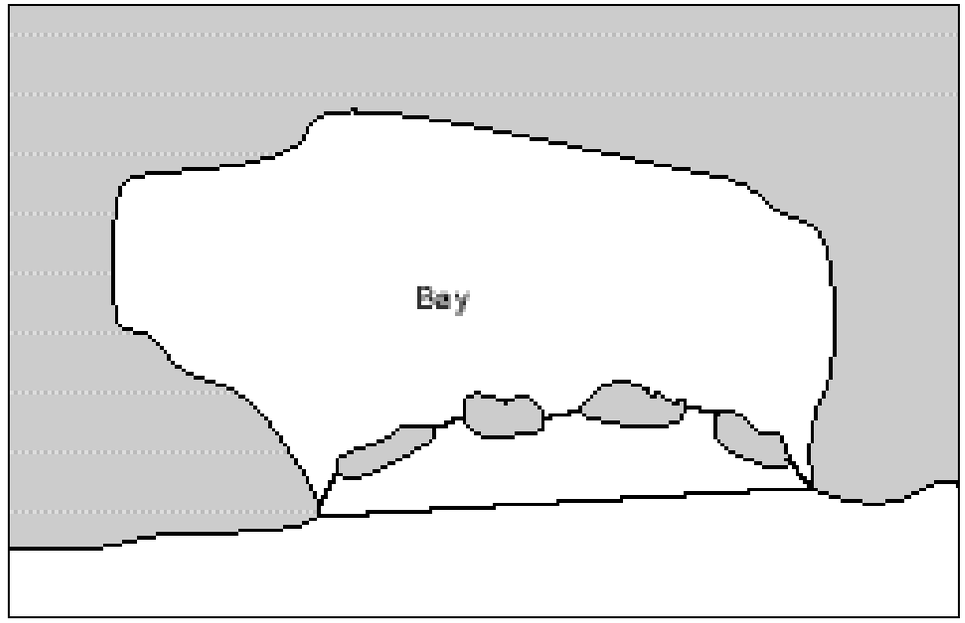

Figure 73. Multiple mouths to a juridical bay. Here multiple mouths are formed by screening islands that are landward of a direct line between mainland headlands.

indentation, no matter how far inland of the initial closing line, just because the 50 percent and 24-mile rules are met. That is so because in this instance the waters of the primary indentation, in the absence of islands, would be landlocked by the mainland headlands.

As the Supreme Court has said, islands that form multiple mouths add to the landlocked nature of the waters shoreward but, likewise, bolster the character of seaward areas as open sea. 394 U.S. at 58. Islands well within an indentation would not seem to separate all waters seaward of the mainland headlands from the open sea. At most they might be considered to form the mouths of subsidiary bays and, as such, have no effect on the coast line.

While there is no readily apparent geographic test for determining how far into the bay an island screen might be if it is not to be treated as forming multiple mouths, it seems reasonable to suggest that at some distance the islands should be ignored and a closing line drawn between the original mainland headlands. The *ad hoc*, "reasonable," approach, so often employed to resolve juridical bay questions, may be the only criterion.

ISLANDS ASSIMILATED TO THE MAINLAND. The third situation in which islands have been said to create multiple mouths to a bay is when they are so closely related to the mainland as to be reasonably treated as

part of it. Here the same principles come into play as are discussed above in the context of headland selection. Land formations completely surrounded by water, yet separated from the mainland by only narrow channels, may be treated as part of the mainland and are available as headlands. They might, of course, affect the location of the closing line. They do not technically, however, create multiple mouths because after they are determined to be assimilated to the mainland, the water area separating them from the mainland is not treated as a mouth, but as land.[311] In sum, whether or not an island is assimilated to the mainland will be determined through application of the criteria set out by the Court in the *Louisiana Boundary Case*, 394 U.S. at 66. If assimilated, it will become a potential mainland headland. In that case a multiple mouth will not be created. If not assimilated, it will affect the closing line if intersected by the mainland-to-mainland closing line or if part of a substantial screen.

Screening Islands and the Mainland Termini

In the classic example, screening islands will produce a series of closing lines beginning from a mainland headland, extending to a headland on the nearest island, running from island to island, and eventually crossing from the last island in the chain to the opposite mainland headland. However, the selection of lines connecting the island chain to the mainland headlands is complicated if the screening islands continue beyond the natural entrance points on the mainland. Dr. Hodgson discussed this situation and concluded that "the bay closing-line would not be continued along the line of the islands unless they form a part of a straight baseline system. The bay-closure line should terminate at the natural headland of the bay." Hodgson, *Islands: Normal and Special Circumstances*, *supra*, at 40. It turned out, however, that the principle is difficult to employ in some instances. For example, when considering the mouth of Buzzards Bay, Massachusetts, the federal Baseline Committee concluded that the Elizabeth Islands screen the bay, forming multiple mouths, but that when they are used it is no longer logical to use the original mainland headlands and new headlands were employed. (Figure 74) The Committee decided as a matter of policy that "screening islands may be used to establish new [mainland] headlands for a bay (i.e., it is not necessary for the closing line to return to the original headlands), provided that a juridical bay is determined to exist in the first instance without considering the presence of the screening

311. The length of that gap, for example, is not included in the length of the closing line for purposes of the 24-mile rule or semicircle test. *United States v. Louisiana*, 394 U.S. at 62 n.83 (1969).

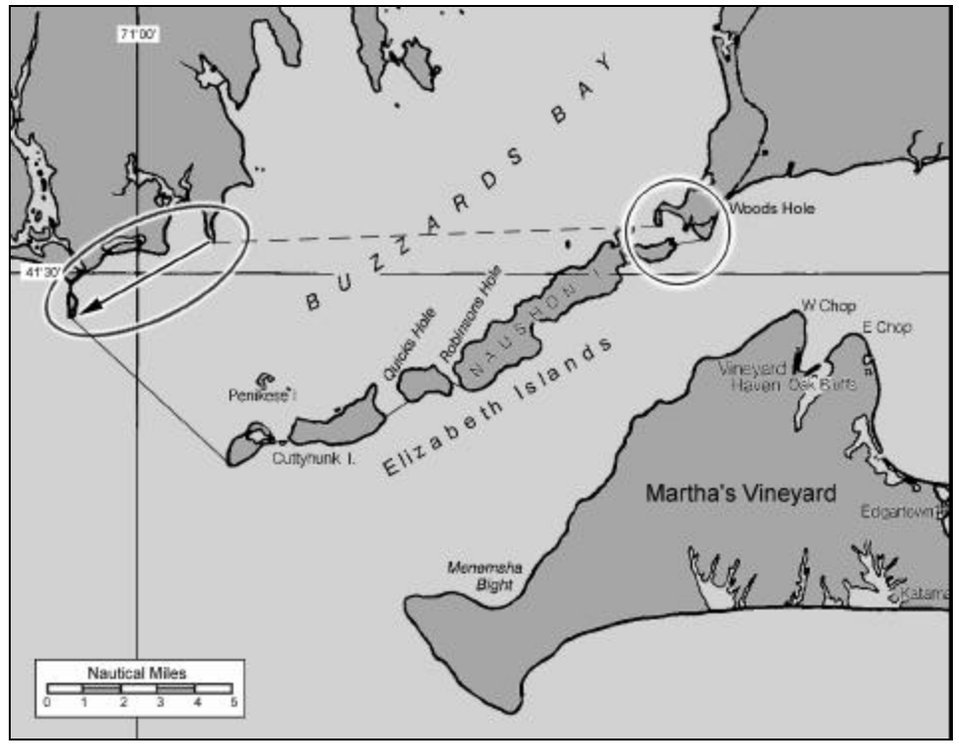

Figure 74. Buzzards Bay, Massachusetts. Screening islands forming multiple mouths to the bay alter both entrance points. (*Based on NOAA Chart 13200*)

islands and provided also the new headlands meet the 45-degree test." Minutes of March 17, 1982. The actual application of these principles will undoubtedly depend on what appears to be reasonable under particular circumstances.

In the case of Buzzards Bay, Massachusetts, screening islands move both mainland headlands seaward. A substantial additional area of inland water is enclosed.

Non-Geographic Criteria

Rhode Island introduced a number of additional arguments in support of its contention that Block Island creates multiple mouths to the Long Island/Block Island Sound complex. These included the facts that: "coastal traffic routinely passes outside of Block Island; commercial vessels rarely go between Montauk Point and Block Island because of the hazardous underwater conditions there; Block Island provides shelter in rough weather; the salinity of the water in Block Island Sound is less than that of

water of the open sea; the island has an effect upon the currents of Block Island Sound; and these factors together link Block Island to the indentation rather than to the open sea." *Rhode Island and New York Boundary Case*, 469 U.S. at 510-511. After reviewing its interpretations of Article 7 from the *Louisiana Boundary Case*, the Court merely concluded that "[n]owhere has it been suggested that because ocean traffic headed into a bay happens to pass landward of an island in open sea in order to enter that bay, the island therefore marks an entrance point to the bay. Nor is such a theory a fair extrapolation of Articles 7(2) and (5) of the Convention." 469 U.S. at 525.[312] The Court declined to hold that Block Island formed multiple mouths to a bay.[313]

In so doing the master and Court focused on the two-dimensional geography of the area. The federal government has always advocated that approach in juridical bay determinations.

Examples of Multiple-Mouth Bays

The *Louisiana Boundary Case* provided a number of claims that islands create multiple mouths to juridical bays. Most common were the state's attempts to use mudlumps off the Mississippi River passes to extend admitted bay closing lines farther seaward. In a few cases the mudlumps were agreed to be so closely connected to the mainland as to be assimilated to it and provide mainland headlands. In some, the mudlumps were intersected by the mainland-to-mainland closing line and were agreed to create multiple mouths. In no case were mudlumps found to screen a large percentage of the opening and, therefore, produce multiple mouths where they were not intersected. See, for example, Report of July 31, 1974, at 38.[314]

The Lake Pelto-Terrebonne Bay-Timbalier Bay complex, on the other hand, is clearly screened by a fringe of barrier islands. Again the parties

312. The Court had explained that "under any reasonable interpretation of the Convention, Block Island is too removed from what would otherwise be the closing line of the bay to affect that line. Block Island is nearly 12 miles from Montauk Point and 7 miles from the nearest land. At no point is it closer than 11 miles from the 14-mile mainland-to-mainland closing line between Montauk Point and Watch Hill Point." 469 U.S. at 524.

313. Special Master Hoffman had recommended that result, finding that "Block Island is located well outside the indentation which begins at the Montauk Point to Watch Hill Point Line. Second, if the closing line included Block Island, there would be waters inside the closing line which are not landlocked. Third, the natural entrance or mouth of the indentation is along the Montauk Point to Watch Hill Point line and Block Island does not form the mouth to the bay or cause the bay to have multiple mouths. Last, Block Island is too far seaward of any mainland-to-mainland closing line to consider altering the closing line to include Block Island." Report of October Term 1983, at 60.

314. Elsewhere the master explained that "[n]or are the additional mudlumps relied upon by Louisiana as causing the closing line to deviate to the seaward sufficient to constitute a screen across the mouth of the bay, as they certainly do not cover a large percentage of the bay's opening, but only a very small portion of it at one terminus. Moreover, they are not located along the natural closing line of the bay, but extend in a seawardly direction from it." Report at 42.

agreed that multiple mouths were created, contending only the location of proper entrance points on the islands. 394 U.S. at 56-61. The Court's final decree describes a baseline composed of segments connecting those islands. 422 U.S. 13 (1975).

The *Rhode Island and New York Boundary Case* had one such issue, which involved Block Island. Rhode Island used a number of theories to justify a holding that it created multiple mouths to Block Island Sound but both the master and Court declined that invitation, finding primarily, that the island is too far removed from the mainland-to-mainland closing lines to qualify.[315]

The Baseline Committee has dealt with multiple mouth bays in a number of locations around our coast. Some are created by intersected islands. These include: Demarcation Bay, Agnun Lagoon, and Peard Bay, Alaska, Minutes of July 27, 1970;[316] Prince William Sound, Alaska, Minutes of August 31, 1970; the Timbalier Bay-Terrebonne Bay complex in Louisiana (which also meets the screening island requirements), Minutes of September 14, 1970; Biscayne Bay, Florida, Minutes of December 2, 1970; and Buzzards Bay, Massachusetts, Minutes of February 3, 1981.

Others are created by islands that screen more than 50 percent of the opening. These include: Pagik Bay, Alaska, Minutes of July 17, 1970; Dease Inlet and Humphrey Bay, Alaska, Minutes of July 27, 1970; Mobile Bay, Alabama, Minutes of August 10, 1970; and Pamlico/Albemarle Sounds, North Carolina (treated as a double-headed bay), Minutes of December 7, 1970.

We can conclude from the foregoing that islands can create multiple mouths to a bay in three circumstances: where they are intersected by a line between mainland headlands, where they screen the entrance to the indentation such that the islands cover more of that distance than the water gaps, and where they are assimilated to the mainland. As a consequence, the inland waters of the bay are delimited by a series of lines rather than a single closing line between mainland headlands. The multiple mouths may be landward or seaward of the mainland-to-mainland line. The semicircle test will be performed using the total of the line segments as the diameter, rather than the mainland-to-mainland line. As a consequence less water area will be required to meet the test. The line segments may not total more than 24 nautical miles.

315. Although the status of Long Island was also at issue it was found to be an island assimilated to the mainland and providing a headland without which there would have been no juridical bay, not an island forming multiple mouths to an already existing bay. 469 U.S. at 520.

316. More recent charts may indicate that the island found to be intersected at that time has migrated seaward and may no longer be intersected or create multiple mouths.

Overlarge Bays

The foregoing principles enable us to determine whether or not a bay exists but provide no limitation as to maximum size. Articles 7(4) and (5) address that point. They state that "[i]f the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters." 7(4)[317] And, "[w]here the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." 7(5). In sum, even though an indentation meets all of the requirements previously described, not all of its waters are "inland" if the mouth is wider than 24 miles. There are numerous "overlarge" bays around the world and a few have been recognized in the United States (e.g., Ascension Bay, Louisiana; Cook Inlet, Alaska; Kotzebue Sound, Alaska; and Norton Bay, Alaska). Questions have arisen in determining how the limits of inland waters are to be identified in such circumstances.

First, it is clear that the primary indentation must qualify as a bay under all of Article 7's criteria save only the provision for a maximum 24-mile closing line. Both parties in the *Louisiana Boundary Case* accepted that starting point when contesting the status of "Ascension Bay."[318] The United States argued that Ascension Bay is not a bay because its headlands do not create landlocked waters.[319] Special Master Armstrong disagreed. Applying the traditional criteria of Article 7, he concluded that "certainly its waters are landlocked, or, as sometimes described, *Inter Fauces Terrae*, within well marked natural entrance points. This is supported by the ratio of its depth of penetration to the width of its mouth, for it is almost perfectly semicircular in shape, the classic form of a bay. In this respect, it bears a startling resemblance to Monterey Bay, which was held to be a true bay in the California case." Report at 45.[320] The master determined that Ascension

317. Although Article 7(4) refers to "these two" low-water marks, it is clear that if, because of islands, the indentation has more than one mouth, the various mouths will be measured and totaled to determine whether the 24-mile maximum has been exceeded.

318. Ascension Bay is the name given by Louisiana to the water area that lies north and west of the southwestern tip of the Mississippi River delta. See Figure 11. We use quotation marks because the name "Ascension Bay" does not appear on most charts or maps of the area. That fact does not, of course, weigh against its potential qualification as a bay. Numerous other areas are denominated "bays" which do not meet the criteria of Article (7) and are not, therefore, juridical bays despite their names. Only geographic factors are relevant to this determination.

319. The federal government took the position that the larger an indentation, the more "pinched" the headlands should be to create landlocked waters. Neither the master nor the Supreme Court adopted that interpretation.

320. Louisiana also offered a number of international examples, including Hawke Bay, Australia.

Bay is an overlarge bay. The United States did not take exception to his recommendation and the final decree in that case includes a 24-mile fallback line within Ascension Bay. 422 U.S. 13 (1975).[321] (Figure 75)

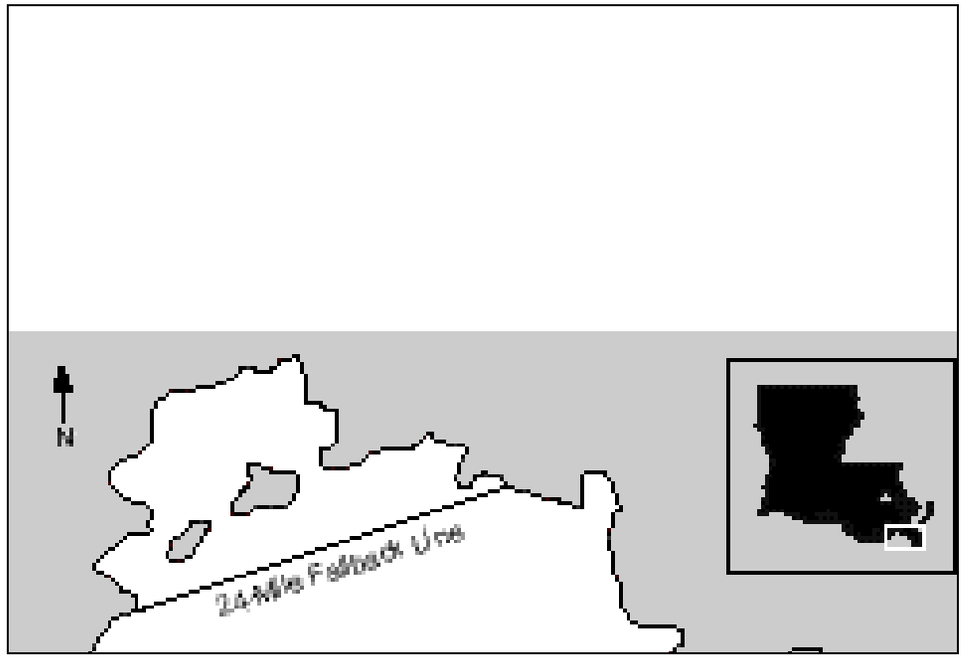

Figure 75. Ascension Bay, Louisiana. Note the dashed line across the bay's overlarge entrance and the solid, 24-mile fallback line.

The Semicircle Test

It is understood that an overlarge bay must meet the semicircle test, as well as the other criteria of Article 7. 1 O'Connell, *The International Law of the Sea*, 409 (1982). However, as with all bays there may be disagreement as to which subsidiary waterways may properly be included for purposes of the semicircle test. The Supreme Court faced this question in the *Louisiana Boundary Case* and the answer seems to depend on whether the two water bodies in question can reasonably be considered one. 394 U.S. at 48-53. The United States sought to exclude Caminada-Barataria Bay in calculating the area of Ascension Bay for semicircle purposes. The Court ruled for the state. It noted that Caminada-Barataria are separated from Ascension Bay only by a chain of islands, that islands are to be ignored for purposes of the semicircle test, and, therefore, these inner bays should be included in testing Ascension Bay's qualifications. *Id.* at 53.

321. The Baseline Committee approved the alteration of its charts to reflect this determination. Minutes of September 18, 1975.

Determining the Maximum Area of Water

Once an overlarge bay is identified it remains to determine where within that bay a 24-mile fallback line is to be drawn that encloses the maximum area of water as dictated by Article 7(5). Whether or not the water of subsidiary bays is calculated toward this maximum may have a significant effect on the location of that line. If their area is considered as part of the "maximum" water area being enclosed by the 24-mile line, other areas may be left as territorial or high seas that might have been enclosed by a different fallback line. Louisiana took the position that it could first draw closing lines across all interior water bodies that qualify separately as juridical bays, then construct a 24-mile fallback line that encloses a maximum of the water area not already determined to be inland. The United States argued that subsidiary water bodies whose area had been used to qualify the overlarge bay under the semicircle test should not be disregarded in measuring the parts of the bay to be enclosed by the 24-mile line. That is, the area used for semicircle purposes should be identified, a 24-mile line drawn that encloses the maximum portion of it, and other areas used for semicircle measurement should not be considered inland. 394 U.S. at 49 n.64.

The Court rejected the federal position. It held that any feature that separately meets Article 7's criteria will not be denied inland water status just because it was treated as part of the overlarge bay for semicircle test purposes but happens not to fall within the area closed by the 24-mile fallback line. *Id.* It is less clear, but seems to follow, that the line of maximum enclosure can be determined without reference to waters already qualifying as inland.

Enclosing the maximum water area (apparently not including waters already inland) is the only criterion for locating the 24-mile fallback line. The area that it encloses need not meet any of the criteria for being landlocked. The line need not run between natural headlands. Prescott, *The Maritime Political Boundaries of the World* 60 (1985). Nor must the enclosed area meet the semicircle test.

Left unanswered is the question – must the termini of the 24-mile line fall on land or might it be drawn to the closing line of a subsidiary bay? It is easy enough to imagine the situation in which the maximum water area (not already encompassed by subsidiary bays) is enclosed by a line that terminates on a bay closing line. (Figure 76) It is unclear whether such a line is authorized by Article 7(5).

Examples of Overlarge Bays

Ascension Bay is not the only overlarge bay that has been the subject of litigation. Cook Inlet, Alaska, is unquestionably an overlarge bay. The state contended that it is also a historic bay, and therefore inland despite the

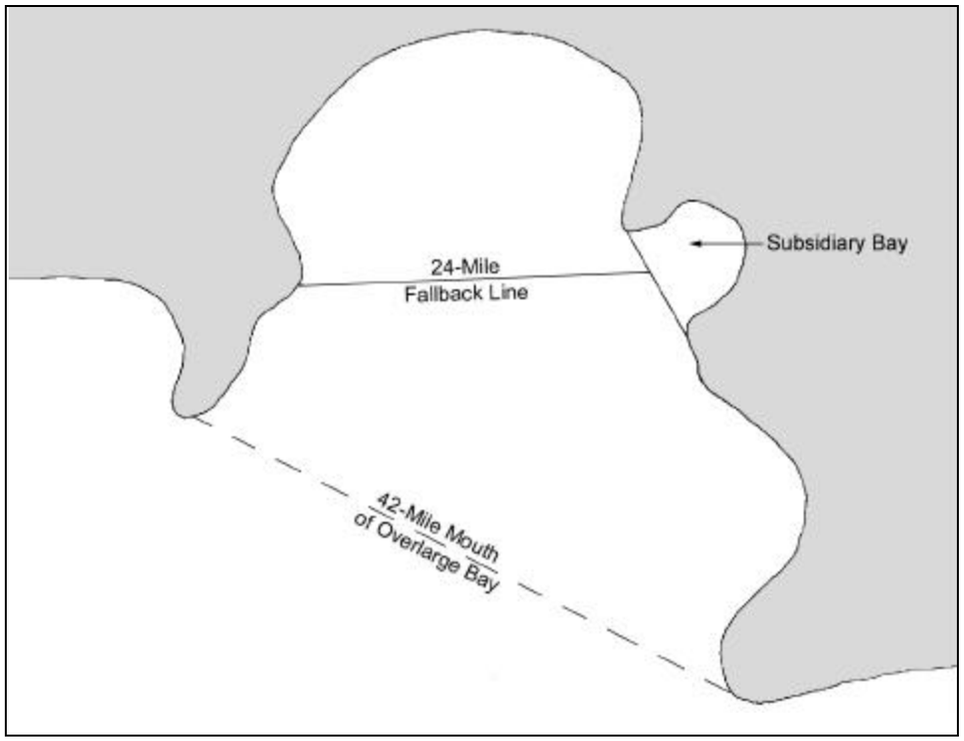

Figure 76. An overlarge bay with 24-mile fallback line terminating on the closing line of a subsidiary bay.

geographic limitations of Article 7.[322] Although Alaska was successful in the United States District Court, *United States v. Alaska*, 352 F.Supp. 815 (D.Ak. 1972), and the Ninth Circuit Court of Appeals, 497 F.2d 1155 (9th Cir. 1974), the Supreme Court rejected its claim. 422 U.S. 185 (1975). Thus, a 24-mile fallback line had to be constructed within Cook Inlet. The result is a pair of lines running from the mainland on either side of the Inlet to Kalgin Island, which lies within it. Together the lines total 24 miles and enclose the maximum water area at the head of Cook Inlet.[323] (Figure 77)

The Baseline Committee has considered a number of other overlarge bays that have not been litigated. Kotzebue Sound, Alaska, was determined to be an overlarge bay and a 24-mile fallback line first was constructed from Espenberg Light to the low tide flats considered to be part of the mainland in front of Kotzebue Light. Minutes of September 14, 1970. When those flats dropped below mean low water the 24-mile line was moved to the

322. Article 7(6) provides that "[t]he foregoing provisions shall not apply to so-called 'historic' bays . . . ."

323. Although the Convention refers to "a straight baseline of twenty-four miles" the United States took the position that a combination of lines not exceeding that length could be used. See also, Beazley, *supra*, at 22-23.

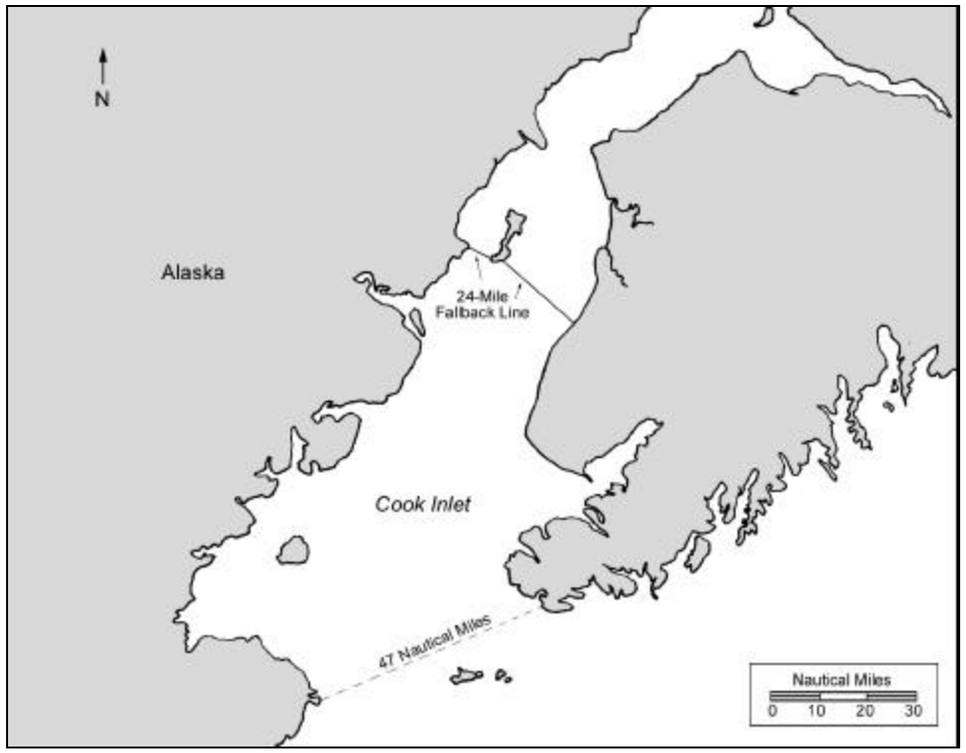

Figure 77. Cook Inlet, Alaska. Note the dashed line joining natural entrance points to this overlarge bay and the 24-mile fallback line at Kalgin Island.

southwest corner of the Sound. Norton Bay, Alaska, was considered an overlarge bay and a fallback line drawn within it. *Id.*

It seems established that any indentation that meets the criteria of Article 7(2) and the semicircle test is a "bay" for purposes of the Convention. Bays whose natural entrance points are more than 24 miles apart may not be closed at those entrance points but will be permitted a closing line of 24 miles, which encloses a maximum area of water. For purposes of determining whether the original feature meets the semicircle tests, the area of subsidiary bays may be included under certain circumstances. Nevertheless, subsidiary juridical bays that are not thereafter enclosed by the 24-mile fallback line retain their inland water status.

RIVERS

From time immemorial river waters have been understood to be inland waters. The Convention on the Territorial Sea and the Contiguous Zone provides that "[i]f a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide

line of its banks." Article 13.[324] Controversies have arisen only in determining the location of that "mouth" and identifying the points on the banks that serve as termini of the closing line.[325]

Definitions

Resolving these controversies begins with the definition of "river." There have been many. Commonly accepted elements include: fresh water, naturally flowing from a region of higher elevation to a region of lower elevation, which is contained between parallel or nearly parallel banks. Testimony of Dr. Robert Hodgson before the special master in *Texas v. Louisiana*, Number 36 Original, Transcript at 522-529.[326] With these elements in mind we turn to the process of locating a particular river mouth.

The Convention's Criteria

The Convention on the Territorial Sea and the Contiguous Zone provides help in locating a river's mouth.

Directly into the Sea

The first consideration is that Article 13 applies only to rivers that flow "directly into the sea." In the simplest case the parallel banks of the river form right angles with the shore of the open sea and a direct line between those angles defines the river "mouth." If there is any question as to the precise entrance points on the banks, they can be determined through the various methods used to define the mouths to juridical bays. But seldom do rivers, particularly large ones, retain their riverine character all the way to the sea. More commonly, their banks begin to diverge as they approach the sea, often forming an estuary that has none of the appearance of a typical river.

Estuaries are not to be treated as part of the river for purposes of Article 13. That was made clear in early drafts of the Article, which included a second provision that read "[i]f the river flows into an estuary the coasts of

324. Article 9 of the 1982 Law of the Sea Convention is identical, save for its use of the term "low-water" rather than "low-tide" line.

325. Unlike bays, river mouths are rarely so wide that they have any significant effect on the seaward limit of the territorial sea. Nevertheless, we must be able to determine the limit of their inland waters for other reasons. For example, environmental statutes may impose different conditions for inland waters than for the territorial sea, making it important to determine whether an outfall pipe, for instance, discharges into a "river" or the territorial sea beyond.

326. For additional definitions and discussions of the evolution of the treatment of rivers in international law see: 4 Whiteman, *Digest of International Law* 336 *et seq.* (1965); 2 Shalowitz, 371 *et seq.* (and glossary) (1964); 1 Fauchille, Part 2, *Traite de Droit International Public* 401 (1925); and Report of the Special Master in *Georgia v. South Carolina*, Number 74 Original of October Term, 1985, at 110.

which belong to a single State, article 7 [bays] shall apply."[327] That language was deleted from the final draft, not because the representatives intended to alter that position, but because of difficulties in defining "estuary." Churchill and Lowe, *supra*, at 34.[328] The single requirement that Article 13 applies only to rivers flowing "directly into the sea" achieves the same result.

Subsequent expert comment and practice confirm that interpretation. G. Etzel Pearcy, then geographer of the Department of State, wrote in 1959 that "an article concerning estuaries was approved by Committee action at the Law of the Sea Conference, but failed to gain the necessary majority in the final Convention. Thus, estuaries must legally qualify as bays." Pearcy, *supra*, at 8. The United Kingdom's official comment on the proposed Article 13 had already made clear that country's position that "'mouth of a river' means the river proper and not an estuary or bay into which it may flow." Report of the International Law Commission, Seventh Session, 1955, A/2934, p. 44. Commander Beazley later opined that the English and French texts taken together make clear that "other provision is to be made for rivers that flow into a bay or form an estuary." Beazley, *supra*, at 14, and "since a river mouth is an 'indentation' of the coast [it] can therefore conveniently be handled under the clearly artificial concept of a juridical bay." *Id.* at 26.

O'Connell likewise recognizes that "Article 13 of the Geneva Convention covers only the case where a river maintains its stream shape, that is, flows directly into the sea," O'Connell, *supra*, at 225, but he does not specifically identify the Article 7 rules for treating estuaries. Rather, he simply concludes that "other cases are left unresolved . . .," *id.*, and that "a criterion may be necessary to establish the baseline of the territorial sea." *Id.* at 221.

American practice has been to apply the bay principles to estuaries. The Supreme Court has decreed, for example, that a river estuary is treated in the same way as a bay. *United States v. California*, 382 U.S. 448, 451 (1965).[329]

327. Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, U.N. Gen. Ass. Off. Rec. 11th Sess., Supp. No. 9 (A/3159), p. 18; II Yearbook of the International Law Commission 1956, pp. 253, 271-272. Discussed at 4 Whiteman, *supra*, 339 *et seq.*

328. Interestingly, the French text of the Convention retained the expression *sans former estuaire*. O'Connell refers to its inclusion as an "accident," which "suggested an interpretation which would re-establish the equation of bays and estuaries." 1 O'Connell, *supra*, at 225.

329. The issue came up again in *United States v. Louisiana* where, on first blush, it might appear that the Mississippi River delta is an estuary. But, as the special master pointed out, it is not a true estuary because the major mouths of the Mississippi do not empty into it, but flow directly to the open Gulf of Mexico. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 27 and 394 U.S. 11, 74 n.99. Nevertheless, the construction of a baseline along that delta is consistent with the federal interpretation of Article 13. When the provisions of Article 7 were applied to waters between the major distributaries of the Mississippi River, such as East Bay, a question arose as to the proper application of the semicircle test. In an effort to maximize water area, Louisiana urged that minor river channels emptying into the bays should be included. It was eventually determined that those areas of "riverine" character should not be included as part of the bay-like indentations into which they emptied. Just as a river does not include the more open waters of a bay into which it flows, that bay does not include waters of the river.

The position has also been taken internationally. In 1961 Uruguay and Argentina agreed upon a line that purported to be the mouth of their common boundary, the Rio de la Plata. The banks of the Rio de la Plata, like many great rivers, diverge as they approach the sea, creating an estuary of substantial width. Nevertheless, the parties cited Article 13 as authority for their closing line. The United States protested the action, stating that the Article "relates only to rivers which flow directly into the sea which is not the situation of the River Plate which flows into an estuary or bay." Quoted and discussed at 4 Whiteman, *supra*, at 343.[330] Thus it is well settled in American practice that a river's "mouth" is located where its parallel banks diverge to the point that the water body can no longer be described as "riverine." It is then either a bay, estuary, or the open sea. In the first two instances it will be nevertheless inland if the criteria of Article 7 are met.[331]

The rule alone does not, of course, solve all of the practical problems. As delegates to the first Law of the Sea Conference recognized, it is not easy to determine where an estuary, bay, or the open sea begins. That question must be left to case-by-case determination with the guidance of political geographers.

We should note that a finding that the river has ended before it reaches the open sea may have significant consequences for the limits of offshore jurisdiction. Article 7 may not permit an inland water closing line in the circumstances, or its line may be shoreward of the entrance to the open sea. First, by its terms, Article 7 applies only to bays of a single state, not boundary bays. Article 7(1). Article 13 appears to have no such limitation. Thus, if for example the Rio de la Plata had parallel banks all the way to the sea it might be closed by a line with termini in Uruguay and Argentina.[332] Its estuary cannot be so closed, as noted in the United States' diplomatic protest, because Article 7 does not apply to boundary bays. 4 Whiteman, *supra*, at 343. Next, even a non-boundary estuary would have to constitute a well-marked indentation into the coast and enclose enough water area to meet the semicircle test.[333] Although commentators have often assumed that an estuary would qualify, the conclusion is hardly a given. Finally, Article 13 has no limit on the width of a river mouth. By contrast, if the

330. The United Kingdom and the Netherlands made similar protests. *Id*.

331. Such waters will also be inland if the area is enclosed by Article 4 straight baselines, is a port, or is historic inland water.

332. The United States took the contrary position in protesting the Rio de la Plata closing line, stating that "it is the view of the United States Government that the provisions of Article 13 relate only to rivers which flow directly into the sea from the territory of a single State and not to rivers whose coasts belong to two or more different States." 4 Whiteman, *supra*, at 343.

333. Ironically, although a party seeking to maximize offshore jurisdiction will benefit from establishing that a river continues until it meets the open sea, if it in fact empties into a bay or estuary it may be to his advantage to urge the most inland possible reach of the bay to increase its potential for meeting the semicircle test.

mouth of an Article 7 bay is more than 24 miles across, inland waters are limited to a fallback line of 24 miles within the bay. Article 7(5).[334]

A Straight Line

Article 13's second requirement is that the baseline at a river mouth shall be a "straight line." That characteristic would seem to go without saying, since all inland water closing lines, or line segments, are straight lines.[335] In rare circumstances a straight line between points on the banks of a river might intersect an island lying in the mouth. In that situation the rules for constructing multiple mouths might be applied, resulting in two line segments. Rarely, if ever, would maritime boundaries be significantly affected.

In unusual circumstances, parties have urged that a river mouth should be described as an area (such as a circle or rectangle) rather than a straight line. Report of the Special Master in *Georgia v. South Carolina*, October Term, 1975, at 110. Such a designation might include areas that have a particular relationship with the river, such as a bar or continued flow of fresh water, but would be difficult to apply for boundary delimitation purposes. In any case, the straight line requirement would seem to preclude their consideration.

The term "straight line" seems to have replaced the requirement, in early drafts of the Article, that closing lines across river mouths "follow the general direction of the coast." In 1930, the Hague Conference for the Progressive Codification of International Law considered maritime boundary questions and its subcommittee drafted a provision providing that "the waters of the river constitute inland water up to a line following the general direction of the coast drawn across the mouth . . . ." Report of the Second Commission (Territorial Sea), Appendix B, League of Nations Doc. C.230.M.117.1930.V., p. 14. The Department of State described this as the United States' position in 1951, 4 Whiteman, *supra*, at 337, and it was employed (without controversy) in *United States v. California*. Reports of the Special Master of May 22, 1951 at 6 and 8 and October 14, 1952 at 4. See also: 2 Shalowitz, *supra*, at 371.

That definition was a starting point for discussions that led to the 1958 Convention; however, it became clear that it is impractical to attempt to define the general direction of any coast. Any determination depends, to a

334. This point was also made in the United States' protest to Uruguay and Argentina, whose line exceeded 24 nautical miles.

335. The special master in *United States v. California* even justified his choice of a segment of the closing line across San Pedro harbor in part on the ground that it more nearly continued a "straight line" when considered with other segments of the closing. However, nothing in the Convention's history suggests that the various closing lines at multiple mouths of a water body need remain on a constant bearing. To the contrary, the Supreme Court has considered such lines and determined that their termini are located at "natural entrance points"on the land forms that create the multiple mouths. *United States v. Louisiana*, 394 U.S. 11 (1969). It gave no indication that separate segments must form a "straight line."

large extent, on arbitrary decisions as to the scale of chart to be used and the length of coastline on either side of the river mouth. As a consequence, the requirement was dropped. 4 Whiteman, *supra*, at 339-340.[336]

We can assume that if the question comes up again in U.S. litigation, the Convention's definition will be adopted and "general direction of the coast" will be given no weight in river mouth delimitation.

On the Low-Tide Line of its Banks

Finally, Article 13 provides that the river closing shall join two points "on the low-tide line of its banks." Two questions have arisen. The first is the definition of "banks" and the second, how specific end points are to be selected.

WHAT ARE BANKS? Surprisingly, two tidelands cases have dealt with the definition of river banks.

Artificial Structures. Artificial structures may actually extend the natural "mouth" of a river well into the larger body of water into which it flows. The matter was put before the Supreme Court in *Texas v. Louisiana*, Number 36 Original (in which the federal government intervened). It is not unusual to have parallel jetties extending out to sea from the original banks of a river. Without such jetties the flow of river water would dissipate and slow as it entered the sea, bay, or gulf and deposit its silt in the shallow nearshore waters, hindering navigation. Jetties permit the river flow to continue at a greater pace until it reaches deeper water, where the deposits have less effect. The Sabine River, which forms the boundary between Texas and Louisiana, has jetties at its mouth that extend some 3 miles into the Gulf of Mexico. (Figure 78)

Texas contended that the mouth of the Sabine River is a line drawn where its "natural" banks meet the Gulf. It would have ignored the jetties for purposes of locating the river mouth. Louisiana (supported by the United States) took the contrary position. It argued that the jetties extended the river mouth to their seawardmost location, reasoning that the parallel jetties merely continued the original riverine character and, in fact, carried the same river waters.[337]

336. It is interesting to note that although the "general direction" requirement was dropped from Article 13 in the 1958 Convention, it reappears in Article 4, which provides that straight baselines "must not depart to any appreciable extent from the general direction of the coast . . . ." Article 4(2).

337. In fact, this part of the controversy was really about the location of an offshore extension of the states' river boundary. Substantial petroleum resources were known to exist near the mouth of the Sabine. However, the states' river boundary had never been extended to the limits of their offshore boundaries. A number of theories may be employed for constructing lateral boundaries. However, most logical options would favor Texas if initiated at the natural coastline and Louisiana if begun at the seaward end of the jetties. Because Texas was granted a 3-league (9-nautical mile) Submerged Lands Act boundary, and Louisiana only 3 nautical miles, the remaining area of federal jurisdiction would be maximized with the Louisiana position, hence the federal intervention on that state's side. (Although, it should be noted, the United States developed its theories and evidence separate from Louisiana and did not adopt most of the state's theories.)

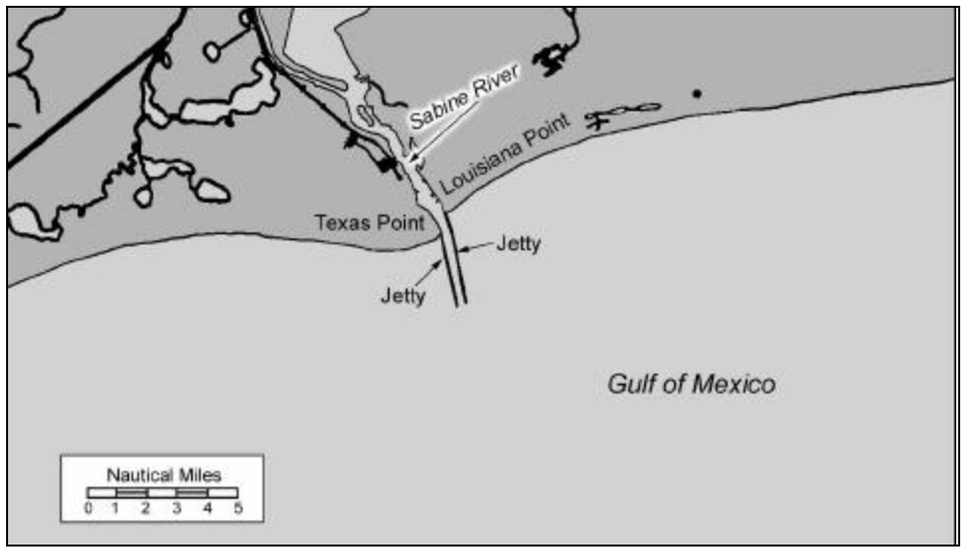

Figure 78. Sabine River. Jetties form the mouth of the Sabine River at the Texas/Louisiana border. *(Based on NOAA Chart 11340*)

Texas presented expert testimony focusing on the waters outside the jetties. Its witness concluded that the mouth of the river should be drawn at the natural shore, ignoring the jetties. He explained (with some degree of common sense) that "I have difficulty picturing river banks with water on both sides." Transcript at 965. The Louisiana and federal witnesses focused on the area inside the jetties, noting that it met the traditional definition of a river and, indeed, the jetties had been constructed at great expense for the purpose of extending the river. The special master explained that "there is evidence and testimony from which it could be found that the jetties extend the river and that the mouth of the river is now actually at the gulfward terminus of the jetties . . . . The geographic middle of the river is therefore the middle of the jetties." Report of October Term, 1974, at 15. He went on to conclude that "the baseline should include the jetties of Texas and Louisiana. Any construction of Article 13 which requires the baseline to include a closing line at the head [landward end] of the jetties, rather than at the terminus, is rejected." *Id.* at 48. Exceptions were taken by the states, but the Supreme Court adopted its master's recommendations. *Texas v. Louisiana*, 406 U.S. 465 (1976).

Rivers have also been closed at the seaward limit of jetties on the coasts of California and Florida, although by stipulation not litigation.

Submerged Features. Submerged features have also been proposed as river "banks" between which a closing line could be drawn. The location of the mouth of the Savannah River was at issue in *Georgia v. South Carolina*, Number 74 Original. The river's southern headlands was agreed to extend to the limits of Tybee Island. However, there is no obvious mainland headland on the north. A number of options were proposed. The master concluded, and the Court later agreed, that the northern headland is a submerged shoal which runs parallel with Tybee Island. Report of October Term 1974, at 111.[338]

The Supreme Court agreed. After acknowledging that the situation is unusual because "the most seaward point of land on the southern side of the river, has no counterpart of high land on the northern side," *Georgia v. South Carolina*, 497 U.S. 376, 399 (1990), the Court explained that "[t]he geographic feature taking the place of the customarily present opposing headlands is, instead, a shoal, long recognized as confining the river." *Id*. And that "[g]iven this somewhat uncommon type of river mouth, the Special Master's conclusion that the northern side of the Savannah's mouth is the underwater shoal is not unreasonable." *Id.* at 400.

But the Savannah River example probably provides no precedent for interpreting the Convention or Submerged Lands Act. The mouth of the Savannah River was being located for purposes of interpreting a boundary treaty, not the Convention on the Territorial Sea. The Convention's reference to "points on the low-tide line of its banks" makes clear that, under its provisions, features without a low-water line will not qualify as riverbanks. Had the master and Court been applying Convention principles, a different result would probably have been reached.

LOCATING ENTRANCE POINTS. Finally comes the question of how exact termini of a closing line are to be identified. Once the area of the river mouth is located, usually by establishing where its banks are no longer roughly parallel, a precise line must be drawn. The end points of that line will be selected through the same processes as are employed for determining the entrance points to a juridical bay. The 45-degree test will probably be the starting point. See: Hodgson, *Toward A More Objective Analysis*, *supra*, at 12. See also: 1 Shalowitz, *supra*, at 63-65.

338. In like manner Louisiana had contended that dredged channels should qualify as harborworks and be treated as base points from which the territorial sea is measured. It was unsuccessful. *United States v. Louisiana*, 394 U.S. 11, 36-40 (1969).

Boundary Rivers and Length of Closing Lines

Some question may remain as to application of Article 13 to boundary rivers and the maximum length of a river closing line, if any. Unlike Article 7, Article 13 makes no distinction between rivers that flow to the sea through the territory of a single state and those that form the boundary between two states. Nevertheless, in its protest to Uruguay and Argentina the United States took the position that Article 13 does not apply to boundary rivers. Churchill and Lowe state that "in the absence of any qualification to the contrary, [Article 13] would appear to apply both to rivers with a single riparian State as well as to rivers with two riparian States . . . ." Churchill and Lowe, *supra*, at 33. They then acknowledge the apparent contrary position of the United States. *Id.*, citing 4 Whiteman, *supra*, at 343.

Unfortunately the American position is not explained. Nor is it clear what its consequence would be. The United States has boundary rivers with both Canada and Mexico. These rivers are certainly considered to be inland waters. Surely they have "mouths." If the limits of inland waters at these mouths are not delimited with the principles of Article 13, we know of no other principles for their delimitation. Consequently, whether Article 13 applies to boundary rivers or not it seems that it would be adopted for their purposes, without foreseeable prejudice to the international community.

Neither does Article 13 place any limit on the length of a proper closing line. Although early positions suggest limits similar to those imposed on bay closing lines, 4 Whiteman, *supra*, 337, 340, and 341, commentators agree that the final provision contains no such constraint. Hodgson, *Toward A More Objective Analysis*, *supra*, at 3; Churchill and Lowe, *supra*, at 33; and Prescott, *The Maritime Political Boundaries of the World* 51 (1985). It would appear that a river closing line, which meets the other criteria of Article 13, can be any length.

In sum, rivers are inland waters. A river is a flowing water course that is contained by roughly parallel banks. The mouth of a river is located where it enters another body of water, that is, where its riverine character ends. Where that occurs at the open sea, the "mouth" may form part of the baseline from which the territorial sea is measured. It appears that river mouths are not limited by Article 7's 24-mile maximum closing line for bays or its admonition that the water body may not lie on a national boundary. On the other hand, if a river flows first into a bay or estuary, the rules of Article 7 will determine whether that body is inland water and, if so, where its closing line is located.

HARBORS AND PORTS

Like bays and rivers, harbors and ports are included within the internal waters of the coastal state. As a consequence, lines across their entrances form part of the baseline from which more seaward maritime zones are measured. Article 8 contains the Convention's relevant provision. It states that "for purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." Although the Article itself makes no mention of inland waters, its legislative history is clear, waters enclosed by such "harbour works" are inland.[339] The United States acknowledged the inland waters status of harbors in the *United States v. California*. As Shalowitz explained "[i]t was the Government's position that the line separating the inland waters of a harbor from the marginal sea 'must be drawn at the point which will include that portion of the water which is enclosed in a bay or inlet and used by vessels as a place to anchor or dock to load or unload passengers or freight.'"[340] Commentators agree.[341]

As with bays, it is one thing to agree that ports comprise inland waters. It is quite another to determine where, exactly, the limits of those inland waters extend. The question was put before a special master in the *California* case. It arose in the context of the Port of San Pedro.

In its natural state the water area of San Pedro is barely an indentation in the coastline, providing little protection from the open sea.[342] To provide the protection necessary for a major port, the Long Beach breakwater was constructed. The breakwater is a substantial structure, roughly paralleling the natural coastline and providing protection for the waters within. The breakwater itself had been accepted as a "harborwork" and the waters of the port as "inland" in *United States v. California*, 382 U.S. 448, 451 (1966) but

339. As was the case with so much of the 1958 Convention, Article 8 evolved from a similar provision considered by the 1930 Hague Conference for the Codification of International Law. The Committee Report on the 1930 language observed that "the waters of the port as far as a line drawn between the outermost works thus constitute the inland waters of the Coastal State." Report of the Second Committee, Conference for the Codification of International Law, The Hague, 1930, League of Nations Doc. C.230.M.117.1930.V., p. 12. This understanding continued through the Article's final adoption in 1958 in Geneva.

340. 1 Shalowitz, *supra*, at 61; quoting Brief for the United States before the Special Master at 101 (May 1952) *United States v. California*, Number 6 Original, October Term, 1951.

341. See, for example, Prescott, *The Maritime Political Boundaries of the World* 61 (1985).

342. This is typical of much of the California coast, a fact relied upon by California when it argued, unsuccessfully, that its numerous coastal piers should be treated as harborworks because they serve as the "ports" on its otherwise mostly straight coastline.

no decision had been made on the limit of its inland waters from the eastern terminus of the breakwater back to the mainland.[343] And the parties could not agree. California opted for the Anaheim Bay East Jetty as its mainland headland. The United States selected the Alamitas Bay Jetty.[344] (Figure 79) The question for the master was which of these jetties is the "outermost permanent harborwork" of the Port of San Pedro.[345]

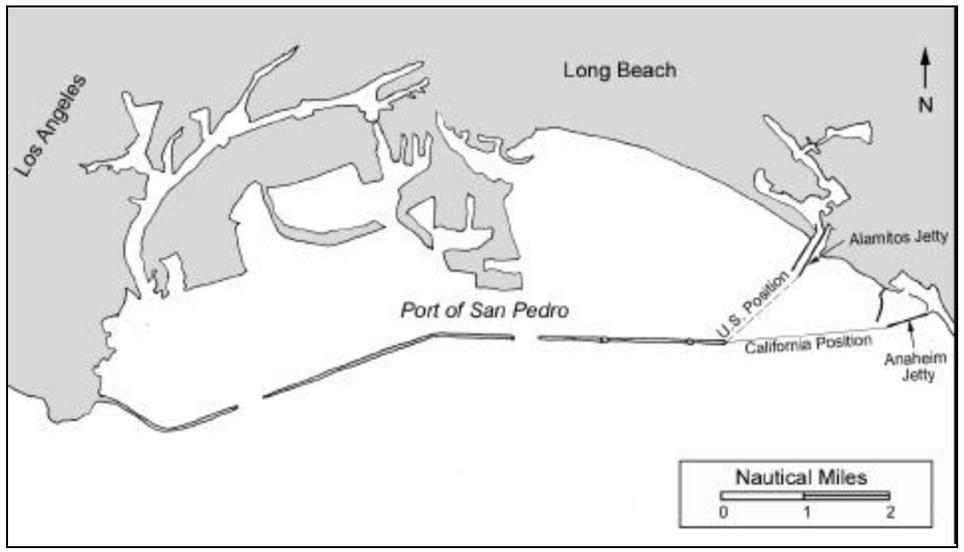

Figure 79. Port of San Pedro, California. The port is formed by artificial harborworks.

The United States emphasized geography in its position. Arguing that the port's mouth should be located through the methods employed for the construction of bay closing lines, the federal government began with the eastern end of the breakwater as one headland then turned to the mainland in search of a logical "opposite" headland there.[346] It concluded that of the

343. "The inland waters of the Port of San Pedro are those enclosed by the breakwater and by straight lines across openings in the breakwater; but the limits of the port, east of the eastern end of the breakwater, are not determined by this decree." *United States v. California, supra*, 382 U.S. at 451.

344. Report of the Special Master in *United States v. California*, Number 5 Original, August 20, 1979, at 7.

345. The limits of similar inland water lines were agreed upon at Humboldt Bay, Port Hueneme, Santa Anna River and Agua Hedionda Lagoon. *United States v. California*, 432 U.S. 40 (1977).

346. Commander Beazley provided authority for that position, noting that "where an artificial sheltered harbour, such as Dover, has been built on the coast the question of determining the baselines across the entrance will seldom create difficulties, although in theory the bay rules could be applied." Beazley, *supra,* at 24.

tests discussed above for bay closing lines the shortest distance method was most applicable.[347]

California took a different approach. It denied any relevance of the bay closing rules, emphasizing function rather than geography in its quest. The state argued that all of the waters shoreward of its proposed line served as the Port of San Pedro. The special master adopted the state's theory. He looked to the use of those waters, concluded that they were are all part of the "integrated" Port of San Pedro, and adopted California's proposed closing line. Report of the Special Master, *id*. at 8-13.[348] The United States did not take exception to the master's recommendation, and that inland water line was incorporated in a subsequent Supreme Court decree.[349]

Although the minor differences between the federal and state positions result in little difference in either the limits of inland waters or more seaward maritime boundaries, the Court's adoption of the state's legal theory is significant. The mouths of other inland waters, specifically bays and rivers, are located through the application of (hopefully) objective legal principles to particular geographic areas. The idea being that any mariner who is aware of those principles, and has an accurate chart of the coastline, can determine when he leaves one zone of maritime jurisdiction and enters another. The limits of inland waters in ports, at least in American practice, are to be delimited by analyzing "function," not geography, a chore for which the typical navigator will not possess the necessary information.[350]

That is not to say that the master and Court were wrong.[351] Ports have traditionally been defined as areas in which particular activities take place.[352] Article 7 gives specific objective guidance to establish the mouths of bays. Article 8 contains no similar criteria for ports. Determining the

347. The parties agreed that the usually preferable "bisector of the angle test" and "45-degree test" were not applicable here. Report of the Special Master, *id*. at 8 n.8.

348. The master determined that 'San Pedro Bay is not one isolated harbor or bay which happens to contain facilities for loading and offloading ships. Rather, the Bay contains the entire Los Angeles area port system . . . (Report at 8) and "Anaheim Bay is itself part of the harbor system. In order to include the Bay with the inland waters the closing line must be drawn to the East Jetty (*id*. at 12-13). "Accordingly, I find that the entrance to the Port of San Pedro is the gap between the Long Beach Breakwater and the Anaheim Bay East Jetty, and that the East Jetty constitutes the outermost permanent harbor work with the meaning of paragraph 4 of the 1966 decree, 382 U.S. at 450-51." *Id.*

349. *United States v. California*, 449 U.S. 408 (1981).

350. The difficulty is not limited to cases, such as San Pedro, in which harborworks form both entrance points to the port. The absence of such works necessitating the selection of termini on the natural mainland, would, presumably, create an even more difficult problem for the mariner if nautical charts gave no information about use of the area.

351. As noted, the federal government did not take exception to the master's recommendation.

352. See: Report of the Special Master in *United States v. California* of August 20, 1979, at 7 n.7; *United States v. Louisiana*, 394 U.S. 11, 36-37 (1969); and 4 Whiteman, *supra,* at 258- 263.

limits of inland waters in ports will always require an *ad hoc* consideration of non-geographic factors. That is probably as it should be.[353]

ROADSTEADS

Roadsteads are areas seaward of the coast or a harbor that are used for loading or anchoring ships. (Figure 80) Article 9 of the 1958 Convention provides that "roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal state must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given."[354] The provision seems straightforward. Where an

353. The special master bolstered his determination with two unrelated considerations. First, he noted that his recommended line is more nearly a "straight" closing line, reasoning that "implicit in the Supreme Court decrees and Geneva Convention is the principle that closing lines across river mouths, ports, bays, and other bodies of inland waters shall be straight. See, e.g., paragraphs 4 and 5 of the 1966 decree, 382 U.S. at 450-51, Articles 7(4) [presumably intended to read 7(5)] and 13 of the Geneva Convention, and paragraph 1(a) of the 1977 decree, 432 U.S. 40." Report, *supra*, at 9-10. And then finding that "a line drawn to the Anaheim Bay East Jetty will, however, most closely approximate the ideal straight closing line. If one stands back and views the Port in context of the coast's natural curvature to each side of the bay, California's proposed closing line more closely 'fits' these curvatures than does the closing line proposed by the United States. A boundary line which tracks a coast line will never, of course, be entirely straight or regular. The straight line requirement is intended, nevertheless, to eliminate such artificial boundaries as proposed by the United States." *Id.* at 10.

We believe that, although harmless in this instance, any effort to apply such reasoning to future limits would be fraught with difficulty. Clearly the Convention and prior decrees of the Supreme Court do not support the conclusion.

The master seems to describe either, or both, of two potential principles. First, that inland water closing lines are supposed to "fit" the curvature of the coast being closed. This concept would appear to be akin to that idea that inland water lines should run parallel to the general direction of the coast, an idea that is applicable only to Article 4 straight baselines. Bay and river closing lines are drawn taking into consideration the landlocked nature of the indentation being enclosed, not adjoining coastlines. A survey of the many closing lines approved by the Court would disclose no relation between the bearings of closing lines and those of the adjacent coasts. Nor does the Court ever mention such a criterion in its many discussions of bay closing lines. Second, the master may have been saying that where a water body has multiple mouths the various closing lines should continue on a similar bearing. Again, neither the Convention nor the Court's analysis has even suggested such a consideration. In fact, in the application of Article 7(3), concerning multiple mouthed bays, the Court has determined only that natural entrance points should be used as termini for each of the closing lines, with no concern for how the bearing of one segment might be related to others. Although Article 7(5) proscribes a "straight baseline" of 24 miles within an overlarge bay, the United States has not even taken that literally. Cook Inlet, Alaska, is such a bay. Its inland waters are delimited by two line segments joining Kalgin Island to the mainland. Those segments do not form a straight line.

Individual inland water closing lines are "straight" lines. That is, they are the shortest lines by which the selected termini can be connected. Where multiple mouths result in a segmented closing line those segments may or may not retain a constant bearing. In nature they almost certainly would not.

The master also looked at the Coast Guard's "COLREGS" lines in the area that separate areas subject to domestic navigation regulations from those subject to international regulations. The Supreme Court had previously ruled that similar Coast Guard lines off the coast of Louisiana had no relevance to inland water determinations. *United States v. Louisiana*, 394 U.S. 11, 35 (1969). Nevertheless, and despite that fact that the COLREGS line at the eastern end of the Port of San Pedro does not coincide with the master's closing line, he found that the Coast Guard line "shed some light" on the question before him. Report at 10.

The master's ultimate conclusion with respect to the Port of San Pedro would seem sufficiently supported by his analysis of the *use* of the water area. For that reason, the federal government did not take exception to his recommendation. We do not believe that his additional bases add any weight to his determination.

354. The 1982 Law of the Sea Convention's comparable provision, Article 12, has only the first sentence of Article 9, and ends there. The requirement for charting roadsteads is found in Article 16 of the 1982 Convention.

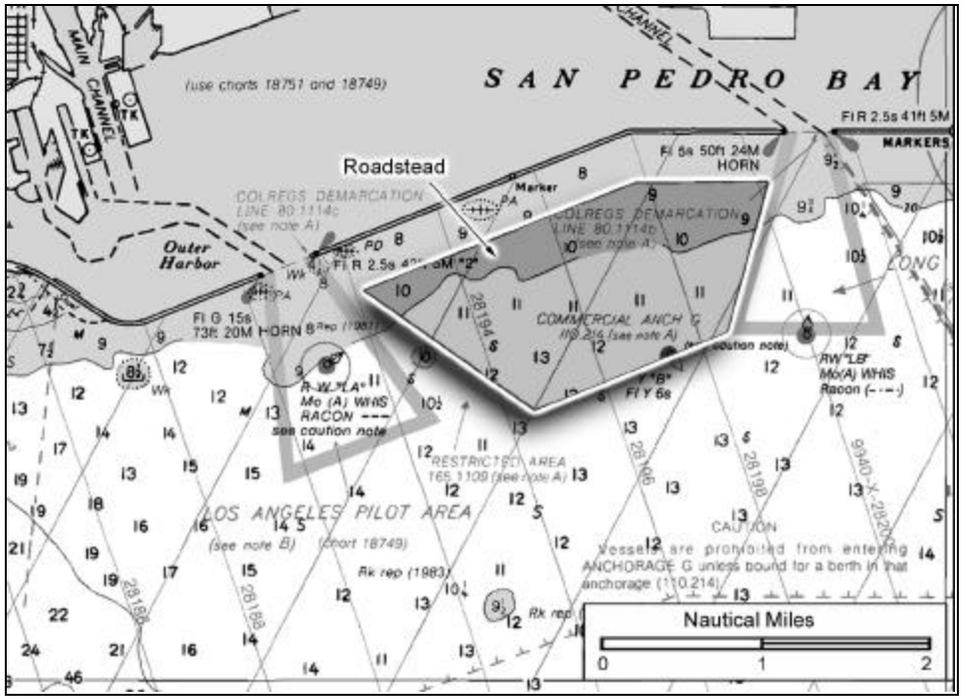

Figure 80. Port of San Pedro, California, and roadstead. The roadstead outside of the Port of San Pedro has no effect on inland waters or the baseline. (*Based on NOAA Chart 18746*)

anchorage area serves as an extension of a port or harbor, its waters shall be considered territorial sea but not inland. They do not, therefore, form part of the inland water baseline.[355]

Although we have been concerned here with the limits of inland waters, it is important to consider roadsteads because of their history. As O'Connell points out, the 1958 provision "involves a departure from the common law tradition, which linked harbors, roads, bays and creeks in the one legal category; and also, it seems, from customary international law which, at least in the early stages, did likewise." 1 O'Connell, *The International Law of the Sea* 219 (1982). For example, the comparable provision considered at the 1930 Hague Conference treated roadsteads as inland waters that generated additional territorial seas. 4 Whiteman, *supra*, at 266. Pre-Convention litigation in *United States v. California* proceeded on the assumption that the inland waters of harbors could include anchorage areas, 1 Shalowitz, *supra*, at 62, but that, absent evidence to the contrary, its outer limit would be assumed to be "the line of the outermost harbor

355. See: McDougal and Burke, *The Public Order of the Oceans* 423-437 (1962).

works." *Id.* The Supreme Court later made clear that anchorage areas seaward of harborworks are not inland waters. *United States v. California*, 381 U.S. 139, 175 (1965) (citing Article 9), and 382 U.S. 448, 451 (1965).

Roadsteads are territorial sea, not inland waters. Presumably their boundaries will, like ports, be determined by usage.

Historic Inland Waters

Waters may also acquire inland water status by having been treated as inland through time even though they meet no specific geographic criteria. The final paragraph of Article 7 specifically provides that "the foregoing provisions shall not apply to so-called 'historic' bays." Article 7(6).[356] Although the Convention itself neither defines historic waters nor explains how that status is attained, a subsequent United Nations study reviewed both issues in some depth. The Supreme Court has relied heavily on that study in tidelands litigation. It has accepted the proposition that historic bays are water areas over which the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States v. California*, 381 U.S. 139, 172 (1965).[357] And, has recognized that "there appears to be general agreement that at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations." *Alabama and Mississippi Boundary Cases*, 470 U.S. 93, 101-102 (1985).[358] The Court has favorably quoted the *Juridical Regime*, saying, "the coastal nation must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States." *Id*. at 102.[359] These then are the benchmarks against which the Supreme Court and its special masters have measured historic inland water claims when they have arisen in American practice.

The issue has come up frequently in the tidelands cases.[360] Coastal states have often asserted that water areas have been treated as inland by the United States even though they do not meet Article 7's criteria. In each

356. Article 10 (6) of the 1982 Law of the Sea Convention contains the identical provision.

357. In its analysis the Court was citing to, and quoting from, a United Nations study on the issue entitled *Juridical Regime of Historic Waters, Including Historic Bays, supra.*

358. Citing *United States v. Alaska*, 422 U.S. at 189; and *Louisiana Boundary Case*, 394 U.S. at 23-24 n.27.

359. Quoting from the *Juridical Regime*, *supra*, at 37-38.

360. California, Louisiana, Alaska, Florida, Massachusetts, Rhode Island, Mississippi, and Alabama all have made historic inland water claims. Massachusetts also made a closely related claim that it characterized as "ancient title."

instance the federal government "disclaimed" title to such areas. The Court has given weight to the federal disclaimer, but permitted the states to pursue their contentions "as if made by the United States and opposed by other nations," *United States v. Louisiana*, 394 U.S. at 23-24 and 74-75. At the same time it has imposed an unusual burden of proof on the states.

The Disclaimer

In every tidelands case since 1971 there have been at least two examples of federal disclaimers to state historic water claims. The first is the federal position in the litigation itself. Opposition to the state claim constitutes a disclaimer.[361] Second is the publication and distribution of official charts that depict the United States' maritime claims. In 1970, the National Security Council's Law of the Sea Task Force set up the "Committee on Delimitation of the United States Coastline." With members from all federal agencies having an interest in our maritime boundaries, that group reviewed and approved charts of our maritime claims. Those charts were, thereafter, relied upon by all federal agencies as the official statement of the United States on the subject and were provided to foreign nations upon request. The charts constitute a disclaimer of the United States' jurisdiction seaward of the boundaries depicted.

But the disclaimer is not decisive in all instances. As one special master has pointed out "the determination of national boundaries is ordinarily a political and not a judicial function; *Jones v. United States*, 137 U.S. 202 (1890); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948). This does not, however, preclude the courts from inquiring into the actual position taken by the sovereign in regard to specific waters, as opposed to its declared position." *United States v. Louisiana*, Report of the Special Master dated July 31, 1974, at 17.

In *United States v. California*, the state introduced evidence of sporadic exercises of federal jurisdiction over areas not claimed by the federal government in the litigation. The Court accepted and reviewed that evidence and then determined that it was so questionable that the federal disclaimer must be decisive. *United States v. California*, 381 U.S. at 175. In so doing the Court determined that in the face of a federal disclaimer a state would have to produce evidence of a historic claim that is "clear beyond doubt."[362] Later masters found that the evidence presented to them did not

361. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 16.

362. Specifically, the Court said that "we are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive." *United States v. California*, 381 U.S. at 175. See also: *United States v. Louisiana*, 394 U.S. at 28-29.

meet that standard and accepted the federal disclaimer. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 22; and *United States v. Florida*, Report of the Special Master of January 18, 1974, at 46. The findings of both were adopted by the Supreme Court. *United States v. Louisiana*, 420 U.S. 529 (1975); *United States v. Florida*, 420 U.S. 531 (1975).

However, a federal disclaimer will not be decisive if it comes only after historic title has ripened. In *United States v. California*, the Supreme Court said that "the national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the states in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." 381 U.S. at 168. In that instance the Court was discussing the United States' decision not to adopt straight baselines. However, it used the same reasoning in reference to historic water claims on the Louisiana coast. There it said that "the Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as suggested in *United States v. California*, it would be inequitable in adopting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events." 394 U.S. at 77.[363]

Interestingly, neither California nor Louisiana was able to establish a past practice that supported its claim. However, the issue again arose when Mississippi and Alabama claimed that Mississippi Sound qualified as historic inland waters. There the states introduced evidence of historic claims going back to the Louisiana Purchase, including statements from the federal government that the Sound was inland waters. The federal disclaimer, by contrast, did not come until publication of the Coastline Committee charts in 1971. The master concluded that historic title had ripened prior to that disclaimer and that, given the Court's statement in the *California* and *Louisiana* decisions, could not be denied thereafter. Report of April 9, 1984 at 46-48. The Supreme Court agreed. *Alabama and Mississippi Boundary Cases*, 470 U.S. 93, 112 (1985). We turn now to a review of the elements that must be proven to establish historic title.

363. In a footnote to that statement the Court added that "it is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of "past" events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California*. See n.97, *supra*." 394 U.S. at 77.

The Elements of a Claim

As previously noted, the Supreme Court has adopted the United Nations' three factors as the basis for historic waters claims. These include (1) the exercise of authority over the area by the state claiming historic title, (2) the continuity of this exercise, and (3) the acquiescence of foreign states.[364] Each of these factors will be discussed.

The Exercise of Authority

The type of authority that must be asserted to acquire historic title has been variously described as "exclusive authority," "sovereign ownership," "jurisdiction," "dominion," and "sovereignty." *Juridical Regime* at 38-39. But the critical question is whether the authority claimed is consistent with that historically asserted. As the United Nations and the Supreme Court have both noted, "historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. 'If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over territorial sea, the area would be territorial sea.'"[365] "The authority continuously exercised . . . must be commensurate to the claim . . . A claim of inland waters is not sustained by conduct that would be adequately explained by a claim only of territorial sea." *Juridical Regime* at 40. See also, *United States v. Alaska*, 422 U.S. 184, 197 (1975).

American practice suggests that the exercise of authority, or "claim," can be proven in two ways. There may be a clearly stated federal position that the waters at issue are part of its territory, or there may be a history of official actions that are consistent only with the existence of such a claim. Of the numerous tidelands cases in which historic inland water claims have been made, only one, the Mississippi Sound litigation, involved a clearly stated federal acknowledgment of inland water status.[366] In all other instances the states have sought to prove historic inland water status through activities said to necessarily reflect such a claim.

364. *Juridical Regime*, at 13 and *United States v. Louisiana*, 394 U.S. 11, 23-24 (1969).

365. *United States v. Louisiana*, 394 U.S. at 24 n.28, quoting from *Juridical Regime*, *supra*, at 13.

366. The special master in the *Massachusetts Boundary Case* placed some reliance on Congress's inclusion of the waters of Vineyard Sound in a Customs District as evidence of a federal claim. Report of the Special Master, October Term, 1984, at 63. However, because Customs jurisdiction has long extended seaward of inland waters, and inland waters were not mentioned in the statutes, the Customs District does not seem to be a clear federal acknowledgment of inland waters.

ARTICULATED CLAIMS. The *Alabama and Mississippi Boundary Cases* produced the clearest example of a public, federal claim. Mississippi Sound is formed on three sides by the mainland of Mississippi and Alabama and on the fourth by barrier islands that lie approximately 10 miles offshore. 470 U.S. at 97. (Figure 81) The Sound is shallow, "ranging in depth generally from 1 to 18 feet except for artificially maintained channels." *Id.* at 102. And it is a cul-de-sac, leading only to American ports. *Id.* at 103. For these reasons, it was historically important to the nation that governed its shores and "of little significance to foreign nations." *Id*. at 102. In accepting its master's recommendation that Mississippi Sound is historic inland water, the Supreme Court reviewed the long history of American interest, including navigation improvements to "afford the advantages of internal navigation and intercourse throughout the United States and its Territories . . . ."[367] *Id.* at 103, and the construction of fortifications on one of the barrier islands to defend the Sound, and commerce within it. *Id.* at 104.

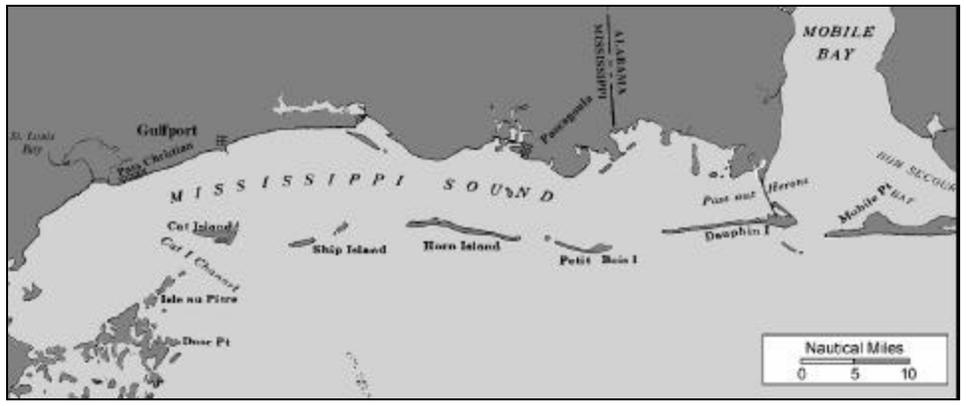

Figure 81. Mississippi Sound off the coasts of Alabama and Mississippi. *(Based on NOAA Chart 11006*)

But most important to the proof of a claim were two judicial actions concerning Mississippi Sound. The first, involving Louisiana and Mississippi, continued the land boundary between those two states into Lake Borgne and the Sound. In that case, the Court described the Sound as "an enclosed arm of the sea, wholly within the United States . . ." *Louisiana v. Mississippi*, 202 U.S. 1, 48 (1906), and constructed the boundary with the thalweg doctrine, a principle of boundary delimitation applicable only to inland waters.[368] "The Court clearly treated Mississippi Sound as inland waters . . . ." *Id.* at 108.

367. Quoting from H.R. Doc. No. 427, 14th Cong., 2d Sess. (1817).

368. The thalweg is the middle of the "deepest or most navigable channel, as distinguished from the geographic center or a line midway between the banks." *Alabama and Mississippi Boundary Case*s, 470 U.S. at 108.

Fifty-two years later the federal government was at odds with the Gulf Coast states over the extent of their rights under the recently enacted Submerged Lands Act. In 1958 the United States filed a brief with the Supreme Court that conceded that "we need not consider whether the language 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (although we believe it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana v. Mississippi*, 202 U.S. 1, 48."[369] The United States went on to concede that "the water between the islands and the Alabama mainland is inland water; consequently we do not question that the land under it belongs to the State." *Id.* at 109, quoting, again, from the United States' Brief.

In its *Alabama and Mississippi Boundary Cases* decision, the Court opined that "if foreign nations retained any doubt after *Louisiana v. Mississippi* that the official policy of the United States was to recognize Mississippi Sound as inland waters, that doubt must have been eliminated by the unequivocal declaration of the inland water status of Mississippi Sound by the United States in an earlier phase of this very litigation [just quoted]." *Id.* at 108-109.[370] These federal concessions distinguish the Mississippi Sound litigation from most tidelands cases involving historic water issues. They were found to constitute the federal claim that is usually missing.[371]

The *Massachusetts Boundary Case* is the only other tidelands case in which historic title has been proven. There Special Master Hoffman found that federal legislation that included Vineyard Sound in a Customs District constituted a claim to its waters.[372] (Figure 82)

369. *Alabama and Mississippi Boundary Case*s, at 109, quoting from Brief for United States in Support of Motion for Judgment on Amended Complaint in *United States v. Louisiana*, October Term 1958, Number 10 Original, at 254.

370. To that statement the Court appended a reference to yet another official concession, saying "the United States also acknowledged that Mississippi Sound constituted inland waters in a letter written by the secretary of the interior to the governor of Mississippi on October 17, 1951, confirming that the oil and gas leasing rights inside the barrier islands belonged to the State of Mississippi." *Id*. at 109 n.11.

371. There is no doubt that the federal statements in 1951 and 1958 were not based on any federal historic claim to Mississippi Sound as inland water. Rather, they arose from the fact that prior to the adoption of the Convention's definitions the United States had proposed principles for juridical bay delimitation that would have closed Mississippi Sound as inland water without a historic waters claim. Because those principles represented the United States' position on boundary delimitation in 1953, the federal government argued in *United States v. California* that they should be employed as evidence of congressional intent in the Submerged Lands Act. It was not until 1965 that the Court rejected that contention and adopted the Convention's definitions for Submerged Lands Act purposes. *United States v. California*, 381 U.S. 139 (1965). Four years later the Court made clear the United States would not be bound by positions taken before the *California* decision, and similar statements regarding the Louisiana coastline were not held against it. *Louisiana Boundary Case*, 394 U.S. 11, 73-74 n.97 (1969). Nevertheless, in the *Alabama and Mississippi Boundary Cases*, the Court made the critical distinction that "the significance of the United States' concession in 1958 is not that it has binding effect in domestic law, but that it represents a public acknowledgment of the official view that Mississippi Sound constitutes inland waters of the Nation." *Alabama and Mississippi Boundary Cases*, at 110.

372. *Massachusetts Boundary Case*, Report of the Special Master, October Term 1984, at 62, citing to Act of July 31, 1789, 1 Stat. 29, 31.

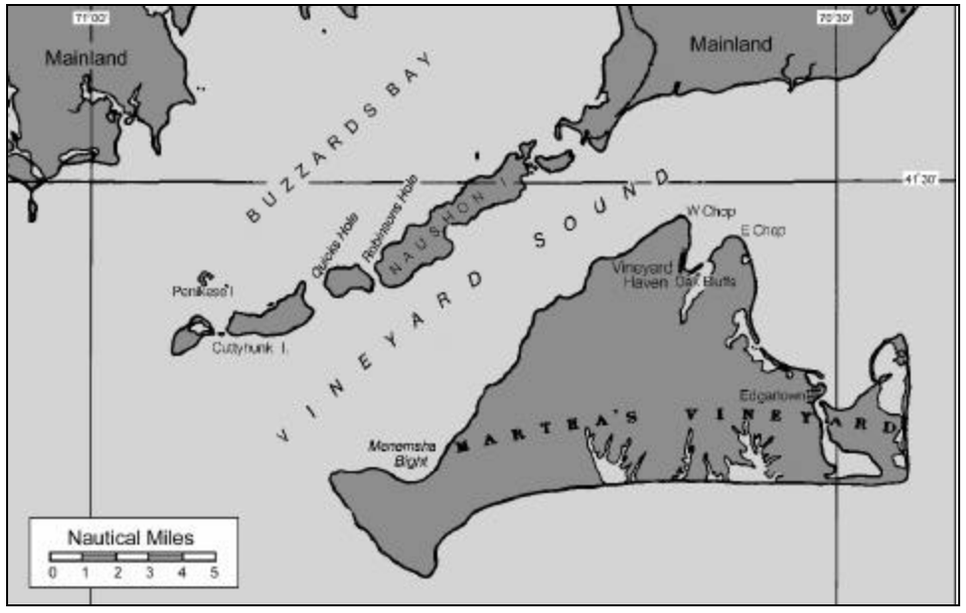

Figure 82. Vineyard Sound, Massachusetts, found to be historic inland waters. (*Based on NOAA Chart 13200*)

More important to his entire analysis, however, are two Massachusetts statutes and a United States Supreme Court opinion. In 1859 the Massachusetts legislature enacted a statute that closed "arms of the sea" of no more than 2 marine leagues (6 nautical miles) in width and claimed jurisdiction 1 marine league seaward of such lines. Massachusetts Acts of 1859, Ch. 289. Under this statute Vineyard Sound became inland waters. Master's Report at 58. In 1881 the state enacted legislation that directed the Harbor and Land Commissioners to prepare reports and charts depicting the boundaries created by the 1859 statute. Massachusetts Acts of 1881, Ch. 196. Master's Report at 59. Those charts were prepared and showed Vineyard Sound as inland waters.

The charts also enclosed Buzzards Bay and shortly thereafter a fisherman was convicted by the state for violating its regulations in that water body. The defendant challenged the state's jurisdiction but the Supreme Court upheld the conviction, ruling that a state may assert jurisdiction over bays no more than 6 miles wide at their mouths. *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891). Interestingly, the charts that were produced pursuant to Massachusetts' 1881 legislation were introduced as evidence in the case, including one that depicted the inland water lines for both Buzzards Bay and Vineyard Sound. Special Master's Report at 59. Almost a century later,

the master found that the federal and state actions constitute a claim to historic title.[373]

Two recent tidelands decisions leave an interesting question as to the significance of long abandoned juridical bay principles to historic water issues.

Prior to 1958 there was no universally recognized set of principles for determining what waters are inland by operation of law. Nations toyed with various theories and made proposals in international fora. For its part, the United States considered at least two means of dealing with waters between the mainland and barrier islands in the first half of this century. One of those was to treat as inland "those areas between the mainland and off-lying islands that are so closely grouped that no entrance exceeded 10 geographical miles." *Alabama and Mississippi Boundary Cases*, 470 U.S. 93, 106 (1985). In that case the Supreme Court, adopting the findings of its special master, determined that "this 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903," *id.* at 106-107, until our ratification of the Convention in 1961. *Id*. at 106. The Court went on to emphasize that the United States had widely published its preference for the principle such that foreign nations were put on notice of its use here. *Id.* at 107.

The federal government objected that juridical principles are not sufficiently specific to support historic waters claims. The Court responded that as to Mississippi Sound the general principles "were coupled with specific assertions of the status of the Sound as inland waters." *Id.*[374] Nevertheless, the juridical position seemed to play an important role as the Court dealt with the question of foreign acquiescence and the Sound was ruled "inland."

Alaska relied upon the Mississippi Sound decision in its claim that waters between the Arctic coast and barrier islands are also inland. Unlike Mississippi and Alabama, Alaska had no specific history of prior Supreme Court decisions upon which to base a historic waters claim. What it did instead was point to the Court's language in the *California* tidelands case, warning against an impermissible contraction of state territory, and the Court's finding in the Mississippi Sound case that the United States employed the 10-mile rule from 1903 until at least 1961. Alaska concluded

373. The federal government did not take exception to the master's recommendations with respect to Vineyard Sound, in part because the conclusion had almost no effect on the extent of state jurisdiction. Because of that, the subsequent Supreme Court hearings did not include the Vineyard Sound issue. *United States v. Maine (Massachusetts Boundary Case)*, 475 U.S. 89 (1986).

374. Those "assertions" were (1) the Supreme Court's determination that the Sound is inland water in *Louisiana v. Mississippi*, 202 U.S. 1 (1906); and (2) an early federal concession in *United States v. Louisiana*, Number 10 [later Number 9] Original.

that its own Stefansson Sound would have been considered inland waters at the time of Alaskan Statehood, in 1959, and could not thereafter be taken away by a change in federal delimitation policy. (Figure 83)

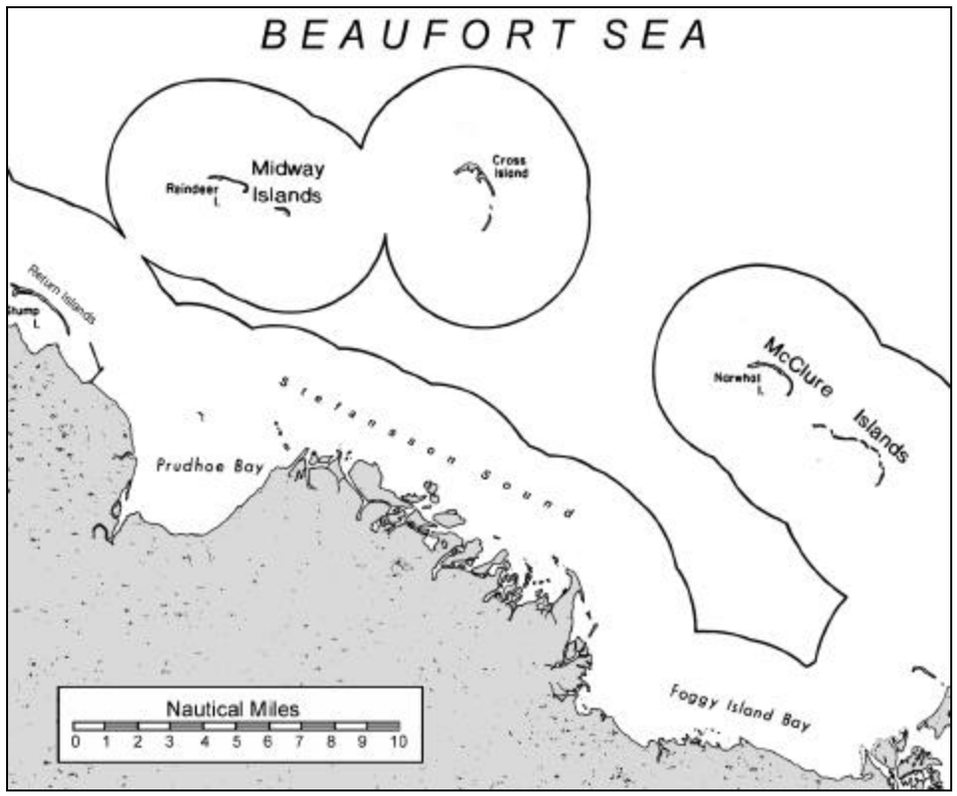

Figure 83. Stefansson Sound, Alaska. The sound is created by islands within 10 miles of each other and the mainland. (*After Report of Special Master J. Keith Mann, Figure 3.2*)

Much of Alaska's argument turned on the Supreme Court's finding in the Mississippi Sound case that federal delimitation policy had been consistent at least from 1903 to 1961. Alaska and the United States went to great lengths to, respectively, prove and disprove that proposition. Ultimately Special Master Mann concluded that at least from 1930 until 1949 the United States had not used the 10-mile rule.[375] The Supreme Court agreed and denied Alaska's claim. Distinguishing the Mississippi Sound situation the Court said that "variation and imprecision in general

375. In fact, during that time the United States was proposing an entirely different principle in international circles, one that would have treated Mississippi Sound and similar waters as territorial rather than inland. *United States v. Alaska*, 521 U.S. 1, 17 (1997).

boundary delimitation principles become relevant where, as here, a State relies solely on such principles for its claim that certain waters were inland waters at statehood." *United States v. Alaska*, 521 U.S. 1, 15 (1997).

The role of past delimitation practice in historic water determinations may need additional consideration. In its most recent decision on the issue the Supreme Court said that "[u]nder the Convention, a nation's past boundary delimitation practice is relevant in a narrow context: specifically, when a nation claims that certain waters are 'historic' inland waters under Article 7(6) of the Convention." *Id.* at 11. However, it went on to note that "we have never sustained a State's claim to submerged lands based solely on an assertion that the United States had adhered to a certain general boundary delimitation practice at the time of statehood." *Id.* at 12. Taking the Mississippi Sound and *Alaska* cases together we may feel some confidence with the following. The admonition from the *California* and *Louisiana* cases remains; the government may not be allowed to abandon a juridical bay policy merely to gain advantage over a state in litigation. A consistent juridical policy by the United States that would have treated waters as inland will support a historic water claim, but only if supplemented by independent evidence of a claim to the water body at issue. The 10-mile rule was not such a policy.

ACTIVITIES CONSISTENT WITH A CLAIM. Efforts to prove a historic water claim in the absence of such specific statements have, to date, been unsuccessful. A number of states have introduced evidence of assertions of jurisdiction and alleged that they are consistent only with the conclusion that the waters involved were historically claimed by the United States. Typically these were assertions of jurisdiction over activities that a coastal state may control beyond its inland waters. As such, they were found not to be commensurate with the inland water claim being made as required by international law and the Supreme Court.

Fisheries Enforcement. Most common has been evidence of fisheries enforcement. In contending that Cook Inlet is historic inland waters, Alaska relied heavily on evidence of fisheries enforcement, both federal and state. The District Court relied upon that evidence in ruling for the state, but the Supreme Court noted that international law permits a coastal state to regulate fishing not only in its inland waters but in the territorial sea and beyond. *United States v. Alaska*, 422 U.S. 184, 199 (1975). The Court opined that "it is far from clear, however, that the District Court was correct in concluding that the fact of enforcement of fish and wildlife regulations was legally sufficient to demonstrate the type of authority that must be exercised to establish title to a historic bay," *id.* at 196, and concluded that "the enforcement of fish and wildlife regulations, as found and relied upon by the District Court, was patently insufficient in scope to establish historic

title to Cook Inlet as inland waters." *Id.* at 197.[376] Louisiana was, likewise, unsuccessful in establishing a historic claim based, among other things, on fisheries regulation. *United States v. Louisiana*, Report of the Special Master of July 31, 1974 at 20-21.[377]

Oyster Leases. Other assertions of wildlife management authority have been equally unsuccessful as evidence of a historic waters claim. Louisiana relied upon its oyster leases within 3 miles of the coast. In discounting the significance of that evidence the master reasoned that "traditionally international law has recognized the right of the coastal state to control fishing, including oystering, within its territorial sea. At all times pertinent to these proceedings, the United States has claimed a territorial sea of at least three miles from the low-water mark in the areas where these leases were granted, and therefore they were entirely consistent with that claim." Report at 19.

Mineral Leases. Louisiana and Florida relied on offshore mineral leases to buttress their historic claims. Most such leases were entered after President Truman claimed exclusive rights to mineral resources on our continental shelf in 1945.[378] As Special Master Armstrong pointed out in the *Louisiana* case, these leases "were issued after the United States claimed the resources of the entire continental shelf, and therefore could not put any nation on notice that an historic inland waters claim was being made." Report of July 31, 1974, at 20.[379] Special Master Maris followed the same reasoning, saying "nor do I think that they afford evidence of a use adverse to foreign nations in light of the accepted view in recent years that maritime nations have special rights in the bed of the continental shelf off their coasts." *United States v. Florida*, Report of the Special Master of January 18, 1974, at 46.

Pollution Regulations. State offshore pollution regulations have also been insufficient. As one special master noted "in the absence of conflicting federal regulations, a state has power to control pollution in its territorial waters if it may affect its inland waters or its shore (see *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 [1973]). Any acts of the State of Louisiana in connection with pollution control in waters off its shoreline were entirely consistent with the character of those waters as territorial sea,

376. This is especially true if the enforcement has only been against American vessels, because "the United States can and does enforce fish and wildlife regulations against its own nationals, even on the high seas." *United States v. Alaska*, 422 U.S. at 198.

377. The master's recommendations were later adopted by the Court. *United States v. Louisiana*, 420 U.S. 529 (1975).

378. Proclamation No. 2667 (59 Stat. 884) September 28, 1945.

379. Other leases, made prior to the Truman Proclamation, were within the territorial sea. *Id.* at 19.

and therefore do not furnish a basis for establishing them as inland water." *Louisiana Boundary Case*, Report of the Special Master of July 31, 1974, at 21.

Navigation Regulations. Finally, coastal states have twice asserted that navigation regulations are evidence of a historic claim. In the *Louisiana Boundary Case* the state pointed to the Coast Guard's "Inland Water Line." A little background may be helpful. Seagoing vessels are subject to two different sets of traffic rules, known as "Rules of the Road," depending upon their location. "Inland Rules" are applicable in inland waters and many nearshore coastal areas. Farther offshore the "International Rules" apply. These areas of application are divided by a series of straight lines, shown on nautical charts, that together are known as "The Inland Water Line." The line segments are located with an eye toward safety of navigation and ease of application for the mariner at sea. The Coast Guard makes no effort to conform the line to the actual limits of inland waters, as that term is used in the Convention and the Submerged Lands Act.

Nevertheless, Louisiana apparently could not resist the similarity of nomenclature and argued that all waters landward of the Coast Guard's "Inland Water Line" had been historically claimed by the United States as inland. The Court dismissed the allegation without reference to its special master. It concluded that navigation regulations suffer from the same infirmity as does fisheries enforcement when offered as evidence of an inland water claim. According to the Court "it is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea." 394 U.S. at 24.[380] And, "because it is an accepted regulation of the territorial sea itself, enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters . . . ." *Id.* at 25.

It happens that the Coast Guard's Inland Water Line suffers from a second defect when asserted in support of a historic inland water claim. It is accompanied by a specific disclaimer of jurisdictional consequence. The Court noted that "for at least the last 25 years, during which time Congress has twice re-enacted both the International Rules and Inland Rules, the responsible officials have consistently disclaimed any but navigational significance to the 'Inland Water Line.' When the line was for the first time completed off the entire Louisiana shore, the commandant of the Coast Guard declared: 'the establishment of descriptive lines of demarcation is

380. Citing to Article 17 of the Convention on the Territorial Sea, which requires that "foreign ships exercising the right of innocent passage [in the territorial sea] shall comply with the laws and regulations enacted by the coastal State . . . and, in particular, with such laws and regulations relating to transport and navigation." As the Court notes, Judge Jessup cites the United States' Inland Rules as an example of such regulation. *Id.* n.29, quoting Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 122 n.37 (1927).

solely for the purposes connected with navigation and shipping . . . these lines are not for the purpose of defining Federal or State boundaries, nor do they define or describe Federal or State jurisdiction over navigable waters.'" *United States v. Louisiana*, 394 U.S. at 27. The Court concluded that "no historic title can accrue when the coastal nation disclaims any territorial reach by such an exercise of jurisdiction." *Id*.

Rhode Island and New York both argued that their pilotage statutes, requiring vessels to take on mariners with local expertise before transiting Block Island Sound, supported a historic inland water claim to that water body. Relying heavily on the Court's *Louisiana* decision, and finding the pilotage requirement to be a reasonable regulation of navigation, the special master concluded that it did not support a historic inland water claim. *United States v. Maine, et al. (Rhode Island/New York)*, Report of the Special Master, October Term 1983, at 16-17.

Additional Considerations. The following are additional considerations that may be relevant to a historic claim. Although historic waters, if proven, are considered to be a claim of the United States, the historic events used to prove such a claim need not have involved federal officials. In *United States v. Louisiana* the Court made clear that assertions of jurisdiction by state officials could be used as evidence of a historic claim. 394 U.S. at 76-78.

Private actions, however, lend no weight to a claim. The State of Alaska introduced evidence of private "enforcement" activity in the Cook Inlet litigation, including a Russian fur trader's effort to discourage foreign competition. The Supreme Court reasoned that "the incident of the fur trader's firing on an English vessel near Port Graham might be some evidence of a claim of sovereignty over the waters involved, but the act appears to be that of a private citizen rather than of a government official." *United States v. Alaska*, 422 U.S. 184, 191 (1975). And it later stated that "the acts of a private citizen cannot be considered representative of a government's position in the absence of some official license or other government authority." *Id*. at 203. To be evidence of a historic waters claim, assertions of jurisdiction must have been made by an authorized officer.

To constitute evidence of an extraordinary geographic claim, assertions of jurisdiction must be made against foreign nationals. The United States, and nations generally, have personal jurisdiction over their citizens wherever they may be found.[381] That is to say, an American operating on the high seas is not beyond the legitimate reach of American law. Consequently enforcement on the high seas, against Americans, does not put foreigners on notice that the particular geographic area might be claimed by the United States.

381. See: *Skiriotes v. Florida*, 313 U.S. 69 (1940).

American courts have often repeated this requirement. In *Civil Aeronautics Board v. Island Airways, Inc.*, involving a historic waters allegation, the court declared that sovereignty must be exercised by deeds such as "keeping foreign ships or foreign fishermen away from the area, or taking action against them . . . ." 235 F.Supp. 990, 1004-1005 (D.Ha. 1964), aff'd 352 F.2d 735 (9th Cir. 1965). The question also arose in the first *California* tidelands litigation, where the state introduced evidence of limited fisheries and criminal jurisdiction over Americans in waters being claimed as historic. The Supreme Court's special master noted that "these instances of assertion of right by the State of California in the courts did not constitute an assertion of exclusive authority over these waters such as might be the occasion for objection by foreign governments or action by the United States in our international relations . . . there is nothing to indicate that the defendants were citizens of a foreign country. Under these circumstances, absence of objection from foreign countries cannot be regarded as acquiescence . . . ." *United States v. California*, Report of the Special Master, October Term 1952, at 35. The master's recommendations were adopted by the Court. *United States v. California*, 381 U.S. 139, 172-175 (1965).

The United States has relied upon this principle in its own opposition to foreign historic waters claims. In 1957 the Soviet Union issued a decree declaring Peter the Great Bay to be historic inland waters, basing its claim on its "Rules of Maritime Fisheries In The Territorial Waters of the Governor-Generalship of Priamurye," published by the Russian government in 1901. The United States protested, warning against encroachments on the high seas, and stating that a claim of historic title could not be based on internal regulations of the Russian government, which were not communicated to the governments of other states. XXXVIII Bulletin, Department of State, No. 978, Mar. 24, 1958, p. 461, quoted and discussed at, 4 Whiteman, *supra*, at 250-257.

The United States had made a similar objection to Spanish maritime claims around Cuba nearly a century earlier. In an 1863 letter to the Spanish minister the secretary of state took the position that "[n]ations do not equally study each other's statute books and are not chargeable with notice of national pretentions resting upon foreign legislation." 1 Moore, *International Law Digest* 709-710 (1906).[382]

In sum, to constitute evidence of historic waters claims, assertions of jurisdiction must have been made against foreign citizens or vessels to be clear that they do not simply represent extraterritorial exercises of personal jurisdiction and to put foreign nations on notice of a territorial claim.

382. See also: *Juridical Regime* at paragraphs 89-90.

The Continuity of the Claim

To support a finding of historic waters a claim must have existed, and been consistently asserted, over a substantial period of time. The *Juridical Regime* lists a number of characterizations that have been suggested, including: "continuous usage of long standing" (Institute of International Law, 1928), "established usage" (Harvard Draft, 1930), and "continued and well-established usage" (American Institute of International Law, 1925). *Juridical Regime* at 44. American practice has done little to make the requirement more specific.

As for the necessary age of a claim, the Supreme Court said in the *Alabama and Mississippi Boundary Cases* that the "United States has effectively exercised sovereignty over Mississippi Sound as inland waters from the time of the Louisiana Purchase in 1803 until 1971 . . . ." 470 U.S. at 102. Although the length of the claim was not specifically at issue in that case, the Court clearly considered 168 years to be sufficient. That would seem to go without saying.

Florida made a historic waters claim based on an 1868 constitutional boundary that the state said extended more than 3 miles offshore. Special Master Maris acknowledged that "if its construction of the boundary language is correct, which I have concluded it is not, this 1868 origin of its claim would certainly be remote enough in time to satisfy the second criterion for historic inland waters." *United States v. Florida,* Report of the Special Master of January 18, 1974, at 42. Again, one hundred plus years would seem sufficient.

Finally, in Massachusetts' successful adjudication of Vineyard Sound, the special master found claims going back to the first Congress of the United States and state actions more than 100 years ago. The usage element was not even contested.

We know of no court that has accepted a claim as adequate but concluded that it is too recent to establish historic rights. Closely related, however, are examples of alleged long standing claims that have been only sporadically enforced. California relied upon a criminal prosecution for activities in claimed historic waters. The Supreme Court described it as "the only assertion of criminal jurisdiction of which we have been made aware." *United States v. California*, 381 U.S. 139, 174-175 (1965).[383] The Court found no historic title.

Nine years later its special master looked back at that language in his review of similar evidence from the State of Louisiana. Referring to testimony of a single arrest along that coast he concluded that "it can hardly

383. Referring to *People v. Stralla*, 14 Cal.2d 617, 96 P.2d 941 (1939).

be said that this isolated incident meets the tests set forth earlier for establishing sovereignty sufficient to support a claim of historic waters. Certainly no continuity is indicated . . . ." *United States v. Louisiana,* Report of the Special Master of July 31, 1974, at 20- 21.

Continuity encompasses two elements. The claim must be long standing. No exact time can be stated but 100 years would seem sufficient.[384] And the claim must have been consistently asserted over the period of its existence.

Foreign Responses to the Claim

The third requirement for historic water status concerns foreign response to the exercise of sovereignty by the coastal state. *Juridical Regime* at 55.[385] International authority is split on whether the attitude of foreign states must be acquiescence or merely the absence of opposition.[386] *Id.* at 13. Recognizing this split in authority, the Supreme Court has opted for the more stringent requirement of acquiescence. *United States v. California*, 381 U.S. 139, 172 (1965); *United States v. Louisiana,* 394 U.S. 11, 24 n.27 (1969). So has the Department of State in its dealings with foreign nations.[387]

However, acquiescence requires more than a mere failure to protest a claim. In order to establish acquiescence it must be shown that foreign countries knew of the claim or, because of its notoriety, their knowledge may be presumed. *Juridical Regime* at 54.[388] The Supreme Court has followed this approach, saying in *United States v. Alaska* that "the failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted." 422 U.S. at 200.[389] And, "in the absence of

384. *The Juridical Regime of Historic Waters, Including Historic Bays, supra*, at 45, states that "no precise length of time can be indicated as necessary to build the usage on which historic title must be based. It must remain a matter of judgement when sufficient time has elapsed for the usage to emerge."

385. In support of its statement the United Nations cited the International Court of Justice's reference to "the notoriety essential to provide the basis of historic title" in the Anglo-Norwegian *Fisheries Case,* [1951] I.C.J. Reports 116.

386. In fact, the United Nations' Report indicated that "there is substantial agreement that inaction on the part of foreign States is sufficient to permit an historic title to a maritime area to arise by effective and continued exercise of sovereignty over it by the coastal State during a considerable time." *Juridical Regime* at 49.

387. For example, when the United States protested the Soviet Union's historic claim to Peter the Great Bay it reiterated that "a degree of acceptance on the part of the rest of the world is required to justify the claim." 4 Whiteman at 256.

388. The Report concludes that "there seem to be strong reasons to hold that notoriety of the exercise of sovereignty, in other words, open and public exercise of sovereignty, is required rather than actual knowledge by the foreign States . . . ." *Juridical Regime* at 55.

389. See also: Report of the Special Master in the *Alabama and Mississippi Boundary Case*s of April 9, 1984, at 54 and subsequent Supreme Court decision in that action, 470 U.S. 93 (1985).

any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title." *Id*. There was no evidence that foreign governments were aware of alleged assertions of jurisdiction in Cook Inlet nor were those assertions such that foreign governments should have been aware of them.[390]

In contrast, the special master and the Supreme Court agreed that foreign countries were specifically aware of the United States' claim to historic waters in Mississippi Sound. The Court said, for example, that the 10-mile rule for closing waters between the mainland and off-lying islands "represented the publically stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903. There is no doubt that foreign nations were aware that the United States had adopted this policy. Indeed, the United States' policy was cited and discussed at length by both the United Kingdom and Norway in the celebrated *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116." 470 U.S. at 107. The Court went on to adopt its master's recommendation that Mississippi Sound is historic inland water, finding that all three of the elements of historic title had been proven.[391]

Special Master Hoffman, in the *Massachusetts Boundary Case*, found acquiescence in the presumed knowledge of foreign states followed by a failure to protest. Early in the litigation the parties stipulated that "by the outbreak of World War I, the major European powers, all of whose foreign ministries had legal departments charged with 'monitoring and analyzing' legal developments, had *'de facto'* knowledge of *Manchester [v. Massachusetts]* and its contents."[392] The master then accepted the state's contention that

390. Likewise, Special Master Armstrong found that there was no "notice to or acquiescence on the part of the Mexican Government" with respect to Louisiana's sole assertion of jurisdiction over a foreign vessel in East Bay being claimed as historic. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 20. He recommended against the historic waters claim and the Supreme Court adopted that recommendation. *United States v. Louisiana*, 420 U.S. 529 (1975).

391. The Court's later decision in *United States v. Alaska*, 521 U.S. 1 (1997), raises an interesting question about the logic of the Mississippi Sound conclusion. In *Alaska* the Court agreed with Special Master Mann that in fact the United States had not consistently employed a 10-mile rule that created inland waters landward of barrier islands for the entire period from 1903 until ratification of the Convention in 1961. In fact, both found the United States had espoused a distinctly different principle from at least 1930 until 1949. Under that proposal waters landward of barrier islands but more than 3 miles from any land would be "assimilated to the territorial sea." In other words, areas such as Mississippi Sound would be territorial seas rather than inland water, a result of little comfort to coastal states in the tidelands cases. Of course the Court emphasized in the Mississippi Sound case that the United States' claim was supported separately by its decision in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), and early federal positions in *United States v. Louisiana*, Number 10 (later Number 9) Original. Nevertheless, the Court seems to rely on its misstated tenure of the 10-mile rule to satisfy the requirement of foreign knowledge of a claim. Its decision in *Louisiana v. Mississippi* and the federal concession in *United States v. Louisiana* would appear to be the kind of internal governmental statements that both the Court and the State Department contend do not put foreign governments on notice of a claim. If, contrary to the Mississippi Sound decision, the 10-mile rule did not represent a continuity for the period described, no other evidence in the case would seem to fill the requirement. It is, of course, too late in the day to change the outcome in Mississippi Sound. It is likely however that future historic claimants will not be able to rely on the 10-mile rule to the extent that Mississippi and Alabama did.

392. Report of October Term 1984, at 60.

this would include "the text of the 1881 Massachusetts statute, the fact that the Supreme Court had upheld the Massachusetts statute as valid under both national and international law, and the fact that Massachusetts maintained charts showing its claims in official repositories." Report of October Term 1984, at 60.

In addition, the master concluded that both France and England, the major maritime powers of the day, could be presumed to know of federal claim to customs waters as early as 1789. Both, he explained, were involved in conflicts that made it important to know where American neutrality would extend. They would have been put on notice of such claims by Attorney General Randolph's opinion on the Delaware Bay claim and would have researched congressional actions and come upon the customs claims. *Id*. at 63.

Foreign acquiescence is essential to a successful historic waters claim. It can be proven, under American precedents, only through an interested nation's failure to protest when it knew, or reasonably should have known, of the claim.

A Fourth Element

The *Juridical Regime* discusses the view of some writers and governments that "geographic configuration, requirements of self-defense, or other vital interests of the coastal state may justify a claim of historic bay status without the necessity of establishing long usage." *Juridical Regime* at 56-58. It goes on to conclude, however, that "it does not make sense for 'historic title' to be claimed in circumstances where the historic element is wholly absent." *Alabama and Mississippi Boundary Cases*, 470 U.S. at 105, citing to *Juridical Regime* at 56- 58.[393] Nevertheless, the Supreme Court concluded that such factors may "fortify a claim to 'historic bay' status that is based on usage." 470 U.S. at 106.[394] The Court pointed out that Mississippi Sound is enclosed, extremely shallow, and leads only to American ports. It is of great importance to the United States and of little or no significance to foreign nations. And it has been defended by fortifications constructed by the United States. *Id*. at 102-106. To top it off, the Court noted that almost

393. Nor will these characteristics substitute for assertions of exclusive jurisdiction. In *United States v. California* Special Master William H. Davis reported that "much of the testimony submitted to the Special Master in these proceedings dealt with the geography, the history and the economic importance of the water area in dispute . . . . if there had been any assertion of exclusive jurisdiction of these waters by or on behalf of the United States, then this testimony would in general be relevant to the question whether these areas present special characteristics such as would justify in international law an assertion of exclusive sovereignty. But if my factual conclusions are correct [that the required assertions are missing], then the testimony is irrelevant . . . ." *United States v. California*, Report of the Special Master of October 14, 1952, at 39.

394. Here the Court cited to the *Juridical Regime*'s reference to Bourquin's view that "the character of a bay depends on a combination of geographical, political, economic, historical and other circumstances." *Juridical Regime* at 25 (translating and quoting Bourquin, *Les Baies Historiques)*. 470 U.S. at 106 n.7.

identical justification had been used by the United States in claiming historic inland waters in Delaware Bay. There Attorney General Edmund Randolph asked rhetorically, "what nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before had a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted." 1 Op. Atty. Gen. 32, 37 (1793), quoted at 470 U.S. at 103 n.4.[395]

A word should be added about the "geographic" element. Article 7(6) of the Convention refers only to historic "bays." The United Nations' study is entitled *Juridical Regime of Historic Waters, Including Historic Bays.* It is uniformly understood that a water body need not qualify as a juridical bay if it has been historically claimed. But whether, and to what degree, it may deviate from the usual criteria for juridical inland water status is not clear. American practice gives no help in determining how "bay-like" a water body must be to be eligible for a historic claim. In each contested case the waters at issue were sufficiently enclosed and the United States did not challenge state claims on that ground. It should not, however, be assumed that a completely unprotected area of open sea could qualify for historic water status even if the three criteria discussed above were met. That circumstance has yet to be tested.[396]

The three international criteria for historic bay status, a claim, continuity, and acquiescence, have been adopted in the United States' practice. The claim may be clearly stated or evidenced by assertions of jurisdiction. It must have been consistently made, or enforced, for a long enough time to constitute usage. And foreign nations must have acquiesced in the claim, with actual or presumed knowledge. The Supreme Court has dealt with historic water claims in a number of tidelands cases. It has recognized claims to Mississippi Sound and Vineyard Sound; it has denied them to Cook Inlet, Alaska, three bays in California, all of the Louisiana coast, much of the Florida coast, Block Island Sound, and Nantucket Sound.[397]

395. Massachusetts also put on extensive evidence about the early use and importance of Vineyard and Nantucket Sounds to its citizenry. Nevertheless, and despite his reliance on Attorney General Randolph's Opinion for other purposes, the special master did not find that it supported the inland water claim. Report at 61.

396. In its *Alabama and Mississippi Boundary Cases* decision the Supreme Court explained that "in this opinion, the term 'historic bay' is used interchangeably with the term 'historic inland waters.' It is clear that a historic bay need not conform to the geographic tests for a juridical bay set forth in Article 7 of the Convention. See *Louisiana Boundary Case*, 394 U.S. 11, 75 n.100 (1969). In this case, as in that one, we need not decide how unlike a juridical bay a body of water can be and still qualify as a historic bay, for it is clear from the Special Master's Report that, at a minimum, Mississippi Sound closely resembles a juridical bay." 470 U.S. 93 at 101 n.2 (1985).

397. For comprehensive lists of internationally claimed historic waters see: *Historic Bays, Memorandum by the Secretariat of the United Nations*, A/CONF.13/1, at paragraphs 12-43; Bouchez, *supra*, at 27-101; and Jessup, *supra*, at 383-439.

Straight Baselines

Article 4 of the Convention on the Territorial Sea and the Contiguous Zone provides a final means of coastline delimitation in certain geographic situations. It provides, in part, that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed . . . ." Article 4(1).[398] This geographic situation exists along numerous stretches of the coast of the United States. Employing Article 4 straight baselines in those circumstances would nearly always expand inland waters, encouraging the coastal states to contend that they should be, or have been, used in the United States.

The question first arose in *United States v. California*. The state had claimed inland water status for the Santa Barbara Channel on other theories and, after the Court announced that inland waters would be defined by the Convention's criteria, it added Article 4 as one of its bases. As the Court summarized, "California argues that because the Convention permits a nation to use the straight-baseline method for determining its seaward boundaries if its 'coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity,' California is therefore free to use such boundary lines across the openings of its bays and around its islands." *United States v. California*, 381 U.S. 139, 167 (1965). The Court responded with two principles that have guided all subsequent straight baseline litigation.

First, it reiterated what would seem to be clear from the Convention. Article 4 is not self executing nor is its use mandatory. It is an alternative to the "normal" baseline of Article 3. Article 4(1)'s indication that the method "may be employed" means just that.[399] Its use is optional.

Second, it clearly ruled, contrary to California's approach, that the federal government holds that option, not the individual states. Although the Convention would "permit" the United States to draw straight baselines, "California may not use such base lines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States." 381 U.S. at 168. And it continued, "the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." *Id.*

398. Article 4 goes on to indicate that such baselines: must follow the general direction of the coast and enclose only waters "sufficiently closely linked to the land domain to be subject to the regime of internal waters" 4(2); shall, generally, not be drawn to low-tide elevations 4(3); may take into consideration economic interests and usage 4(4); may not cut off another country's territorial sea from the high seas 4(5); and must be clearly indicated on charts to which "due publicity" must be given 4(6).

399. See also: Churchill and Lowe, *The Law of the Sea* 28 (1983).

The Court reiterated that position four years later when it said "the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so." *Louisiana Boundary Case*, 394 U.S. 11, 67 (1969). And, "since the United States asserts that it has not drawn and does not want to draw straight baselines along the Louisiana coast, that disclaimer would, under the California decisions, be conclusive of the matter . . . ." *Id.* at 72.[400]

The Court went on in the *Louisiana Boundary Case* to hold that the judiciary could not elect to employ Article 4, saying "the selection of this optional method of establishing boundaries would be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by domestic concern, not to extend its borders to the furthest extent consonant with international law." *Louisiana Boundary Case* at 72- 73.

Even so, in its *California* decision the Court left the door ajar for future straight baseline claims when it said "the national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus, a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." 381 U.S. at 168. With that in mind, the Court later permitted Louisiana to attempt to prove that the federal government had effectively employed the straight baseline system sanctioned by Article 4 and might not be able to abandon that position "solely to gain advantage" in a lawsuit, citing its statement in the *California* case. *Louisiana Boundary Case* at 74 n.97. A number of states have accepted the invitation. None has proven a straight baseline claim.

The coastal states have taken two routes in their efforts to prove that the United States has actually used straight baseline systems. Some have pointed to specific lines in the sea, adopted by a variety of federal agencies for their own purposes, and characterized them as "straight baselines." Others have asserted that juridical systems proposed by the United States through history amount to straight baselines and may not now be withdrawn. Neither approach has been successful.

Federal Agency Lines

A number of federal agencies have statutory obligations that have prompted them to draw lines in the sea. Typically these lines have been constructed with the particular needs of the agency in mind. They have not

400. At the same time the Court made clear that the federal government had similar control over decisions to employ the concept of "fictitious bays." That term was used to describe a pre–straight baseline theory by which waters landward of offshore islands might be considered inland. *United States v. California*, 381 U.S. at 172; *Louisiana Boundary Case*, 394 U.S. at 72.

employed consistent delimitation principles. Nor has any been proffered by the United States as a reflection of its official baseline position. Nevertheless, states have asserted that they constitute straight baseline systems.[401] The examples are discussed individually.

The Coast Guard Line

Louisiana did a thorough job of ferreting out various maritime boundary systems adopted by federal executive departments. Its first example was the Coast Guard's "Inland Water Line." In 1895 Congress provided for the adoption of maritime "Rules of the Road" to govern navigation on the "harbors, rivers and inland waters of the United States." Act of February 19, 1895, 28 Stat. 672.[402] Louisiana argued first that waters landward of these lines are historic inland waters. The Supreme Court ruled otherwise, finding that "the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters." *Louisiana Boundary Case*, 394 U.S. 11, 24 (1969). It also pointed out that the Coast Guard had specifically disclaimed any boundary significance to the lines, *id*. at 27, and found "no indication that in enacting the navigation rules and authorizing the designation of an Inland Water Line Congress believed it was also determining the Nation's territorial boundaries." *Id.* at 30.

Nevertheless, when the Court appointed Mr. Walter Armstrong to consider questions left unanswered by the opinion, including straight baselines, Louisiana took the opportunity to claim that the Coast Guard Line was a system of straight baselines. The special master noted that the Court found no evidence that the line had been intended or treated as a boundary and stated that "this would appear to conclude the matter insofar as the Special Master is concerned." *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 8. Despite this conclusion, the master reviewed Louisiana's arguments and reported that "lest there be any doubt it is now specifically held that the Inland Water Line does not constitute a system of straight baselines within the meaning of Article 4 of the Geneva Convention and therefore does not delineate the outer boundaries of inland waters of the United States or the State of Louisiana." *Id.* at 9. The Court later adopted all of Special Master Armstrong's recommendations. *United States v. Louisiana*, 420 U.S. 529 (1975). There is now no doubt that the Coast Guard's Inland Water Lines do not support a historic waters or straight baselines claim.

401. The Department of State recognized some time ago that "agencies of the Federal Government have made their own determinations for administrative purposes," but no general determination of inland waters, binding government wide, had been adopted. 1 Hackworth, *Digest of International Law* 644-645 (1940).

402. Those rules are now codified at 33 U.S.C. 152-232.

Census Line

In 1937 the United States Bureau of the Census attempted to "measure" the United States for purposes of the 1940 census. In so doing it adopted general principles for determining what waters should be included. Within a category denominated "State Waters," it included waters landward of straight lines connecting islands within 1 mile of the coast.[403]

Louisiana contended that these lines constitute a system of Article 4 straight baselines. The special master rejected the contention, saying that "this determination was made, however, many years before the adoption of the Geneva Convention, for purposes totally unconnected with it; and the results were certainly never clearly indicated on charts which were given due publicity to the nations of the world. It therefore follows that whatever their validity may have been for internal purposes, the census line established in 1937 did not constitute a system of straight baselines . . . ." Report at 11.[404]

Chapman Line

In 1950 the Supreme Court ruled that the United States had paramount rights to submerged lands seaward of Louisiana's coast line. *United States v. Louisiana*, 339 U.S. 699 (1950).[405] Soon thereafter the federal government proposed a line to implement that decision. That so-called Chapman Line, after then Secretary of the Interior Oscar Chapman, was based upon principles of coast line delimitation espoused by the United States prior to its adoption of the 1958 Convention and included waters landward of some barrier island chains.[406] (Figure 84) In 1956 it was adopted in an "interim agreement" that the parties entered as a basis for allocating revenues from disputed areas pending resolution of the litigation. But Louisiana acknowledged in the agreement that "no inference or conclusion of fact or law from the said use of the so-called Chapman Line' or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto." Quoted in *Louisiana Boundary Case*, 394 U.S. at 73-74. A second stipulation was signed in 1971 that provided, *inter alia*, that

403. This principle is a variation of a delimitation method first proposed by the United States at the 1930 Hague Conference on the Codification of International Law. The lines are found in Proudfoot, *Measurement of the Geographic Area*, U.S. Bureau of the Census (1946). For a more complete discussion of the Census Lines, see 2 Shalowitz, *Shore and Sea Boundaries* 473-475 (1964).

404. Article 4(6) provides that "the coastal State [nation] must clearly indicate straight baselines on charts, to which due publicity must be given."

405. This was, of course, merely to say that the Court's opinion in *United States v. California*, 332 U.S. 19 (1947), applied to other states as well.

406. Of course the United States continued to argue that pre-Convention principles should be used to implement a pre-Convention statute (the Submerged Lands Act) until the Supreme Court ruled otherwise in *United States v. California*, 381 U.S. 139 (1965). For an example of the Chapman Line along portions of the Louisiana coast see 1 Shalowitz at 110 and 111.

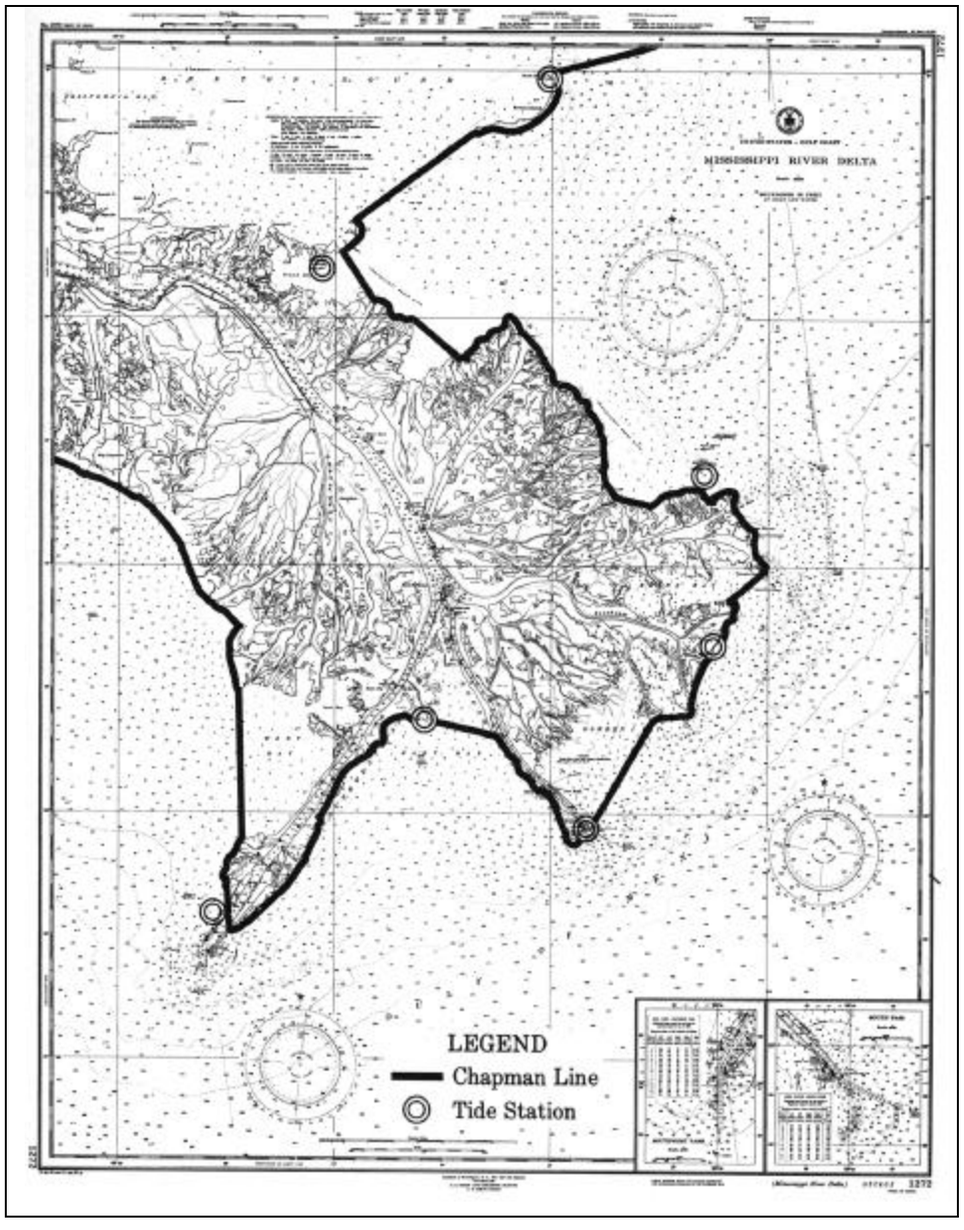

Figure 84. Portion of the Chapman Line on the Mississippi River delta. The line was constructed using pre-Convention principles. (*From I Shalowitz, Figure 23*)

"Louisiana recognizes, however, the United States position that these are not wholly inland waters, and agrees that Louisiana does not and will not base its arguments regarding the inland status of these or any other waters in this or any future litigation between it and the United States, upon this stipulation, upon action of the United States in fixing the Chapman Line in this area, or upon prior concessions regarding this area made by the United

States for the purpose of this case and the predecessor case, *United States v. Louisiana*, 339 U.S. 699."[407]

From these agreements the special master found that "the Chapman Line was not drawn in accordance with the principles and methods embodied in Article 4 of the Geneva Convention so as to give it force in international law." Report at 9. "In view of the foregoing, . . . the Chapman Line does not meet the requirements of Article 4 of the Geneva Convention for a system of straight baselines, and it is now so held." *Id*. at 10.

Bird Sanctuaries

President Theodore Roosevelt had a penchant for issuing Executive Orders that established federal reservations of various sorts. Often the orders included rough maps with hand-drawn circles depicting the areas to be included. Two such orders established the Tern Island and Shell Keys bird sanctuaries off the Louisiana coast. Each contained a map with a circular line enclosing the islands and surrounding waters. *United States v. Louisiana*, Report of the Special Master of July 31, 1974, at 11. Louisiana insisted that the lines constituted straight baselines.

Special Master Armstrong found otherwise. He concluded that "even a cursory glance at these orders and the diagrams attached to them, will, however, serve to dissipate this impression. In neither case is there a system of straight lines drawn from point to point, but merely a roughly drawn circular line enclosing an area in which there is both land and water, a line having reference to no particular points of land whatsoever. The purpose is obviously not to establish a boundary between inland and territorial water but to establish a limit with which bird life will be protected . . . ." *Id.* at 11-12. "These two executive orders did not establish a system of straight baselines within the meaning of Article 4 of the Geneva Convention." *Id*.

Louisiana v. Mississippi Decision

In 1906 the Supreme Court resolved a dispute over the river boundary between those two states and its extension into Mississippi Sound. The Court attached to its decision three maps with lines intended to depict Louisiana's offshore jurisdiction. *Louisiana v. Mississippi*, 202 U.S. 1 (1906).

407. Stipulation of January 21, 1971, between Solicitor General Erwin N. Griswold for the United States and Attorney General Jack P. F. Gremillion for the State of Louisiana, reproduced as Appendix A-2 to the Special Master's Report of July 31, 1974. The areas referred to are Chandeleur and Breton Sounds on the east side of the Mississippi River delta, which had been treated as inland under pre-Convention principles and lay shoreward of the Chapman Line. The Stipulation memorialized Solicitor General Griswold's decision to maintain the federal litigation position for that area, so as not to interfere with activities begun in reliance upon it, despite the Supreme Court's subsequent determination that the Convention's principles would be applied and the United States would not be bound by prior concessions.

(Figure 85) Louisiana argued in its tidelands case that these maps constitute a system of straight baselines.[408]

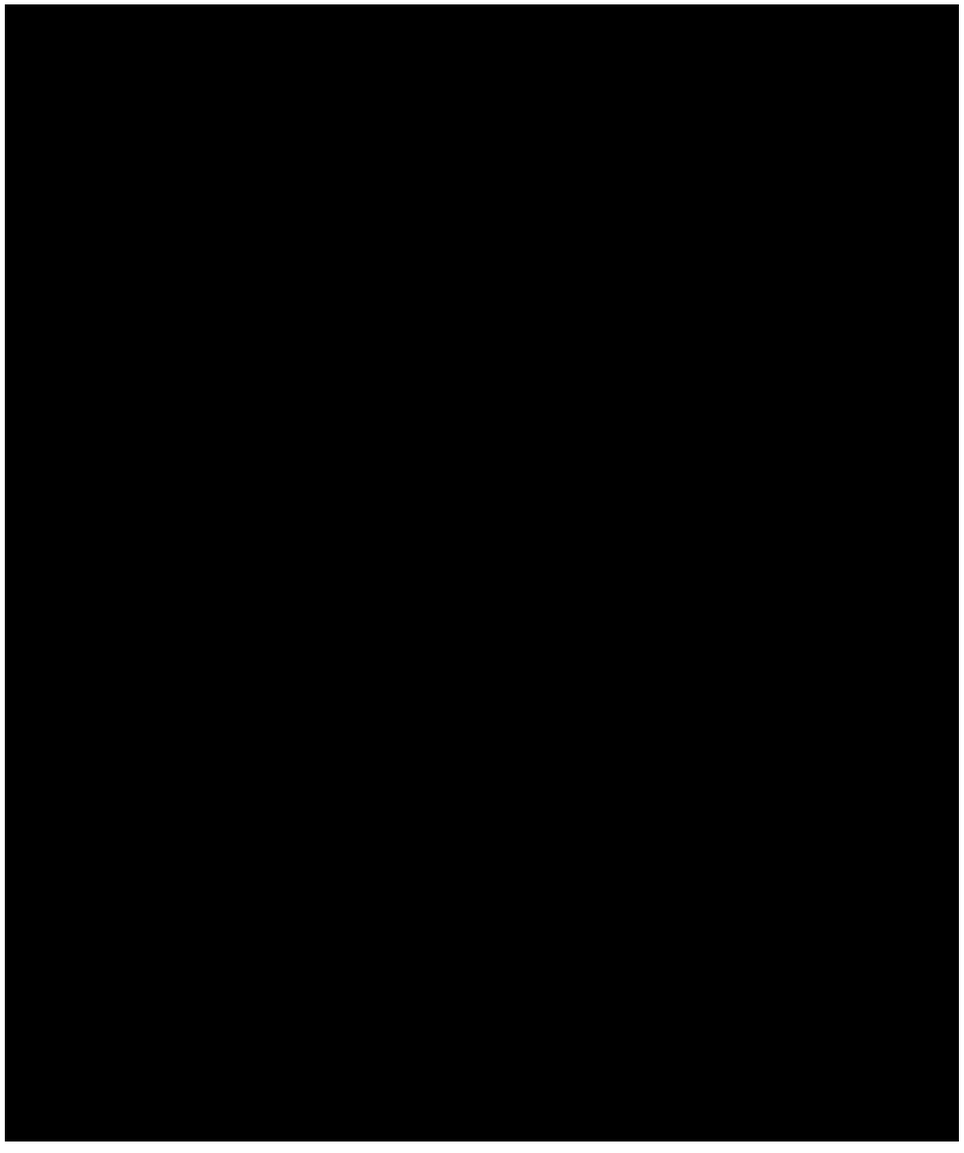

Figure 85. Map included in Supreme Court decision in *Louisiana v. Mississippi*, 202 U.S. 1, 10 (1906). (*Arrows along coast added*)

408. As discussed above, the Supreme Court did rely on its reasoning in that decision as evidence that Mississippi Sound is inland waters. In the *Alabama and Mississippi Boundary Cases* it looked back at the 1906 decision, noted that it had employed inland water principles in reaching its conclusion there, and determined that the decision, therefore, was evidence of an inland water claim. 470 U.S. 93, 107-109 (1985). It did not suggest that the maps attached to the earlier decision had any legal significance.

The special master disagreed, finding, as he had with the bird sanctuaries, that the lines were not constructed to establish maritime boundaries, were not a straight line at all but an attempt to parallel the coastline, and had not been drawn by the executive or legislative branches but by the judiciary.[409] Interestingly, the same special master later was appointed to handle the Mississippi Sound litigation. Those states made a straight baselines claim, which he also rejected, but neither state based its arguments on the 1906 Supreme Court maps.[410]

Other Executive Branch Lines

At least one other set of agency lines has been argued to have boundary significance. Prior to Alaskan statehood, the federal government drew a series of straight lines along the coast of Alaska which, like the Coast Guard's Inland Water Lines, separated regulatory regimes, this time for fishing. Alaska pointed to the lines not as Article 4 straight baselines but as evidence of a historic waters claim in the Cook Inlet case. The Supreme Court concluded that they were not intended as territorial boundaries, saying "the very method of drawing straight baselines conflicted with this country's traditional policy of measuring its territorial waters by the sinuosity of the coast, 381 U.S., at 167-169." *United States v. Alaska*, 422 U.S. 184, 199 (1975). Although the statement was made in a historic waters decision, it makes clear that the fisheries lines would not have supported a straight baselines claim.

No federal lines have been found to constitute Article 4 straight baselines. The states' various contentions did, however, play a significant role in developing a more systematic process for publicizing the federal boundary position. In 1970 the secretary of state established a Committee on the Delimitation of the United States Coastline. Known as the "Coastline Committee" or "Baseline Committee," the group is made up of representatives of federal agencies responsible for developing international policy and/or enforcing federal statutes off our coasts.[411] In less than a year the Committee had produced a set of charts depicting the territorial sea along the entire coast of the United States. The Committee has continued

409. The master did not expand on the latter element but it is a clear reference to the Court's prior statements that boundary delimitation is to be left to the branches of government responsible for the conduct of foreign affairs, not the judiciary. See, for example, *Louisiana Boundary Case*, 394 U.S. at 72-73.

410. *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 5-7. The states succeeded in their historic waters claims, making it unnecessary for the Supreme Court to consider the straight baseline arguments. *Alabama and Mississippi Boundary Cases*, 470 U.S. 93 (1985).

411. The Committee is an arm of the National Security Council's Law of the Sea Task Force. Its original membership included the Departments of State, Justice, Interior, Commerce, and Transportation, but other departments and agencies are encouraged to participate and often do so.

its work over the ensuing 28 years, updating those charts as required. The original charts were distributed to United States attorneys and federal maritime enforcement agencies as well as to foreign governments. More recently, the Committee's boundaries have been included on the National Ocean Service's large-scale charts of our coast and are easily available through that agency and commercial sources.

The United States' Pre-Convention Juridical Practice

The Supreme Court suggested in 1965 that if the United States had employed a straight baseline system prior to its ratification of the 1958 Convention a subsequent "contraction of a State's recognized territory . . . would be highly questionable." *United States v. California*, 381 U.S. 139, 168 (1965). It reiterated that position in 1969 saying "if that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana." *Louisiana Boundary Case*, 394 U.S. 11, 74 n.97 (1969).

It happens that the federal government had, over time, considered a number of methods for dealing with waters landward of barrier islands. One such scheme would have treated as inland all waters landward of barrier islands that are no more than 10 nautical miles apart. An area off the north slope of Alaska is screened by such islands, forming Stefansson Sound. Alaska was encouraged by the Court's statements in *California* and *Louisiana* and accumulated a mass of evidence in support of its theory that the United States had employed this 10-mile rule at least from 1903 through Alaskan Statehood and could not now alter it to the state's detriment.

The state's preparation was exhaustive, and in the middle of the case it received additional support. Special Master Armstrong concluded, in the Mississippi Sound case, that the United States had indeed employed the 10-mile rule for the period urged by Alaska in its special master proceedings. *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 53-54. Based in part upon that conclusion he recommended that Mississippi Sound be recognized as historic inland waters. That recommendation was adopted by the Court. *Alabama and Mississippi Boundary Case*s, 470 U.S. 93 (1985).[412]

But the historic evidence is not so clear as suggested in the Mississippi Sound Report. The United States pointed out in the Alaska litigation that

412. Interestingly the special master specifically ruled that the 10-mile policy did not prove Mississippi and Alabama's straight baseline claims. Report at 5-7. Thus, Mr. Armstrong provided a factual finding in support of Alaska's position but refused to take the ultimate step necessary to Alaska's case, a conclusion that the 10-mile rule amounted to a straight baseline system.

prior to 1958 the federal government had experimented with a number of juridical principles for dealing with waters landward of barrier islands. An example was its proposal to the 1930 Hague Codification Conference that would have assimilated such waters to the territorial sea.[413]

Alaska's expert witnesses, J. R. Victor Prescott and Jonathan Charney, testified that the Alaskan north slope is well suited to the use of straight baselines, numerous foreign nations have employed Article 4 in similar circumstances, and but for particular law of the sea interests the United States might also have done so by now.[414] But neither could say that the United States had actually implemented Article 4.

Ultimately, Special Master Mann concluded that the 10-mile rule had not existed as United States policy for the periods mentioned by the master and Court in the Mississippi Sound case. *United States v. Alaska*, Report of the Special Master of March 1996, at 127 and 150. The Court later agreed. *United States v. Alaska*, 521 U.S. 1, 21-22 (1997).[415]

We have focused on Louisiana's and Alaska's straight baseline claims because those states presented the most comprehensive evidence and arguments, based on actual agency line drawing schemes and prior federal juridical practice respectively. However, five other states have made straight baseline claims in tidelands cases.

First, California contended that straight baselines should be used to enclose the Santa Barbara Channel. The Court said that although permitted by international law, the United States had not elected that course and neither the judiciary nor the state could compel it. *United States v. California*, 381 U.S. 139, 168 (1965). Florida argued that a system of straight baselines should be used in the Florida Keys and Dry Tortugas Islands. Special Master

413. See: 4 Whiteman, *supra*, at 148 and *United States v. Alaska*, 521 U.S. 1, 17 (1997).

414. Dr. Prescott taught geography at the University of Melbourne, Australia, and is a widely published authority on international boundaries, including maritime boundaries. Mr. Charney is a professor of law at Vanderbilt University. He represented the Department of Justice at the birth of the Baseline Committee and was government counsel during trial of the *Louisiana Boundary* and Cook Inlet cases.

415. In addition to the inconsistency in federal theories through history, there is substantial evidence that whatever was espoused, it was not considered by the United States or the international community as a straight baseline system. Article 4 is acknowledged to have evolved from the Norwegian example, approved by the International Court of Justice in the Anglo-Norwegian *Fisheries Case*, [1951] I.C.J. Rep. 116. The majority of the Court in the *Fisheries Case* contrasted the United States' "arcs of circles" method of delimiting the territorial sea with the straight baselines under consideration. *Id.* at 129. Following the I.C.J. decision the attorney general asked the secretary of state whether the United States would be changing its policy to conform to the straight baseline system approved by the Court. Secretary Acheson responded that the International Court decision made straight baselines optional, not required, and the United States would not be adopting them. Letter of February 12, 1952, reproduced at 1 Shalowitz, *supra*, at 357; see also, 4 Whiteman, *supra*, at 178.

The United States has also been diligent in protesting foreign straight baselines that it believes do not conform to the requirements of Article 4 of the 1958 Convention (Article 7 of the 1982 Law of the Sea Convention). By 1995 at least 60 countries had drawn straight baselines and some 10 more had legislatively authorized straight baselines that had not yet been drawn. Roach and Smith, *United States Responses to Excessive Maritime Claims* 75, 2nd ed., 1996. The United States has either protested or asserted its right of innocent passage in 34 of those cases. *Id.* The United States has not only declined to draw straight baselines itself, it has maintained its traditional policy of maximizing high seas freedoms by actively contesting excessive foreign claims.

Maris reviewed the state's contentions and concluded that "the evidence in this case conclusively establishes that the United States has not adopted the straight baseline method . . . [for] the coastline of the State of Florida."[416] *United States v. Florida*, Report of the Special Master, October Term 1973, at 49. Mississippi and Alabama claimed straight baselines for Mississippi Sound on exactly the same theory urged by Alaska for the north slope; the United States had historically closed sounds with mouths of less than 10 nautical miles. *Alabama and Mississippi Boundary Cases*, Report of the Special Master of April 9, 1984, at 5. Special Master Armstrong referred to his prior experience with the straight baseline issue along the Louisiana coast and ruled consistently that there had been no contraction of state territory and Article 4 was not applicable. *Id.* at 7.[417]

Finally, and although the state did not strongly pursue a straight baseline claim, Special Master Hoffman touched on the issue in the *Massachusetts Boundary Case*. He noted that although parts of the United States' coastline are suited to Article 4, the federal government alone held the option to employ straight baselines and had elected not to do so. *Massachusetts Boundary Case*, Report of the Special Master, October Term, 1984, at 6.

The question would seem to be resolved. Despite extremely thorough work by counsel for the states, both the Court and its special masters have consistently held that the United States has not adopted Article 4 straight baselines. It seems unlikely that the issue will arise again.

International law provides the boundary delimitation principles discussed above, but the United States Supreme Court and its special masters have put meat on the bones of those principles. The law that they have developed will continue to be critical to the delimitation of maritime boundaries both here and abroad.

416. Judge Maris later recommended that the waters within three island groups — the lower Florida Keys, the Marquesas Keys, and the Dry Tortugas Islands — are inland waters enclosed by "straight lines drawn between those islands . . . ." Report at 52-53. That result had not been urged by either party and the United States took exception, arguing to the Court that the master's proposal could only be explained as a straight baseline system that he had already rejected. The Court returned the question to the master for further consideration and the parties stipulated that no such inland waters existed. *United States v. Florida*, 420 U.S. 531 (1975); Stipulation of December 11, 1975, signed by Solicitor General Robert H. Bork for the United States and Attorney General Robert L. Shevin for the State of Florida (Appendix A to Supplemental Report of the Special Master of December 30, 1975).

417. Interestingly, the master accepted the same alleged pre-Convention practice (the 10-mile rule) as evidence of a historic waters claim. The Court adopted that recommendation, leaving no reason for it to comment on the straight baselines arguments. *Alabama and Mississippi Boundary Cases*, 470 U.S. 93 (1985).

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 Inupiats 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 for such periods as the formation is determined to be above the level of mean high water. Additionally, 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 ambulation 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' 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.

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.

APPENDICES A TO H

Appendix A

Glossary of Terms Used

A

Ambulatory: Not stationary. Baselines from which maritime boundaries are measured ambulate with accretion and erosion causing ambulation of the boundaries themselves.

Ancient Title: A doctrine that may form the basis for the acquisition of territory that is considered, under international law, to be *terra nullius* or having no sovereign but susceptible of sovereignty. Closely related to the doctrine of historic title. Asserted by Massachusetts as an alternative to its historic title claim to Nantucket and Vineyard Sounds.

ANWR: The Arctic National Wildlife Refuge. A large federal wildlife refuge in the northeast corner of Alaska. Its coastal boundaries and the status of waters within those boundaries were among the issues litigated in *United States v. Alaska*, No. 84 Original.

Artificial Headlands: Man-made structures that form the mouths of inland water bodies. Although the Convention on the Territorial Sea and the Contiguous Zone refers to "natural" entrance points, the mouths of bays, rivers, and harbors may be formed by man-made features.

Artificial Islands: Offshore structures or features that do not meet the Convention's definition of "island" in that they were not "naturally formed." Mineral production platforms and spoil banks are examples. Artificial islands are not part of the baseline from which maritime zones are measured.

Assimilated to the Mainland: So closely related to the mainland as to be legally considered part of it. The Supreme Court determined in *United States v. Louisiana* that features that meet the Convention's definition of "island" may nevertheless be treated as part of the mainland. The Court provided criteria for making such determinations.

Assimilated to the Territorial Sea: The consequence of a pre-Convention proposal for dealing with water areas that lie between the mainland and offshore islands but are more than the breadth of the territorial sea from either. The proposal would have included such areas in the territorial sea. Article 4 of the Convention on the Territorial Sea and the Contiguous Zone permits such areas to be claimed as inland water. If straight baselines are not employed, the areas are high seas.

B

Baseline: The line from which maritime zones are measured. The coast line. A combination of the low-water line and closing lines across the mouths of inland water bodies.

Baseline Committee: A Committee of the federal government's Law of the Sea Task Force made up of representatives from federal agencies responsible for developing American international policy and/or enforcing domestic and international law in our various zones of maritime jurisdiction. The Committee's primary purpose has been to apply principles of international law to the coastal geography of the United States and produce descriptions of our maritime zones. Lines produced by the Committee are printed on large-scale charts

published by the National Ocean Service. Those lines form the basis for the federal government's litigation position in the tidelands cases. Also known as the "Coastline Committee."

Base Point: A point on the baseline, or coast line, that affects the outer limit of a maritime zone.

Bay: An indentation of water into land that meets the requirements of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. An inland water body.

Bisector of the Angle Test: One of a number of means for locating the natural entrance points to inland water bodies. Secondary to the 45-degree test. Used when no pronounced headland provides a terminus for the closing line.

Breakwater: A man-made structure extending seaward from the natural coastline which has an apparently continuous low-water line. Often constructed to affect the movement of water. A harborwork. Part of the coast line from which maritime zones are measured. Often contrasted with piers.

C

Cannon Shot Rule: Said to be the original criterion for establishing the breadth of the marginal sea. Advanced by Cornelius Van Bynkershoek in 1702 when cannon were said to have a range of approximately 3 miles.

Chapman Line: A tentative line proposed by the federal government as the "coast line" of the State of Louisiana. Based upon pre-Convention proposals for inland water delimitation that were superceded by the Supreme Court's adoption of the Convention's principles for Submerged Lands Act purposes. Named for Secretary Oscar L. Chapman of the Department of the Interior.

Clear Beyond Doubt: The standard of proof that the Supreme Court has suggested is necessary to prove a historic water claim in the face of a federal disclaimer of historic status.

Closing Line: The line dividing inland waters and the territorial sea at the mouth of a river, bay, or harbor.

Coast Guard Line: Lines constructed by the United States Coast Guard to separate areas of the sea where the Inland Rules of the Road apply from those where the International Rules are in effect. Found by the Supreme Court to have no bearing on the location of the coast line or inland waters as those terms are used in the Convention on the Territorial Sea and the Contiguous Zone.

Coast Line: The term used in the Submerged Lands Act to describe the low-water line and closing lines across the mouths of inland water bodies. The same as "baseline" in the Convention.

Coast Protective Works: Man-made structures erected along the coast, such as jetties and groins. Harborworks. Treated as part of the coast line for purposes of maritime zone delimitation.

Coastline: The water/land interface. The shoreline. A more general term than "coast line."

Coastline Committee: See: *Baseline Committee*.

Contiguous Zone: A zone seaward of the territorial sea in which coastal states may assert jurisdiction short of complete sovereignty. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone authorizes such a zone "to prevent infringement of its customs, fiscal, immigration or sanitary regulations in territory or territorial sea . . . ." Under the Convention the contiguous zone may extend no more than 12 miles from the coast line. See also: 1982 Law of the Sea Convention, Article 33.

Convention: Convention on the Territorial Sea and the Contiguous Zone.

Convention on the Continental Shelf: One of the four Conventions on the law of the sea adopted at Geneva in 1958. 15 U.S.T. 471.

Convention on the Territorial Sea and the Contiguous Zone: One of the four Conventions on the law of the sea adopted at Geneva in 1958 which, among other things, sets out principles for establishing the baseline from which maritime zones of jurisdiction will be measured. 15 U.S.T. 1606. Those principles were later adopted by the United States Supreme Court for purposes of implementing the Submerged Lands Act, 43 U.S.C. 1301 *et seq*. Sometimes referred to herein simply as "the Convention."

County Waters: An English predecessor to the modern concept of inland waters. According to Hale, the doctrine dated back to the early 14th century and provided that if waters were so narrow that the events on one side could be discerned from the opposite shore, the waters were *inter fauces terrae* and within the adjacent county. Massachusetts relied on the concept in its historic and ancient waters claims to Vineyard and Nantucket Sounds.

D

Disclaimer: A publicly stated federal position that the United States does not make a claim to particular waters. Disclaimers have been asserted to all alleged historic water claims in tidelands litigation. Prior to 1971 they were evidenced by federal litigation positions. Subsequent to 1971 they are also reflected in the Coastline Committee's boundary depictions on official government charts. It is such disclaimers that trigger the "clear beyond doubt" burden of proof in litigation to establish historic title.

Distributaries: Multiple branches of a river. The Mississippi River divides into numerous distributaries as it flows through the delta and enters the Gulf of Mexico through numerous mouths.

Diurnal Tide: A tide with a cycle of approximately one day. Having one high and one low tide per day. The typical tide in the Gulf of Mexico.

Double-Headed Bay: A pair of adjacent bays that share a central headland. If, when considered together, the two indentations meet the requirements of Article 7 of the Convention they may be combined to form a single juridical bay with a closing line joining their non-common headlands.

Dredged Channel: An artificially maintained sea lane extending from an inland water body into the marginal sea to accommodate vessel traffic through coastal shallows. Louisiana contended that such submerged features are "harborworks" and part of the coast line. The Supreme Court held otherwise.

E

English Mile: A measure of distance. 5280 feet. Also known as a statute mile. As contrasted with a nautical or geographic mile of 6080.2 feet.

English Seas: A maritime belt of sovereignty asserted around the British Isles by Charles I (1625-1649). Also called the "narrow seas."

Entrance Points: The points on the low-water line that are joined to create a closing line marking the seaward limits of inland waters.

Equal Footing Doctrine: The Constitutional doctrine that states admitted to the Union after the adoption of the Constitution enter on an equal footing with the original states. In tidelands litigation this doctrine was the basis for the Supreme Court's

determination that California did not enter the Union with rights in the marginal sea because the original 13 states held no such rights. On the other hand, subsequently admitted states did acquire sovereignty over lands beneath inland waters because the original states had entered with such rights.

Equidistant Line: A line that is at all times equidistant from two adjacent or opposite coast lines. It is, in the absence of special circumstances, the preferred method for constructing lateral offshore boundaries. Used to continue the common boundary between Texas and Louisiana (in the Sabine River) to the limit of their Submerged Lands Act grants. Also known as a "median line."

Excepted To: The term used to describe a litigant's request to the Supreme Court that it not adopt a special master's finding or recommendation in an Original action. Most tidelands cases have been initiated in the Supreme Court pursuant to Article III, Section 2 of the Constitution. They have then been assigned, by the Court, to a special master to take evidence and report his findings and recommendations to the Court. At that stage the parties are invited to "take exception" to the master's findings and recommendations.

F

Fallback Line: A line of 24 miles length constructed within an overlarge bay to define the limit of inland waters. Article 7 of the Convention provides that the inland waters of a bay will extend to a line between its natural entrance points only if those points are 24 miles or less apart. The inland waters of a bay that meets all requirements of Article 7 except for the 24-mile maximum mouth extend seaward to an arbitrary line of 24 miles constructed within the bay such that the maximum water area is enclosed.

Fictitious Bay: A water area enclosed by the mainland and offshore islands. Some pre-Convention proposals would have treated such areas as inland waters. Others would have treated them as territorial sea, even though farther from land than the claimed breadth of the territorial sea. Under the Convention such areas are territorial seas and high seas unless enclosed by Article 4 straight baselines.

Forty-five Degree Test: The preferred method of locating the proper headlands and entrance points for an inland water body. The test determines whether the coastline between two potential entrance points faces more on the inland water body or the open sea. If the former, the more seaward potential headland is employed; if the latter, it is rejected and the more landward option is similarly evaluated.

Fringing Islands: A series of islands that fringe, or mask, a mainland coast. Often known as barrier islands. Prior to the Convention there was no international agreement on how to treat the waters landward of such islands. The Convention provides two means. The coast line of the mainland and each island may be used separately as baselines for measuring zones of maritime jurisdiction, leaving open the possibility of high seas enclaves or cul-de-sacs in the intervening waters. Article 4 straight baselines may also be adopted, making all intervening waters inland.

G

Garrett-Scudder Line: A series of straight lines drawn along portions of the Alaska coast for fisheries administration purposes and said by Alaska to evidence a claim of inland water sovereignty in support of its historic waters claim to Cook Inlet. The Supreme Court disagreed.

Geographic Mile: A unit of linear measure equal to one minute of latitude at the equator. 6080.2 feet. Also known as a nautical mile. Unless otherwise noted, references to a "mile" in this work are to the geographic or nautical mile.

Groin: An artificial structure, like a small jetty, extending from the shore. Usually for the purpose of preventing beach erosion. Treated as a harborwork. Part of the coast line from which Submerged Lands Act grants and zones of maritime jurisdiction are measured.

H

Harbor: A place where ships may find shelter. A harbor may be natural or artificially constructed. In either case its waters are inland. The limits of its inland waters are determined, at least in part, by their use as a harbor rather than the mere application of delimitation principles to geography, as is the case with bays and rivers.

Harborwork: Artificial structures erected to protect the coast or provide shelter. Treated as part of the coast line pursuant to Article 8 of the Convention.

Headland: A geographic feature that serves to give an inland water body its landlocked nature. A headland may be natural or man-made. It must be above mean low water but not by any significant extent. It will usually provide an appreciable change in the direction of the coast.

High-Seas Enclave: An area of high seas entirely surrounded by territorial seas generated by the mainland and islands that lie more than twice the breadth of the territorial sea offshore.

Historic Bay: A water area over which the coastal state has asserted sovereignty, over a long period of time, with the acquiescence of foreign nations. The geographic requirements for a juridical bay, as set out in Article 7 of the Convention, need not be met.

Historic Boundary: As used in this volume, a state's boundary at the time it entered the Union. Congress, through the Submerged Lands Act, permitted states bordering on the Gulf of Mexico to prove historic boundaries of up to 3 marine leagues (9 nautical miles) offshore. Their Submerged Lands Act grants would then extend to the lesser of those lines or lines 3 leagues from the present coast line. Florida and Texas provided such proof and received the extraordinary grant. Louisiana, Mississippi, and Alabama could not.

Historic Inland Waters: Water areas over which inland water jurisdiction has been asserted for a substantial period of time with the acquiescence of foreign states. See: *Historic Bay.*

Historic Territorial Seas: Water areas over which territorial sea jurisdiction has been asserted for a substantial period of time with the acquiescence of foreign states.

I

Inland Water Line: A series of straight lines developed by the Coast Guard to separate areas that are subject to its Inland Rules of the Road from those to which the International Rules apply. The lines have no bearing on inland water determinations for Convention or Submerged Lands Act purposes. See: *Coast Guard Line*.

Inland Waters: Waters landward of the baseline from which the marginal seas are measured and over which complete sovereignty is exercised. Also known as "internal waters."

Innocent Passage: The right of a vessel to navigate through the territorial sea of a foreign state for purposes of traveling from one area of high seas to another or passing between the high seas and the inland waters of the coastal state.

Inter Fauces Terrae: Landlocked. Literally "within the jaws of the land." The initial requirement for juridical bay status under Article 7 of the Convention.

Internal Waters: See: *Inland Waters.*

Intersected Islands: Islands that lie on a direct line between the mainland headlands of an inland water body, thereby forming multiple mouths to that body.

J

Jetty: A substantial, artificial structure erected on the coast for the purpose of extending the flow of a river or protecting a harbor or beach. A harborwork. Part of the coast line for Convention and Submerged Lands Act purposes. See: *Breakwater*.

Juridical Bay: An indentation into the mainland that qualifies for inland water status under the criteria of Article 7 of the Convention. Because the provisions of Article 7 are self-executing, a coastal state need not put foreign nations on notice of the inland water status of juridical bays.

K

King's Chambers: Coastal waters within lines between distant headlands that "squared off" the British Isles. Proclaimed by James I in 1604, the waters constituted a neutral zone within which foreign warships were prohibited from engaging in combat. The Chambers have no continuing significance.

L

Landlocked: Separated from the open sea by mainland headlands. For practical purposes, any indentation into the mainland that meets the requirements of Article 7 of the Convention.

Lateral Offshore Boundary: The offshore extension of land boundaries between adjacent coastal states to the limits of their offshore jurisdiction. In the absence of agreement such boundaries are described as a median or equidistant line. Convention, Article 12. The Texas/Louisiana, South Carolina/Georgia, and Maine/New Hampshire lateral boundaries have been litigated and are discussed in this volume.

Law of the Sea Convention: The United Nations' 1982 Convention that, for most purposes, supercedes the four Geneva Conventions of 1958. The "baseline" provisions of the Law of the Sea Convention do not deviate significantly from those of the Convention on the Territorial Sea and the Contiguous Zone. The Supreme Court's adoption of the 1958 principles for purposes of the Submerged Lands Act is not affected by the new Convention. Entered into force on November 16, 1994. The United States has recognized most provisions of the 1982 Convention as customary international law (including the baseline provisions) but, at the time of this writing, has not ratified the Convention.

Limits of the Tides Test: A proposal that river waters, running upstream to the limit of tidal effect, should be included within the area of the water body into which they flow for purposes of determining whether that body qualifies as inland water (that is, meets the semicircle test of Article 7).

Littoral: Bordering on the sea.

Low-Tide Elevation: A naturally formed area of land that is surrounded by and above water at low tide but below water at high tide. Low-tide elevations serve as part of the coast line when they are within the breadth of the territorial sea of the mainland (either uplands or inland waters) or an island. Convention, Article 11.

M

Marginal Sea: The maritime belt over which a coastal state asserts sovereignty. See: *Territorial Sea*.

Marine League: Three nautical, or geographic, miles.

Median Line: See: *Equidistant Line*.

Mixed Tides: Two high and two low tides per day. Typical of the Pacific coast of the United States.

Mouth: Entrance to an inland water body. The line that divides inland waters from the territorial sea.

Mudlumps: Small islands found near the various mouths of the Mississippi River.

Multiple Mouths: More than one entrance to an inland water body. The result of islands either intersected by or in the vicinity of, and screening a large proportion of, the closing line between mainland-to-mainland headlands.

N

Narrow Seas: See: *English Seas*.

NPR-A: National Petroleum Reserve–Alaska. A federal reservation along the central Arctic coast of Alaska. The United States and Alaska disputed the location of its coastal boundary and title to certain submerged lands within that boundary in *United States v. Alaska*, No. 84 Original.

Natural Entrance Points: Points on the headlands of an inland water body that serve as the termini of its closing line.

Naturally Formed: Composed of natural substance which has been naturally placed. One of the requirements for island and low-tide elevation status under Articles 10 and 11 of the Convention.

Nautical Mile: See: *Geographic Mile*.

Navigable Waters: Waters that are either tidally influenced or navigable in fact.

Normal Baseline: The low-water line as adopted for large-scale charts by the official government charting agency.

O

Original Action: A legal action initiated in the Supreme Court, rather than a lower federal court, as provided in Article III, Section 2 of the Constitution. All but one of the tidelands cases discussed herein were filed as Original actions in the Supreme Court.

OCSLA: The Outer Continental Shelf Lands Act. 43 U.S.C. 1331 *et seq.* Federal legislation which, for the first time, provided a mechanism for the administration of mineral resources seaward of the territorial sea. Enacted shortly after passage of the Submerged Lands Act in 1953.

Overall-Unit-Area: The area along the southern California coast between the mainland and a line running from Point Conception to Point Loma around the seaward side of all islands. Unsuccessfully claimed by California as part of its inland waters.

Overlarge Bay: An indentation into the mainland that meets all requirements of Article 7 for inland water status except that its entrance is more than 24 miles across. Cook Inlet, Alaska, is an example. Article 7 provides that in such circumstances a "fallback line" of 24 miles shall be drawn within the indentation to enclose the maximum possible water area.

P

Paramount Rights: The term used by the Supreme Court to describe the federal interest in offshore submerged lands prior to passage of the Submerged Lands Act.

Pier: An artificial structure erected on the coast and extending into the sea. Distinguished from jetties and breakwaters in that its platform is generally supported by pilings that do not produce a continuous low-water line and are not intended to affect the movement of water or provide a coast protective function.

Pollard Rule: The proposition that subsequently admitted states entered the Union on an equal footing with the original 13 states, thereby acquiring title to submerged lands beneath the inland navigable waters within their boundaries.

Port: A protected place along the coast in which ships may take refuge from storms or transfer cargo. A harbor. Protection may be provided by natural or artificial features. The waters of a port are inland.

Q

Quitclaim: A release or relinquishment of all of the grantor's interest without a warranty of title.

R

Roadstead: An area of the sea used for the anchorage of vessels and transhipment of cargo, usually without the protection from weather associated with ports and harbors. Roadsteads are part of the territorial sea but are not inland waters.

S

Screening Islands: Islands that lie on or near the mainland-to-mainland closing line across the mouth of an inland water body and form multiple mouths to that body.

Self-Executing: Occurring by operation of law. Needing no further act for implementation.

Semicircle Test: The requirement of Article 7 that to qualify as a juridical bay an indentation in the coast must, at a minimum, contain a water area equivalent to that of a semicircle whose diameter is that of the indentation's mouth.

Shortest Distance Test: The method for locating the entrance point of an inland water body when only one distinct headland exists. In such cases the shortest possible line is drawn from that headland to the opposite coast.

Solicitor General: The official in the United States Department of Justice who is responsible for all federal litigation in the United States Supreme Court.

Special Circumstances: Considerations that might justify adopting something other than an equidistant line as a lateral boundary dividing the offshore jurisdiction of adjacent states. Examples include historic assertions of jurisdiction, navigation channels, offshore islands, or any other physical or geographic feature that might result in an inequitable division of the seabed.

Special Master: An individual appointed by a court to conduct evidentiary proceedings, hear arguments, and report his findings and recommendations. The Supreme Court used special masters for each of the tidelands' Original actions that included the need for significant factual findings. (Those upon which the parties could agree to all relevant facts, or which involved only legal determinations, have been resolved by the Court without the help of masters.) As a matter of law the Supreme Court reviews the entire record of an Original action. As a factual matter the Court almost always agrees with its masters' conclusions. Special masters have been highly respected senior federal judges, academics, and private practitioners.

Spoil Bank: An artificial formation created by the deposit of dredged materials on the seabed. Spoil banks that are connected to the natural coastline are part of the baseline from which maritime zones are measured. Those that are unattached are artificial islands and are not part of the baseline.

Statute Mile: 5280 feet. Also known as a "land mile" or "English mile."

Straight Baselines: An artificial coast line from which maritime zones are measured. Appropriate for coastlines that are deeply indented or masked by a fringe of islands. Article 4 of the Convention provides the rules for straight baselines. The United States has never adopted such baselines.

Submerged Lands Act: Federal legislation that granted to the coastal states federal rights to natural resources within 3 nautical miles (up to 9 miles for Texas and the Gulf coast of Florida) of the coast line. 43 U.S.C. 1301 *et seq.*

Subsidiary Water Body: A river that empties into, or bay that opens onto, another water body. Numerous questions have arisen in the tidelands litigation as to whether or when the area of subsidiary water bodies may be included for purposes of applying the semicircle test to a primary indentation under consideration for inland water status.

T

Ten-Mile Rule: A pre-Convention proposal for coast line delimitation that would have included as inland any waters lying between the mainland and offshore islands that were so closely grouped that no entrance to the intervening waters exceeded 10 nautical miles. Under the Convention such areas can, in most cases, be enclosed with Article 4 straight baselines.

Territorial Sea: The offshore belt in which a coastal state has exclusive jurisdiction. The territorial sea may not extend more than 12 nautical miles from the coast line. See: *Marginal Sea*.

Territorial Waters: The territorial sea and inland waters of a state.

Thalweg: The middle of the main navigation channel of a river. Often serving as the boundary between two states. As opposed to the geographic middle of the river, which may also be used as a boundary.

Three-League Boundary: The historic offshore boundaries of Texas and of Florida in the Gulf of Mexico. The seawardmost extent of Texas's and Florida's Submerged Lands Act grant in the Gulf.

Tidelands: The zone between the mean high-water line and the mean low-water line, commonly referred to as the "beach." Waters above the tidelands are inland, being landward of the coast line. Despite the traditional reference to "tidelands litigation," the United States never questioned state jurisdiction over these lands. The "tidelands cases" involved only submerged lands seaward of the low-water line.

Tidelands Cases: That body of litigation between the federal government and the coastal states that has determined ownership over submerged lands and resources seaward of the coast line and defined that coast line through the application of international law.

Truman Proclamation: A proclamation through which the United States unilaterally claimed exclusive jurisdiction over the resources of its continental shelf beyond the marginal sea. Presidential Proclamation No. 2667 of September 28, 1945, 59 Stat. 884.

W

Well-Marked Indentation: An indentation of water into the mainland that is more than a mere curvature of the coast. The first requirement for juridical bay status under Article 7 of the Convention.

Appendix B

Table of Authorities

Judicial Decisions and Decrees

Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845)

Post Office v. Estuary Radio Ltd. [1968] 2 Q.B. 740

The Queen v. Keyn [1876] L.R. 2 Exch. Div. 63

Shively v. Bowlby, 152 U.S. 1 (1894)

Skiriotes v. Florida, 313 U.S. 69 (1941)

Soult v. Africaine, 22 Fed. Cases 13179 (D.S.C. 1804)

Temple of Preah Vihear, 1961 I.C.J. 6

Texas v. Louisiana, 414 U.S. 1107 (1973)

Texas v. Louisiana, 416 U.S. 965 (1974)

Texas v. Louisiana, 426 U.S. 465 (1976)

Texas v. Louisiana, 431 U.S. 161 (1977)

United States v. Alaska, 423 F.2d 764 (9th Cir. 1970), *cert. denied,* 400 U.S. 967 (1970)

United States v. Alaska, 352 F.Supp. 815 (D.Ak. 1972), *aff'd,*497 F.2d 1155 (9th Cir. 1974), *rev'd,* 422 U.S. 184 (1975)

United States v. Alaska, 503 U.S. 569 (1992)

United States v. Alaska, 521 U.S. 1 (1997)

United States v. California, 329 U.S. 689 (1946)

United States v. California, 332 U.S. 19 (1947)

United States v. California, 332 U.S. 804 (1947)

United States v. California, 334 U.S. 825 (1948)

United States v. California, 381 U.S. 139 (1965)

United States v. California, 382 U.S. 448 (1966)

United States v. California, 432 U.S. 40 (1977)

United States v. California, 436 U.S. 32 (1978)

United States v. California, 447 U.S. 1 (1980)

United States v. California, 449 U.S. 408 (1981)

United States ex rel. Greathouse v. Dern, 289 U.S. 352 (1933)

United States v. Florida, 363 U.S. 121 (1960)

United States v. Florida, 404 U.S. 998 (1971)

United States v. Florida, 420 U.S. 531 (1975)

United States v. Florida, 425 U.S. 791 (1976)

United States v. Florida and Texas, 434 U.S. 1031 (1978)

United States v. Grush, 26 Fed. Cas. 48 (C.C. D. Mass. 1829) (No. 15,268)

United States v. Holt State Bank, 270 U.S. 49 (1926)

United States v. Louisiana, 339 U.S. 699 (1950)

United States v. Louisiana, 340 U.S. 899 (1950)

United States v. Louisiana, 354 U.S. 515 (1957)

United States v. Louisiana, 363 U.S. 1 (1960)

United States v. Louisiana, 395 U.S. 901 (1969)

United States v. Louisiana, 422 U.S. 13 (1975)

United States v. Louisiana, 452 U.S. 726 (1981)

United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985)

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11 (1969)

United States v. Louisiana (Louisiana Boundary Case), 420 U.S. 529 (1975)

United States v. Louisiana (Texas Boundary Case), 389 U.S. 155 (1967)

United States v. Louisiana (Texas Boundary Case), 394 U.S. 1 (1969)

United States v. Louisiana (Texas Boundary Case), 394 U.S. 836 (1969)

United States v. Maine, et al., 420 U.S. 515 (1975)

United States v. Maine, et al., 421 U.S. 958 (1975)

United States v. Maine, et al., 423 U.S. 1 (1975)

United States v. Maine (Massachusetts Boundary Case), 452 U.S. 429 (1981)

United States v. Maine (Massachusetts Boundary Case), 475 U.S. 89 (1986)

United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985)

United States v. Midwest Oil Co., 236 U.S. 459 (1915)

United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973)

United States v. Republic Steel Corp., 362 U.S. 482 (1960)

United States v. San Francisco, 310 U.S. 16 (1940)

United States v. Sorina, No. 74-325 (S.D. Tx.. Sep. 9, 1974), *aff'd* without opinion, 511 F.2d 1401 (5th Cir.1975)

United States v. Texas, 339 U.S. 707 (1950)

Utah v. United States, 394 U.S. 89 (1969)

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987)

Vermont v. New York, 417 U.S. 270 (1974)

Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948)

Warner v. Replinger, 397 F.Supp. 350 (D.R.I. 1975), *aff'd sub nom., Warner v. Dunlap,* 532 F.2d 767 (1st Cir. 1976), *petition for cert. filed sub nom., Ball v. Dunlop,* Docket No. 75- 6990

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971)

SPECIAL MASTERS' REPORTS

Georgia v. South Carolina, Report of October Term 1975, Judge Walter E. Hoffman

New Hampshire v. Maine, Report of October 8, 1975, Retired Justice Tom C. Clark

Texas v. Louisiana, Report of October Term 1974, Judge Robert Van Pelt

United State v. Alaska, Report of March 1996, Mr. J. Keith Mann

United States v. California, Report of October 14, 1952, Mr. William H. Davis

United States v. California, Report of August 20, 1979, Judge Alfred A. Arraj

United States v. Florida, Report of December 1973, Judge Albert B. Maris

United States v. Florida, Report of December 30, 1975, Judge Albert B. Maris

United States v. Louisiana, Report of July 31, 1974, Mr. Walter P. Armstrong, Jr.

United States v. Louisiana (Alabama and Mississippi Boundary Cases), Report of April 9, 1984, Mr. Walter P. Armstrong, Jr.

United States v. Louisiana (Alabama and Mississippi Boundary Cases), Report of March 16, 1987, Mr. Walter P. Armstrong, Jr.

United States v. Maine, et al., Report of August 27, 1974, Judge Albert B. Maris

United States v. Maine (Massachusetts Boundary Case), Report of October Term 1979, Judge Walter E. Hoffman

United States v. Maine (Massachusetts Boundary Case), Report of May 26, 1981, Judge Walter P. Hoffman

United States v. Maine (Massachusetts Boundary Case), Report of October Term 1984, Judge Walter E. Hoffman

United States v. Maine (Rhode Island, New York), Report of October Term 1983, Judge Walter E. Hoffman

BIBLIOGRAPHY

Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation,* The Hydrographic Society, Special Publication No. 2 (2nd ed. Rev. 1978)

Boggs, *Delimitation of Seaward Areas Under National Jurisdiction,* 45 American Journal of International Law 240 (1951)

Bouchez, *The Regime of Bays in International Law* (1964)

Bowett, *The Legal Regime of Islands in International Law* (1979)

Churchill and Lowe, *The Law of the Sea* (1983)

Coastal States Organization, Inc., *Putting the Public Trust Doctrine to Work* (2nd ed. 1997)

Department of State, *Sovereignty of the Seas* (1969)

Fachille, *Traite de Droit International Public,* pt. II (8th ed. 1925)

Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 International and Comparative Law Quarterly (1959)

Fulton, *The Sovereignty of the Sea* (1911)

Gidel, *Le Droit International Public de la Mer* (1934)

Griffen, Jones and McAlinden, *Establishing Tidal Datum Lines for Sea Boundaries* (1967)

Griffin, *The Emerging Law of Ocean Space*, 1 The International Lawyer (1966)

Gross, *The Maritime Boundaries of the States*, 64 Michigan Law Review (1966)

1 Hackworth, *Digest of International Law* (1940)

Hodgson, *Islands: Normal and Special Circumstances*, Law of the Sea: The Emerging Regime of the Oceans (Gamble and Pontecorvo eds. 1974)

Hodgson and Alexander, *Towards an Objective Analysis of Special Circumstances*, Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 13 (1972)

International Hydrographic Bureau, *Limits of the Oceans and Seas*, Special Publication No. 23 (3rd ed. 1949)

Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927)

Johnson, *Artificial Islands*, 4 International Law Quarterly (1951)

1 Lauterpacht, *Oppenheim's International Law* (8th ed. 1955)

Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa Law Review 631 (1986)

Lumb, *The Law of the Sea and Australian Off-Shore Areas* (2nd ed. 1978)

McDougal and Burke, *The Public Order of the Oceans* (1962)

1 Moore, *International Law Digest* (1906)

1 O'Connell, *The International Law of the Sea* (Shearer ed. 1984)

Papadakis, *The International Legal Regime of Artificial Islands* (1977)

Pearcy, *Geographical Aspects of the Law of the Sea*, 49 Annals of the Association of American Geographers No. 1 (1959)

Pearcy, *Measurement of the U.S. Territorial Sea*, Department of State Bulletin (June 29, 1959)

Prescott, *The Maritime Political Boundaries of the World* (1985)

Proudfoot, *Measurement of Geographic Area*, U.S. Department of Commerce (1946)

Reed, Koester and Briscoe, *The Reports of the Special Masters of the Supreme Court in the Submerged Land Cases 1949-1987* (1991)

Roach and Smith, *United States Responses to Excessive Maritime Claims* (2nd ed. 1994)

1 Shalowitz, *Shore and Sea Boundaries* (1962)

2 Shalowitz, *Shore and Sea Boundaries* (1964)

Shalowitz, *The Concept of a Bay as Inland Waters*, Surveying and Mapping, Vol. XIII, No. 4 (1953)

Smith, *A Geographical Primer to Maritime Boundary Making*, 12 Ocean Development and International Law Journal (1982)

Sohn and Gustafson, *The Law of the Sea* (1984)

Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* (7th ed. 1993)

Strohl, *The International Law of Bays* (1963)

Swarth, *Offshore Submerged Lands, An Historical Synopsis*, U.S. Department of Justice, Land and Natural Resources Division Journal, Vol. 6, No. 3 (April 1968)

Symmons, *The Maritime Zones of Islands in International Law* (1979)

Teutenberg, *The Evolution of the Law of the Sea: A Study of Resources and Strategy With Special Regard to Polar Regions* (1984)

United Nations, *Historic Bays*, Memorandum by the Secretariat of the United Nations, A/CONF. 13/1

United Nations, *Juridical Regime of Historic Waters, Including Historic Bays*, 2 Yearbook of the International Law Commission, U.N. Doc. A/CN.4/143 (1962)

4 Whiteman, *Digest of International Law* (1965)

Appendix C

Relevant Portions of the Submerged Lands Act, As Amended

Codified at 43 United States Code 1301 *et seq.*

1301. Definitions

When used in this subchapter and subchapter II of this chapter —

(a) The term "lands beneath navigable waters" means —

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such States became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such States became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

1311. Rights of States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources with such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

1312. Seaward boundaries of States

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating

the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or it has been heretofore approved by Congress.

1313. Exceptions from confirmation and establishment of States' title, power and rights

There is excepted from the operation of section 1311 of this title —

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

Appendix D

A Partial List of Federal Statutes Whose Administration and Enforcement Require Application of the Coastline Principles Explored in this Volume

Although the maritime boundary principles discussed in this volume have, for the most part, been developed in litigation under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, they are equally important to defining the geographic reach of innumerable other federal and state statutes—both civil and criminal. The following is a list of common statutory phrases whose definition is dependent on the application of these principles.

Baseline
Coastline (or Coast Line)
Coastal Waters
Coastal Zone
Contiguous Zone
Continental Shelf
Customs Zone
High Seas
Marine Environment
Maritime Environment
Navigable Waters
Navigable Waters of the United States
Ocean Waters
Territorial Limits of the United States
Territorial Sea (or Seas)
Territorial Waters
Territorial Waters of the United States
Territory
Territory and Waters
Seaward Boundary of a State
United States
Waters of the United States
Waters Subject to the Jurisdiction of the United States

Federal statutes whose enforcement requires application of the coast line principles discussed in this volume. [1]

Travel Control of Citizens and Aliens During War, 8 U.S.C. 1185
Powers of Immigration Officers, 8 U.S.C. 1357

Supply to Foreign Naval Vessels, 10 U.S.C. 7227
Maritime Prizes During War, 10 U.S.C. 7651

Safety of Naval Vessels, 14 U.S.C. 91

Atlantic Tunas Convention Act, 16 U.S.C. 971
Eastern Pacific Tuna Fishing Act, 16 U.S.C. 972
Marine Mammal Protection Act, 16 U.S.C. 1362
Coastal Zone Management Act. 16 U.S.C. 1451
Endangered Species Act, 16 U.S.C. 1538
Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1802
Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851
Driftnet Impact Monitoring Assessment and Control Act of 1987, 16 U.S.C. 1822, note
Salmon and Steelhead Conservation and Enhancement Act, 16 U.S.C. 3302
North Atlantic Salmon Fishing Act, 16 U.S.C. 3606
Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. 4701

Gambling Ships, 18 U.S.C. 1083
Destruction or Misuse of Vessel, 18 U.S.C. 2274

Tariff Act of 1930, 19 U.S.C. 1401
Aviation Smuggling, 19 U.S.C. 1590
U.S.–Canada Free Trade Agreement Act, 19 U.S.C. 2112

Submarines, 22 U.S.C. 451
International Narcotics Control, 22 U.S.C. 2291

Internal Revenue Code, 26 U.S.C. 48, 274, 638

1. Taken, in part, from Executive Branch submissions to the United States House of Representatives Merchant Marine and Fisheries Committee on its consideration of H.R. 3842, a bill to extend the territorial sea and contiguous zones of the United States. l02d Cong., 2d sess.

Foreign Sovereign Immunities Act, 28 U.S.C. 1603

Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1403

High Seas and Inland Demarcation Lines, 33 U.S.C. 151
River and Harbor Act, 33 U.S.C. 403
Anchorage Grounds, 33 U.S.C. 471
Longshore Workers Compensation, 33 U.S.C. 902
National Sea Grant College Program Act, 33 U.S.C. 1122
Vessel Bridge-to-Bridge Communications Act, 33 U.S.C. 1201
Ports and Waterways Safety Act, 33 U.S.C. 1223
Clean Water Act, 33 U.S.C. 1251, 1311
Ocean Dumping Act, 33 U.S.C. 1401
Oil Pollution Act of 1990, 33 U.S.C. 2701
Deepwater Ports Act, 33 U.S.C. 1501, 1502
International Regulations for Preventing Collisions at Sea, 33 U.S.C. 1601
National Ocean Pollution Planning Act, 33 U.S.C. 1702
Prevention of Pollution from Ships, 33 U.S.C. 1902
Shore Protection from Municipal or Commercial Waste, 33 U.S.C. 2601

Ocean Thermal Energy Conversion Act, 42 U.S.C. 9101
Superfund, 42 U.S.C. 9601

Submerged Lands Act, 43 U.S.C. 1301
Outer Continental Shelf Lands Act, 43 U.S.C. 1331
Offshore Oil Pollution Fund, 43 U.S.C. 1811

Salvaging Operations by Foreign Vessels, 46 U.S. app. 316(d)
Death on the High Seas by Wrongful Act, 46 U.S.C. 767
Jones Act [requiring use of U.S. vessels], 46 U.S.C. 883
Vessel and Seaman Act, 46 U.S.C. 2101
Operation of Vessels Generally, 46 U.S.C. 2301
Carriage of Liquid Bulk Dangerous Cargoes, 46 U.S.C. 3701
Uninspected Vessels Generally, 46 U.S.C. 4101
Recreational Vessels, 46 U.S.C. 4301
Uninspected Commercial Fishing Industry Vessels, 46 U.S.C. 4501
Load Lines, 46 U.S.C. 5101
Reporting Marine Casualties, 46 U.S.C. 6101
State Pilotage, 46 U.S.C. 8501
Commercial Fishing Industry Vessel Anti-Reflagging Act, 46 U.S.C. 12108

Recovery for Injury to or Death of a Seaman, 46 U.S.C. app. 688
Time Limits for Salvage Suits, 46 U.S.C. app. 730
Drug Abuse Prevention on Board Vessels. 46 U.S.C. app. 1903

Jurisdiction of District Court, 47 U.S.C. 33
Vessels in Distress, 47 U.S.C. 321

Puerto Rico, 48 U.S.C. 749
Trust Territories of the Pacific Islands, 48 U.S.C. 1681
Territorial Submerged Lands, 48 U.S.C. 1705

Federal Aviation Administration, 49 U.S.C. 1301
National Transportation Safety Board Act, 49 U.S.C. app. 1903(a)(1)(E)

Captain of the Port, 50 U.S.C. 191

Appendix E

Baseline Provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 Convention on the Law of the Sea Compared

1958	1982
Article 3 [normal baseline] Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.	Article 5 Normal baseline Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.
[no comparable provision]	Article 6 Reefs In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

Article 4 [straight baselines]	Article 7 Straight baselines
1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.	1. [identical]
[no comparable provision]	2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.
2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.	3. [identical to paragraph 2]
3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.	4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage.	5. [identical to paragraph 4]
5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.	
6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.	[no comparable provision, but see article l6]
	6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.
Article 6 [outer limit of the territorial sea] The outer limit of the territorial sea is the line every point on which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.	Article 4 Outer limit of the territorial sea [identical to Article 6]

Article 7
[juridical bays]

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

Article 10
Bays

[“these articles” changed to “this Convention”; remainder of article is identical]

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.
6. The foregoing provisions shall not apply to so-called "historic" bays, or to any case where the straight baseline system provided for in article 4 is applied.

Article 8
[harborworks]

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming a part of the coast.

Article 9
[roadsteads]

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.

Article 11
Ports

[first sentence identical, new second sentence added]

Off-shore installations and artificial islands shall not be considered as permanent harbour works.

Article 12
Roadsteads

[first sentence identical, second sentence deleted from 1982 Convention, but see article 16]

Article 10 [islands]	Article 121 Regime of islands
1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. 2. The territorial sea of an island is measured in accordance with the provisions of these articles.	1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.
Article 11 [low-tide elevations]	Article 13 Low-tide elevations
1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.	[identical]

Article 12 [lateral boundaries]	Article 15 Delimitation of the territorial sea between States with opposite or adjacent coasts
1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.	[first sentence is identical] [second sentence is amended to read:] The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance herewith.
2. The line of delimitation between the territorial sea of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.	[no comparable provision, but see article 16]
Article 13 [rivers]	Article 9 Mouths of rivers
If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.	[identical, but see article 16]

Article 14
Combinations of methods for determining baselines

[no comparable provision]

The coastal State may determine baselines in turn by any of the methods provided for in the foregoing articles to suit different conditions.

Article 16
Charts and lists of geographical co-ordinates

[no comparable provision]

1. The baselines for measuring the breadth of the territorial sea determined in accordance with articles 7 [straight baselines], 9 [mouths of rivers] and 10 [bays], or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 12 [roadsteads] and 15 [opposite and adjacent coasts] shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical co-ordinates of points, specifying the geodetic datum, may be substituted.
2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Appendix F

Coastline Committee Charter

DEPARTMENT OF STATE
Washington, D.C. 20520
August 7, 1970

MEMORANDUM

TO: Members, LOS Task Force Executive Operations Group

FROM: Carl F. Salans
Acting Legal Adviser

SUBJECT: Establishment of Ad Hoc Committee on Delimitation of the United States Coastline

I am sending this memorandum in the absence of Jack Stevenson, Chairman of the LOS Task Force.

Pursuant to an exchange of correspondence between the Secretary of Commerce (at Tab A), there has been established within the Law of the Sea Task Force an ad hoc committee to review questions relating to the delimitation of the coastline of the United States. This committee will review the lines recently drawn by the Geographer of the Department of State on existing charts of the Environmental Sciences Services Administration and will determine the location of the limits of the United States territorial sea and the contiguous zone as accurately as possible in light of the data on those charts. It is anticipated that the committee will arrive at a provisional United States position. Although this position will be subject to modification as necessary when new data is available, it can be used to respond to current problems both in the international and the domestic sphere, with necessary caveats to reflect its provisional nature. A fuller description of the committee's functions is included (at Tab B).

The committee has already begun its activities with representation from the Departments of State, Justice, Interior, Commerce and Transportation. The following persons have been designated to serve on the committee:

Department of State
Horace F. Shamwell, Jr., Chairman
Robert D. Hodgson

Department of Justice
George S. Swarth
Jonathan I. Charney

Department of Interior
Francis A. Cotter

Department of Commerce
Rear Adm. Harley D. Nygren
Hugh Dolan

Department of Transportation
Rear Adm. William T. Morrison, U.S.C.G.
Captain G. H. Patrick Bursley, U.S.C.G.
Lt. Michael Reed, U.S.C.G.

It is requested that you review the above list and the attached description of the new committee. If you approve them or have any additions or corrections to make, please telephone Mr. Horace F. Shamwell, Jr., at 632-2658, by close of business August 14, 1970.

After all clearances are received, I will request the Under Secretary of the Department of State to communicate with the respective Under Secretaries or appropriate level officials of the agencies represented on the committee for formal confirmation of the committee's membership.

Attachments:
Tab A - Correspondence between the Secretary of State and the Secretary of Commerce
Tab B - Description of Committee's Functions

L/PMO: HFShamwell, Jr. :jah

LOS TASK FORCE COMMITTEE ON THE DELIMITATION OF THE COASTLINE OF THE UNITED STATES

This committee is established for the purpose of providing an interagency forum to discuss and make recommendations on all questions and issues relating to the delimitation of the coastline of the United States. Represented on the committee will be those agencies of the Government most directly concerned with the implementation of the United States policy with respect to the coastline. These agencies are the Departments of State, Commerce, Interior, Transportation and Justice. The initial reason for the establishment of the committee at this time is that there have been a number of inquiries from both foreign Governments and States of the United States for a definitive United States position on the exact location and nature of he United States coastline. There is a severe operational need by the Coast Guard for a reliable description of the coastline. As of now, there is no official United States position on the exact physical location of the entire coastline.

The United States subscribes to the position that the coastline should be drawn in strict accordance with the Geneva Convention on the Territorial Sea and the Contiguous Zone. With respect to the United States, the "normal baseline" standard should be followed, with the exception of areas that qualify as legal bays defined under Article 7 of the Convention, and in the case of historic bays also covered by Article 7, in which cases closing lines are drawn. The committee will not take up the political issue as to whether the United States should or should not employ the method of straight baselines.

In the last year an effort has been made to prepare charts which represent the first official description of the coastline of the United States. Much progress was made toward completion of these charts as the official United States position; however, before the completion of a full set of charts, a question arose as to the propriety of using certain symbols found on the U.S. Coast and Geodetic Survey nautical charts as points on the coastline from which baselines could be drawn. Because these questions have arisen, archival research and new surveys must be undertaken to determine whether certain of these features represented by the symbols in question qualify for true measurement of the territorial sea and contiguous zone. The completion of the necessary work may take several years. In the meantime the United States is in a position where some tentative positions must be taken with respect to its coastline.

The committee will undertake to review the most recent existing charts with respect to the usability of various symbols contained thereon. The

committee will not utilize those symbols about which there is a question as to whether they meet the relevant legal requirements. The result of this approach may be to designate territorial limits which in view of subsequent information may have to be altered to some extent. No symbols, however, will be utilized which will result in the representation of territorial limits which extend farther than those claimed by the United States and recognized under international law. A significant reason for this is that it is not felt the Coast Guard should be asked to enforce limits, established by using questionable chart symbols, which may later be discovered to exceed those which the Untied States has the right to exercise.

The committee will prepare and approve lines showing the closing lines of bays, the limits of the 3-mile territorial sea and 12-mile contiguous zone and then submit the approved charts to the Coast and Geodetic Survey for inking. Upon approval by the LOS Task Force, the charts will be reproduced. Such printed representations, however, will only be provisional guidelines to be used when necessary, and will contain sufficient caveats to indicate that they are not a final and definitive United States position. It is hoped that rapid progress can be made to do the necessary archival and survey work to facilitate the revision of these charts to show a precise determination of the location of [the] United States territorial sea and contiguous zone. It is not intended that the charts resulting from the committee's work will be circulated throughout the Government, even as a provisional United States position, but rather will be available for use when current pressing problems arise. Such use will be conditioned by the relevant caveats.

While the committee is carrying out the above functions, a record will be maintained of the discussions engaged in and the factors considered in coming to the conclusions which are reached. It is hoped that this record will be available for use by Government agencies along with the charts, as necessary. This background material should prove helpful in understanding the significance to be attached to the representations made on the charts.

Appendix G

Presidential Proclamation No. 5928
December 27, 1988, 54 F.R. 777

Territorial Sea of the United States of America

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extends to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

(b) impairs the determination, in accordance with international law, or any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

/s/ Ronald Reagan

Appendix H

Presidential Proclamation No. 7219
August 2, 1999, 64 F.R. 48,701

The Contiguous Zone of the United States

International law recognizes that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones.

The contiguous zone of the United States is a zone contiguous to the territorial sea of the United States, in which the United States may exercise the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea.

Extension of the contiguous zone of the United States to the limits permitted by international law will advance the law enforcement and public health interests of the United States. Moreover, this extension is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline.

NOW, THEREFORE, I, WILLIAM J. CLINTON, by the authority vested in me as President by the Constitution of the United States, and in accordance with international law, do hereby proclaim the extension of the contiguous zone of the United States of America, including the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty, as follows:

The contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation.

In accordance with international law, reflected in the applicable provisions of the 1982 Convention on the Law of the Sea, within the contiguous zone of the United States the ships and aircraft of all countries enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of international law reflected in the 1982 Convention on the Law of the Sea.

Nothing in this proclamation:

(a) amends existing Federal or State law;

(b) amends or otherwise alters the rights and duties of the United States or other nations in the Exclusive Economic Zone of the United States established by Proclamation 5030 of March 10, 1983; or

(c) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of September, in the year of our Lord nineteen hundred and ninety-nine, and of the Independence of the United States of America the two hundred and twenty-fourth.

/s/ William J. Clinton

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