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.

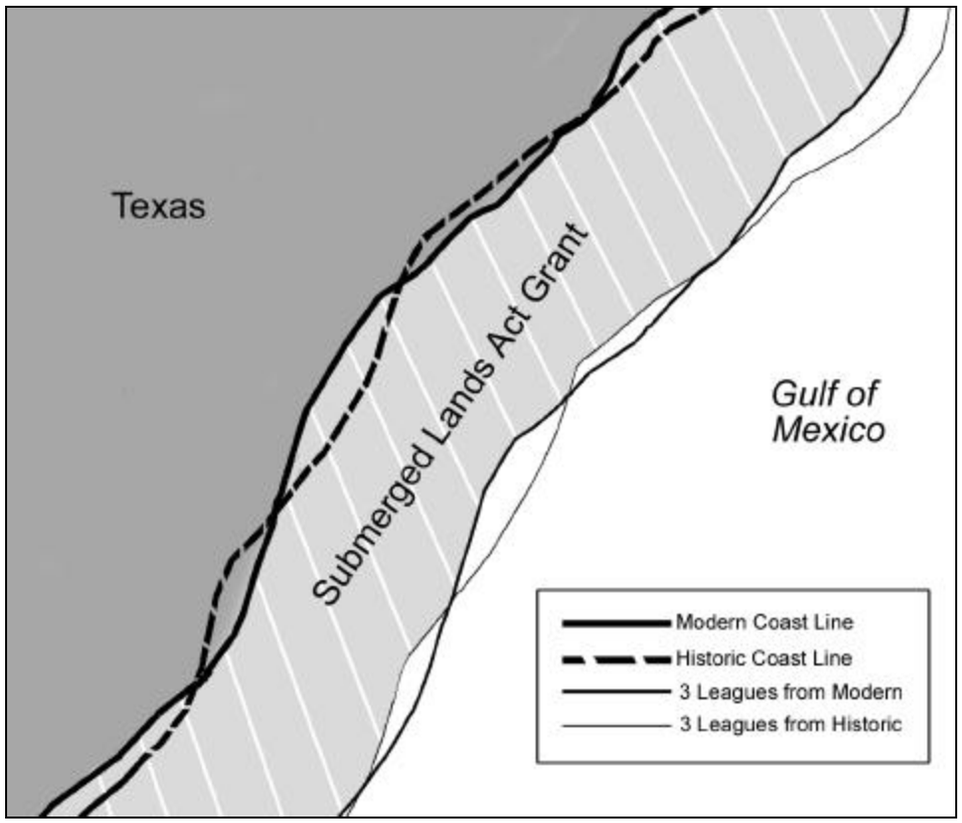

Figure 1. Texas's Submerged Lands Act grant. Texas's Submerged Lands Act grant is delimited using the lesser of 3 leagues from the modern or historic coast line.

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.

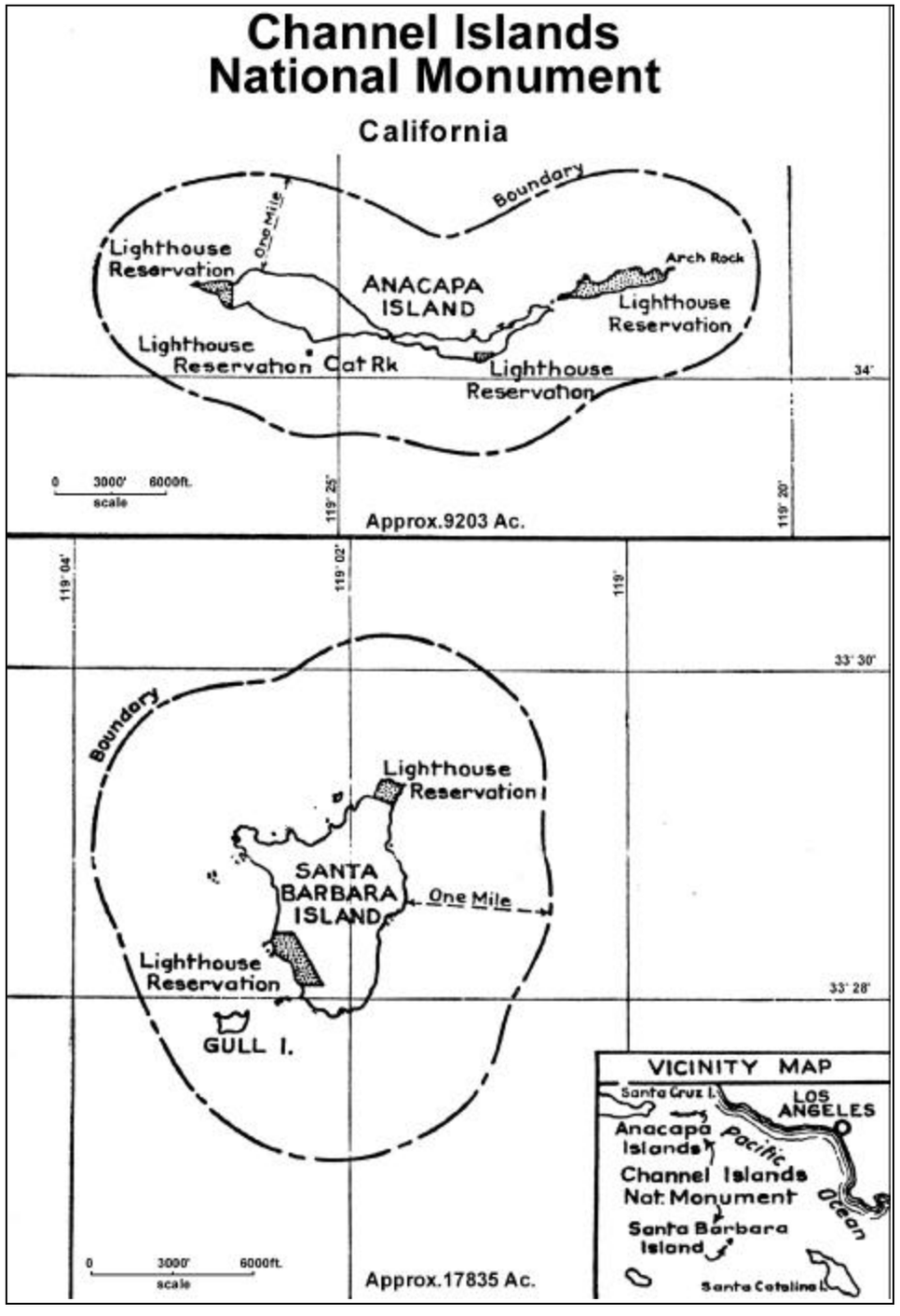

Figure 2. Map attached to Presidential Proclamation No. 2825, 63 Stat. 1258, February 9, 1949.

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).

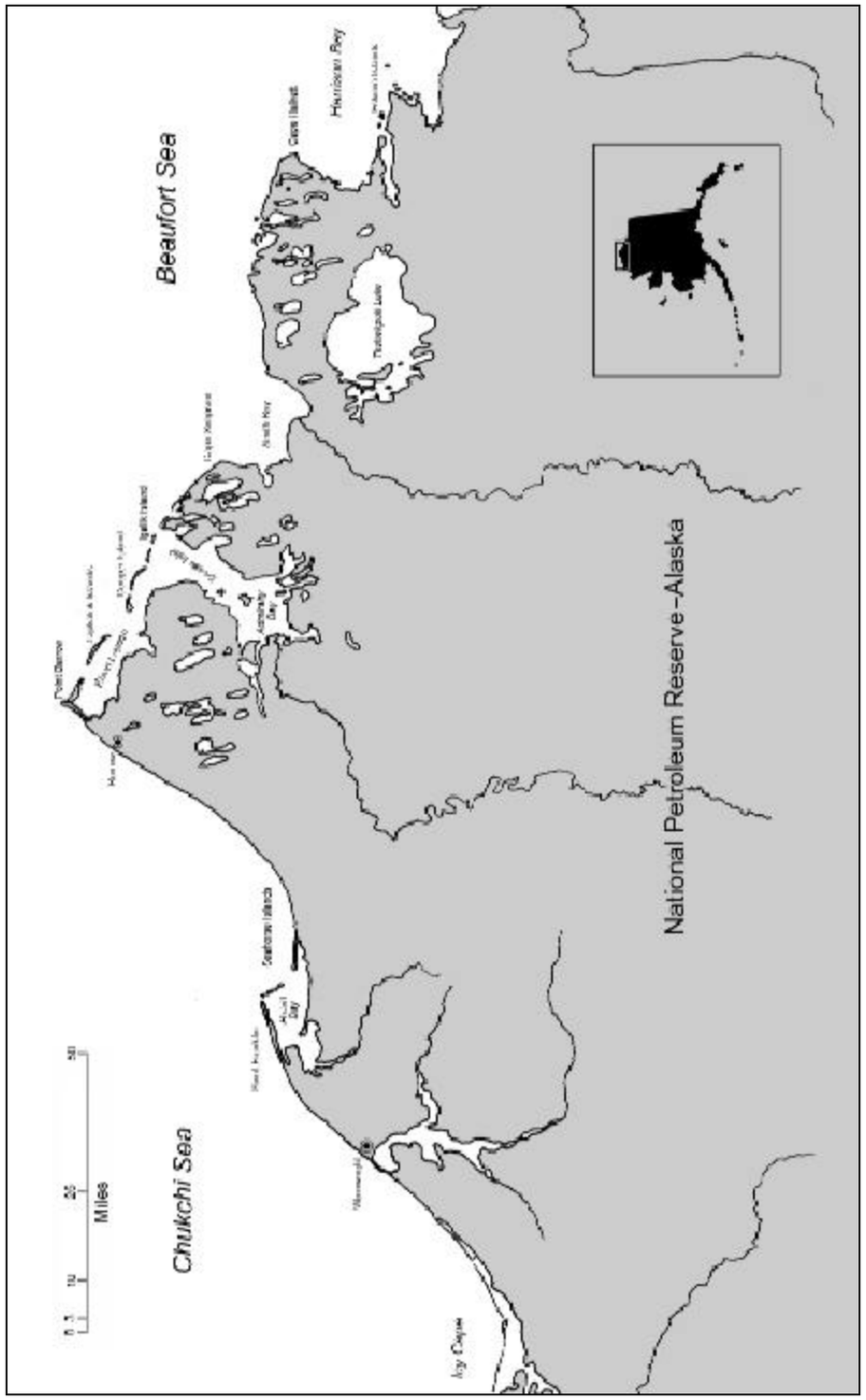

Figure 3. The coastline of the National Petroleum Reserve–Alaska. (*After Report of Special Master J. Keith Mann, Figure I.1*)

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]

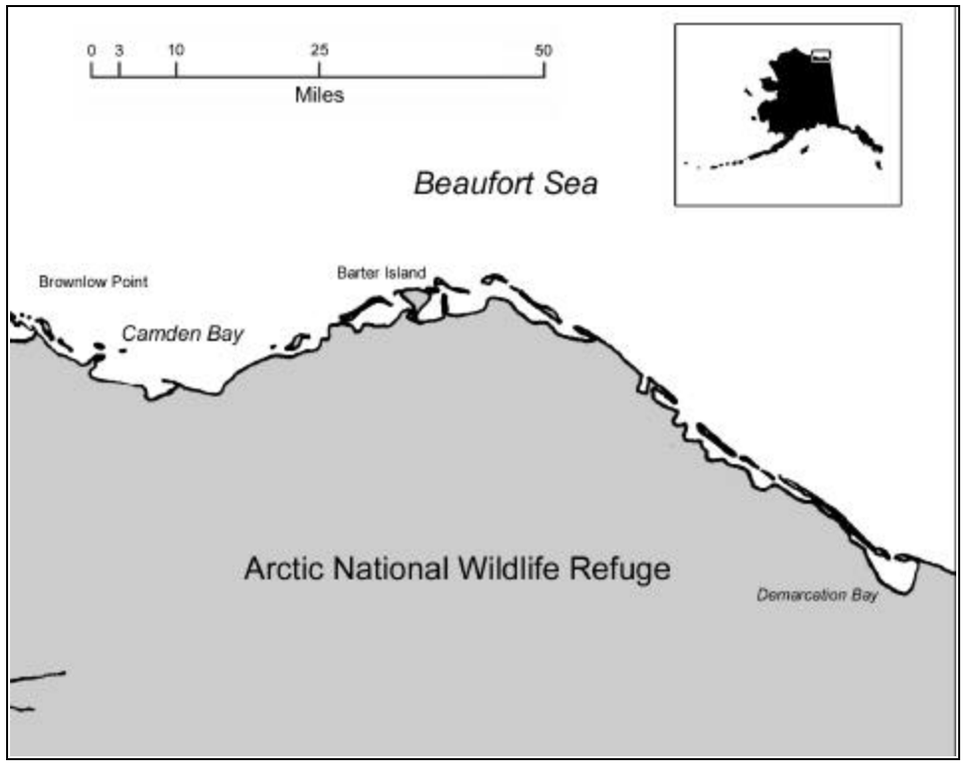

Figure 4. The coastline of the Arctic National Wildlife Refuge, Alaska. (*After Report of Special Master J. Keith Mann, Figure 1.1*)

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.

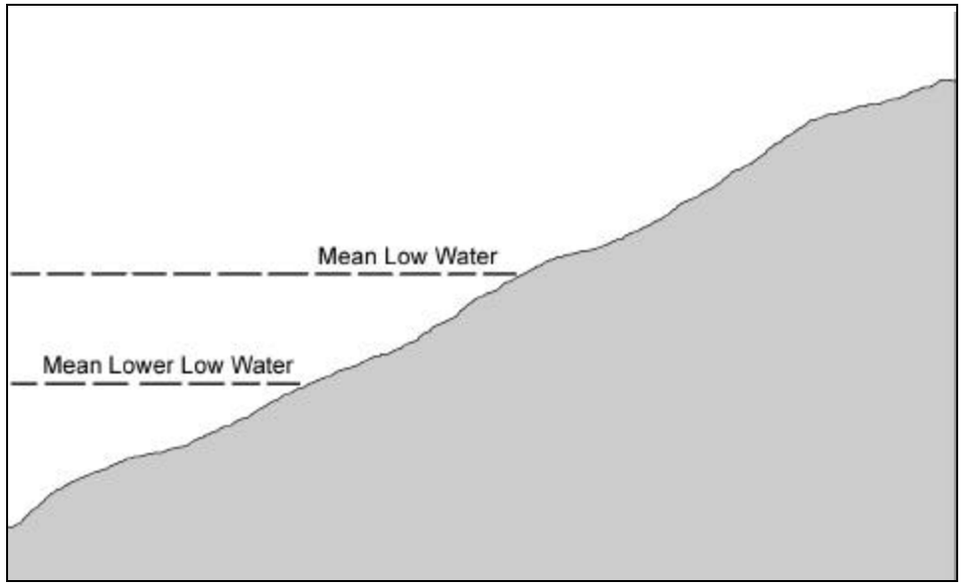

Figure 5. Shoreline cross section, comparing the low and lower low-water tidal datums. The mean lower low-water line is depicted on offical U.S. charts and was adopted by the Supreme Court as the “ordinary” low tide line.

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.

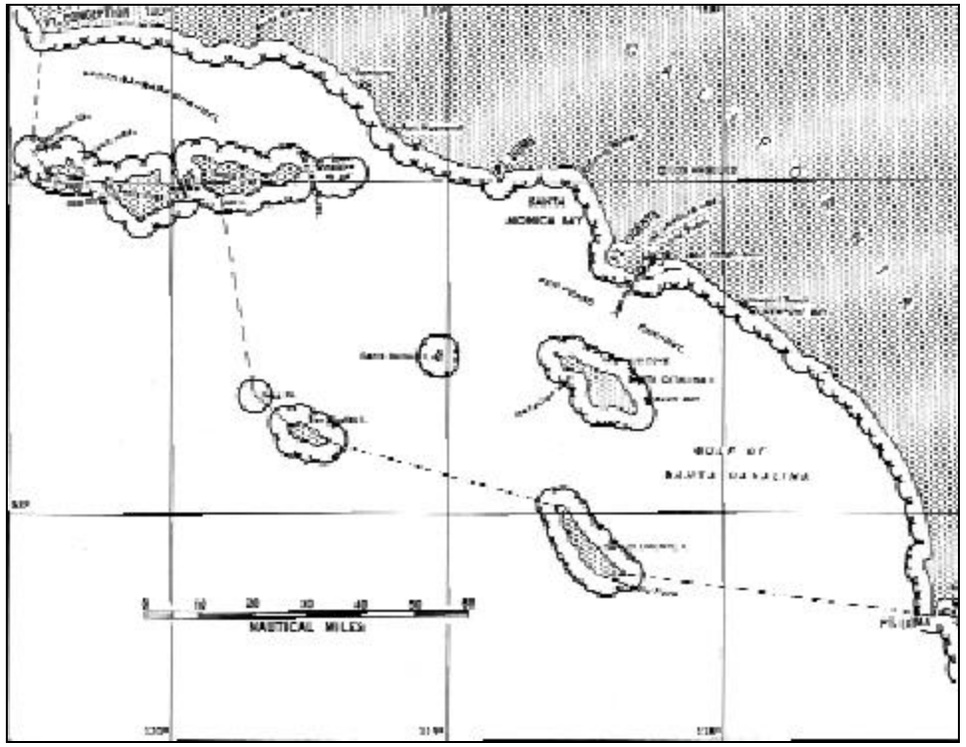

Figure 6. California's "Overall Unit Area" inland water claim. (*From I Shalowitz, Figure 13*)

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]

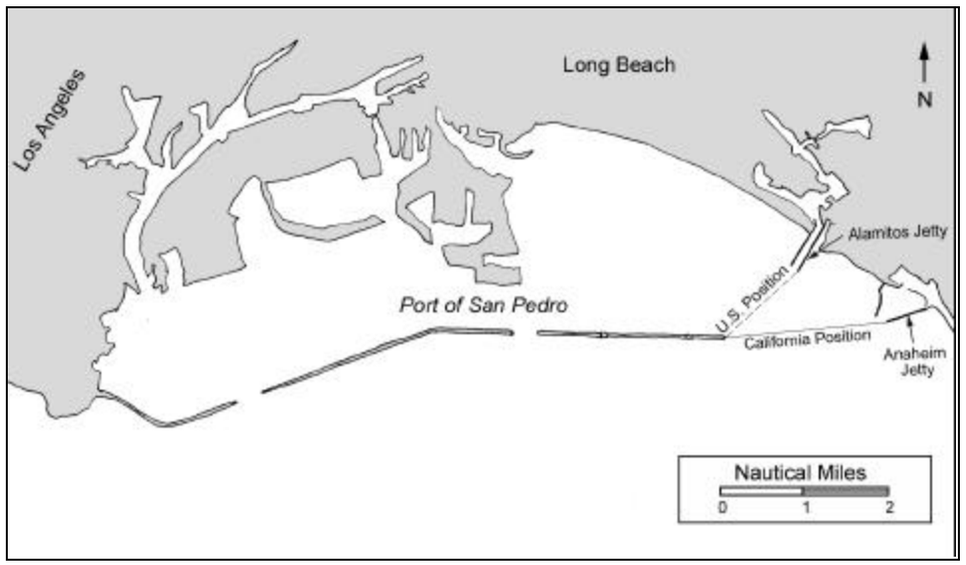

Figure 7. Port of San Pedro, California. Note the differing state and federal contentions as to the limits of inland waters.

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.

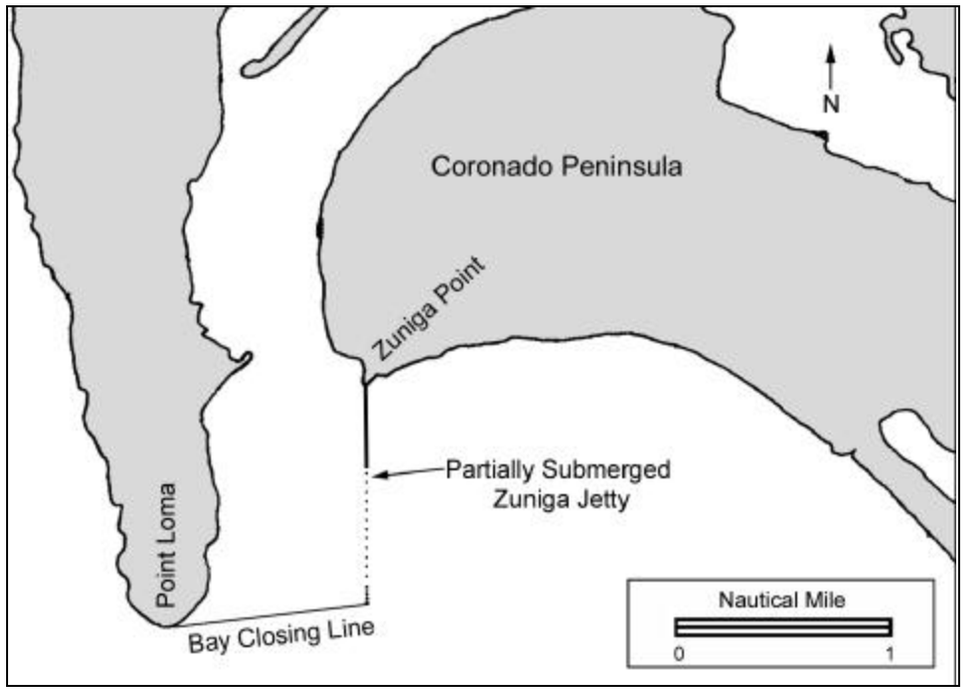

Figure 8. Headlands of San Diego Bay. Point Loma and the Zuniga Jetty constitute the headlands of San Diego Bay.

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.

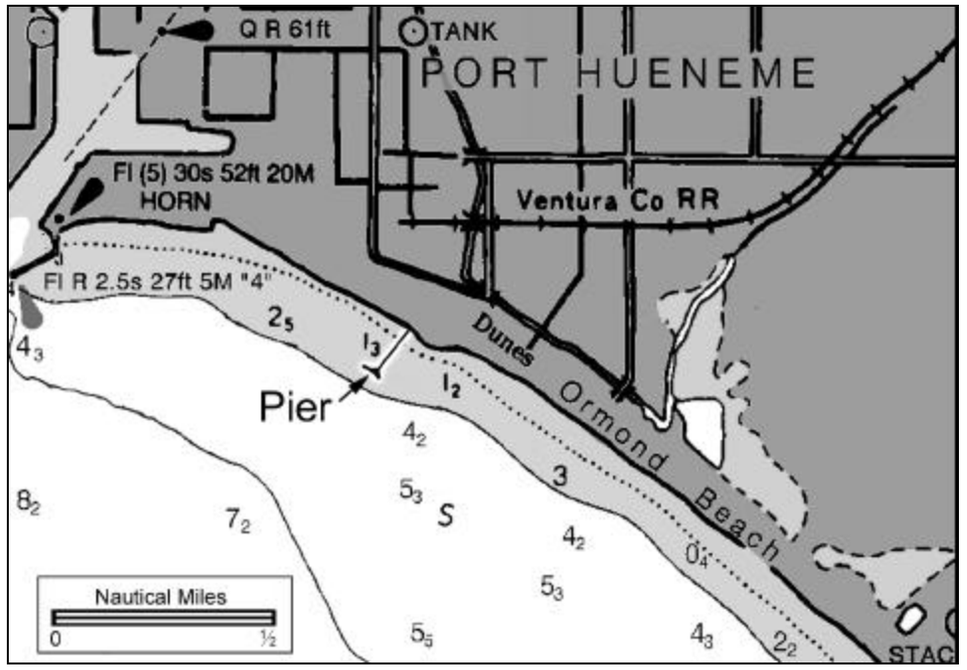

Figure 10. Typical pier on NOAA charts. The label and arrow (added) point to a pier as depicted on a NOAA chart. (*Based on NOAA Chart 18725*)

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.

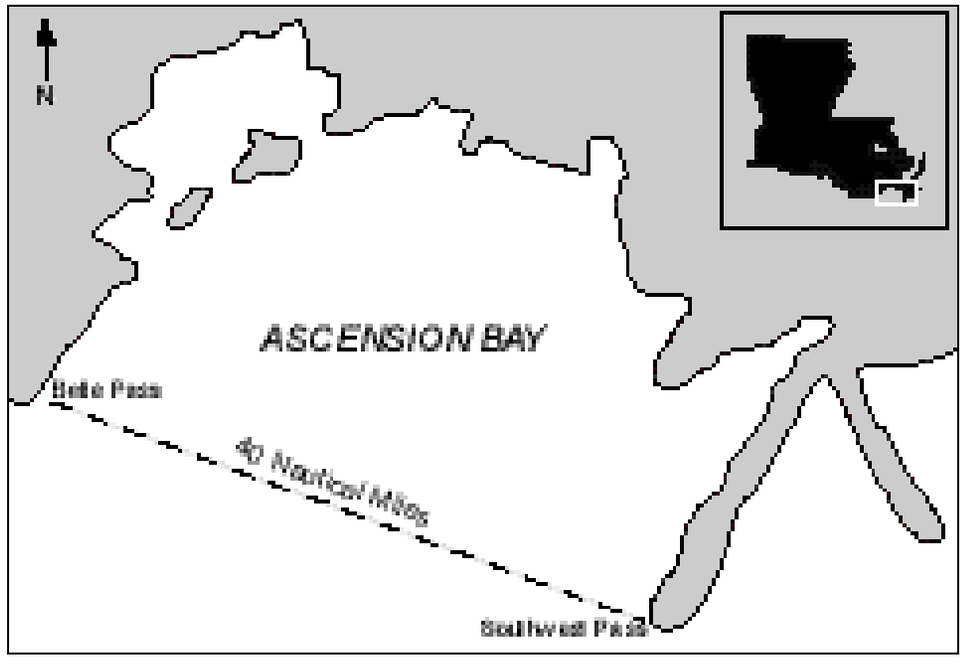

Figure 11. Ascension Bay, Louisiana, an overlarge bay.

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]

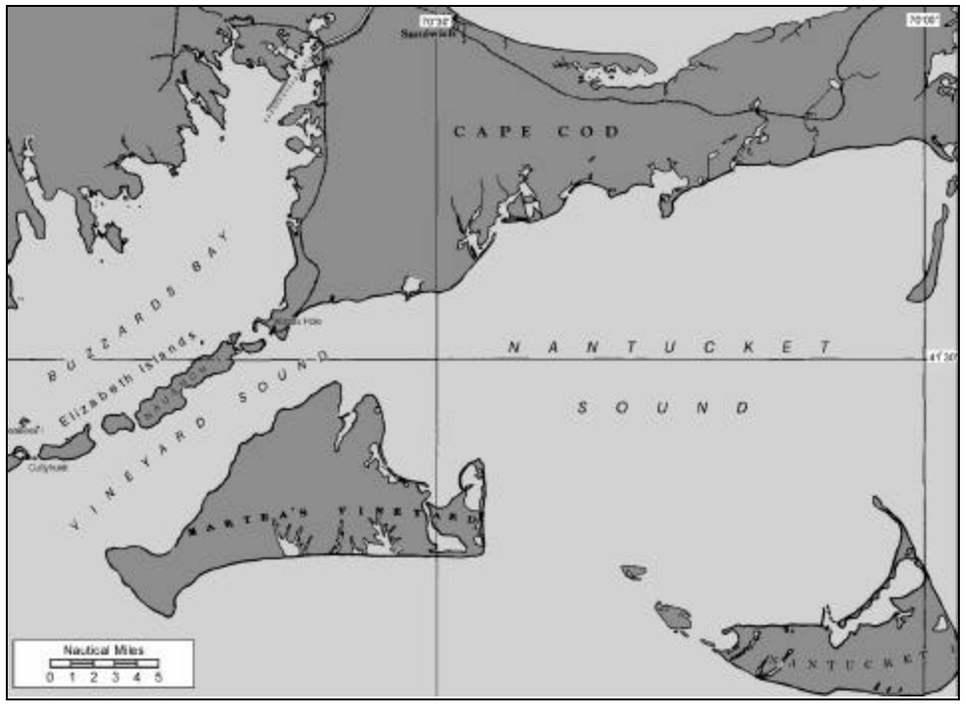

Figure 13. Vineyard and Nantucket Sounds, south of Cape Cod, Massachusetts. (*Based on NOAA Chart 13200*)

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.

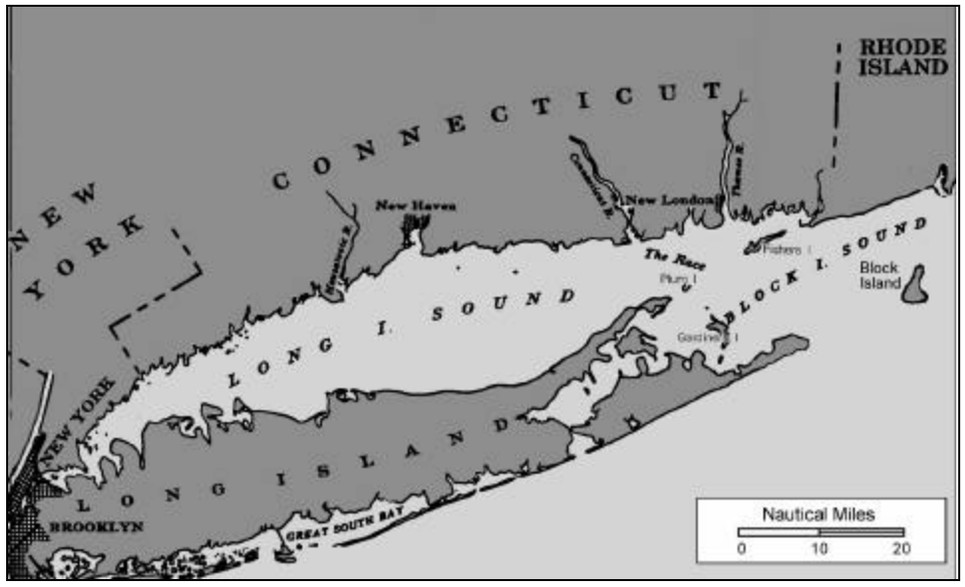

Figure 14. Long Island and Block Island Sounds. (*Based on NOAA Chart 13003*)

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.

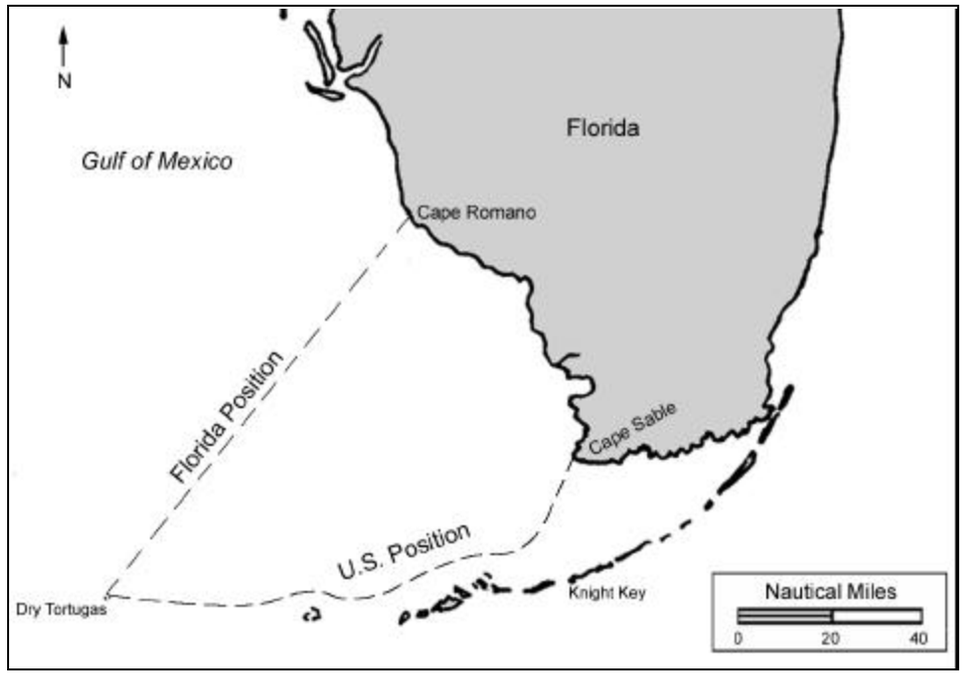

Figure 15. Florida Bay. The state and federal positions differed as to the location of Florida's 1868 constitutional boundary.

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.

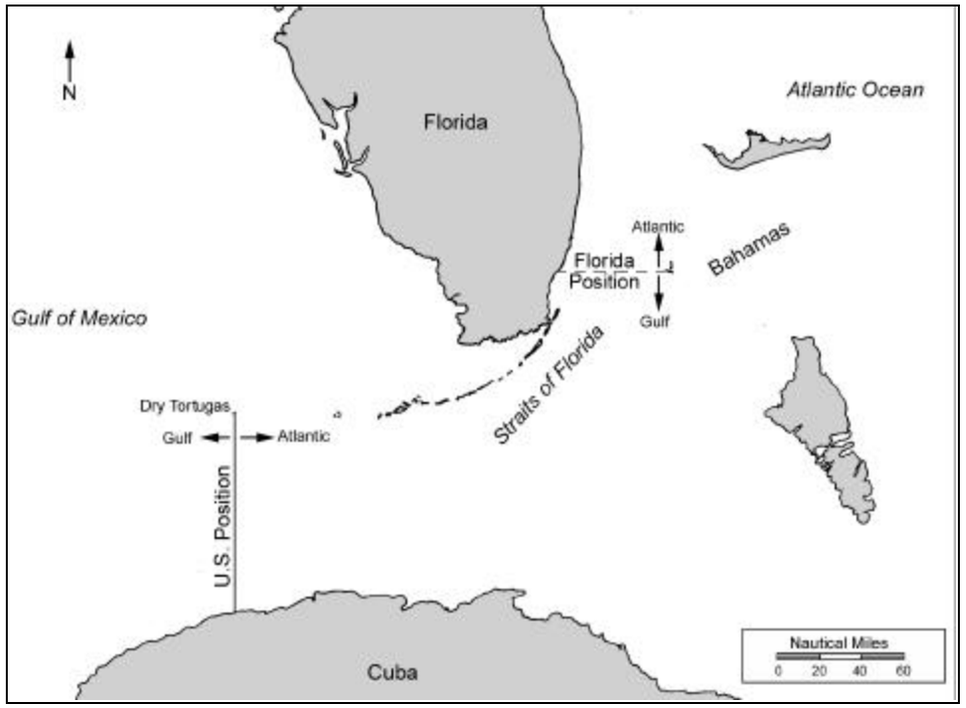

Figure 16. Straits of Florida. Note the positions taken by the U.S. and Florida as to the limits of the Gulf of Mexico.

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.

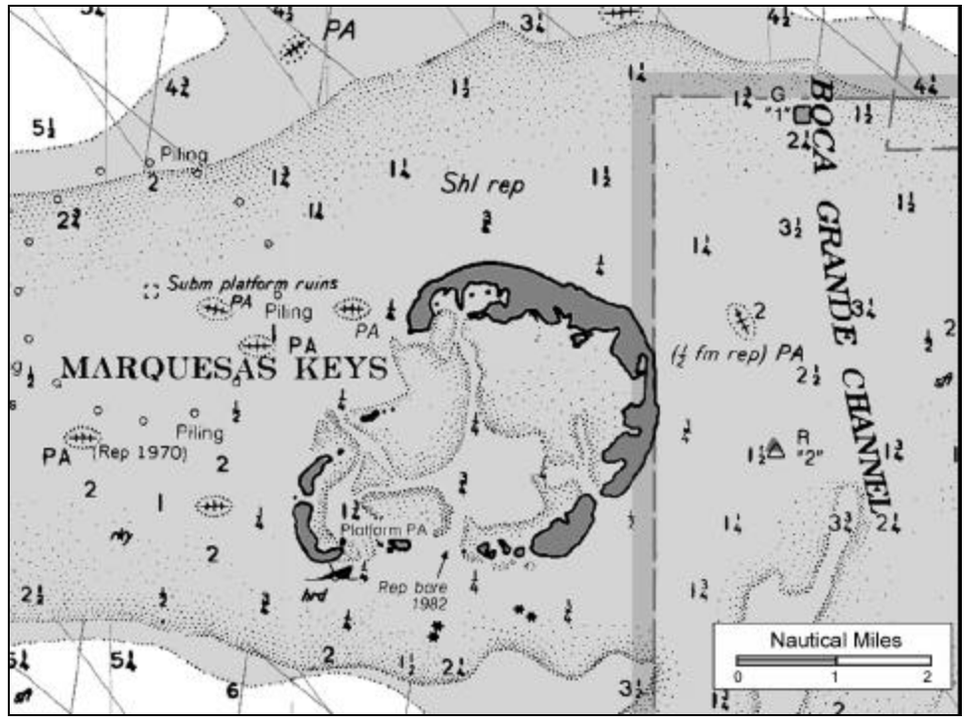

Figure 17. Marquesas Keys, west of Key West, Florida. The special master recommended that the "narrow waters" within the Marquesas, and other island groups, are inland. (*Based on NOAA Chart 11434*)

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.

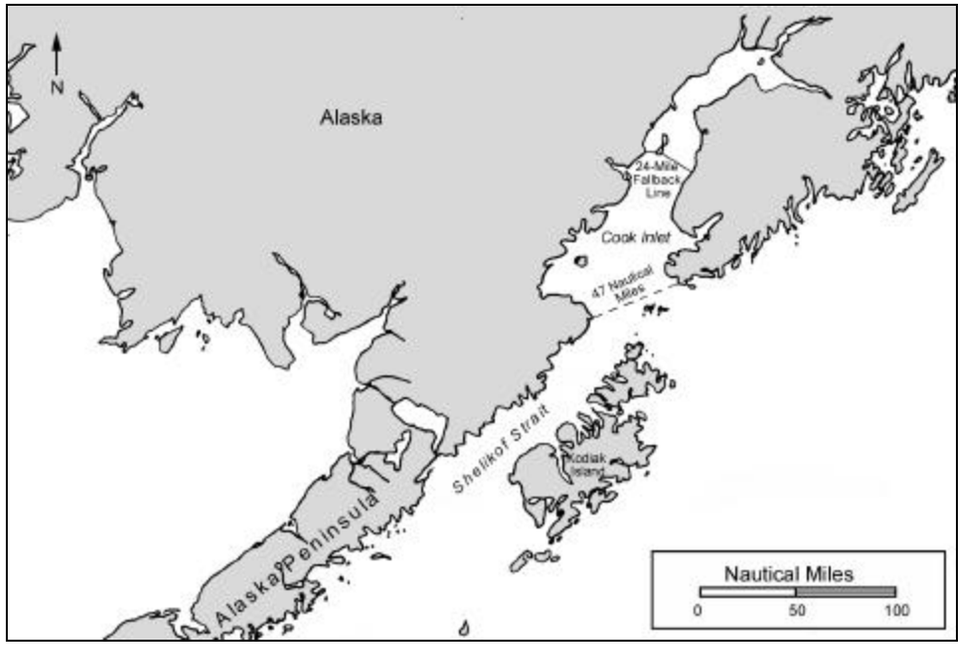

Figure 18. Cook Inlet and Shelikof Strait, Alaska.

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.

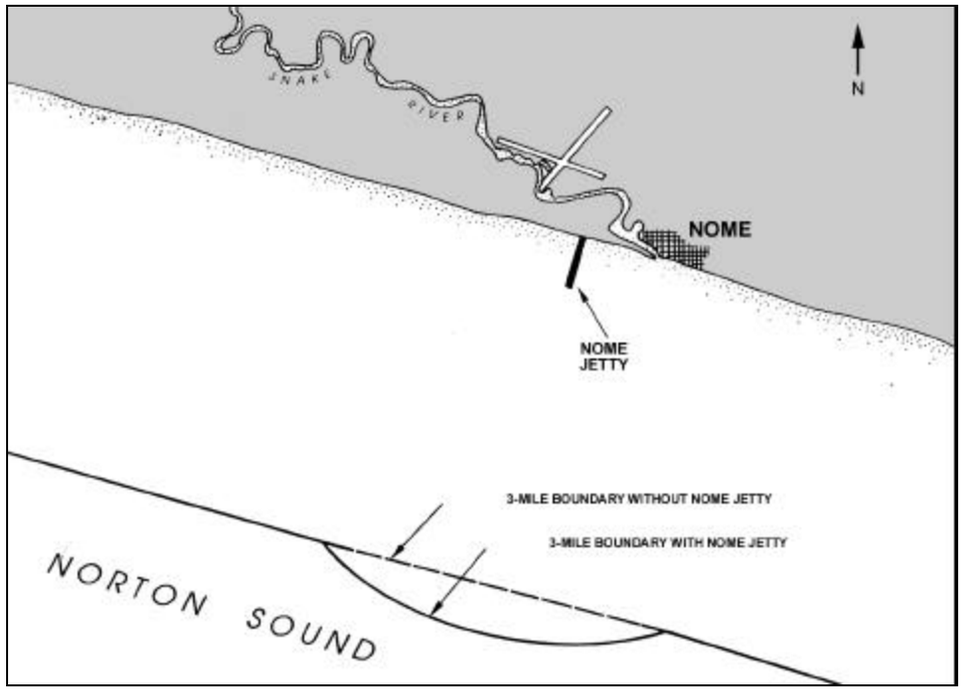

Figure 19. Nome jetty, Alaska. The potential effect of the Nome jetty on Alaska's Submerged Lands Act boundary is illustrated. (*After Joint Stipulation of Facts, U.S. v. Alaska, Number 118 Original, Appendix O*)

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)

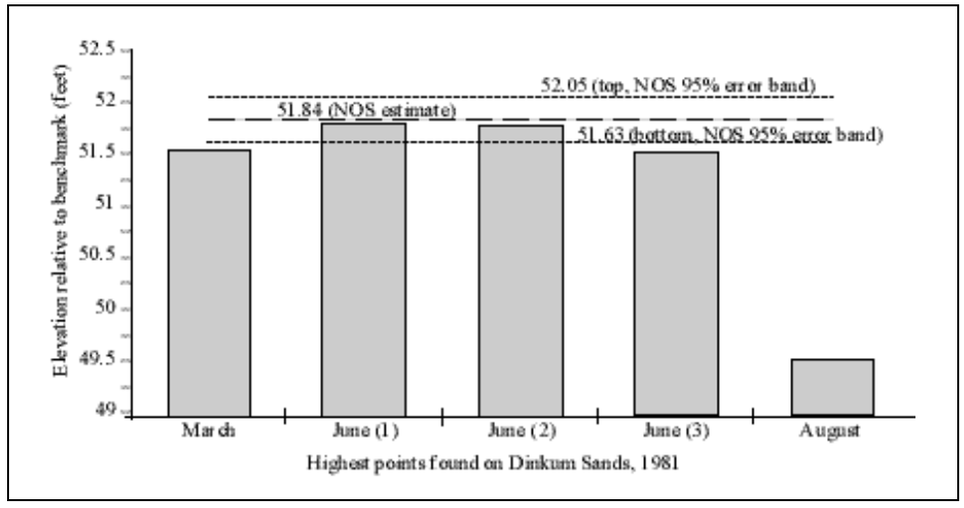

Figure 20. Estimated mean high-water datum superimposed on the observed high points of Dinkum Sands. (*From the Report of Special Master J. Keith Mann, Figure 5.2*)

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.

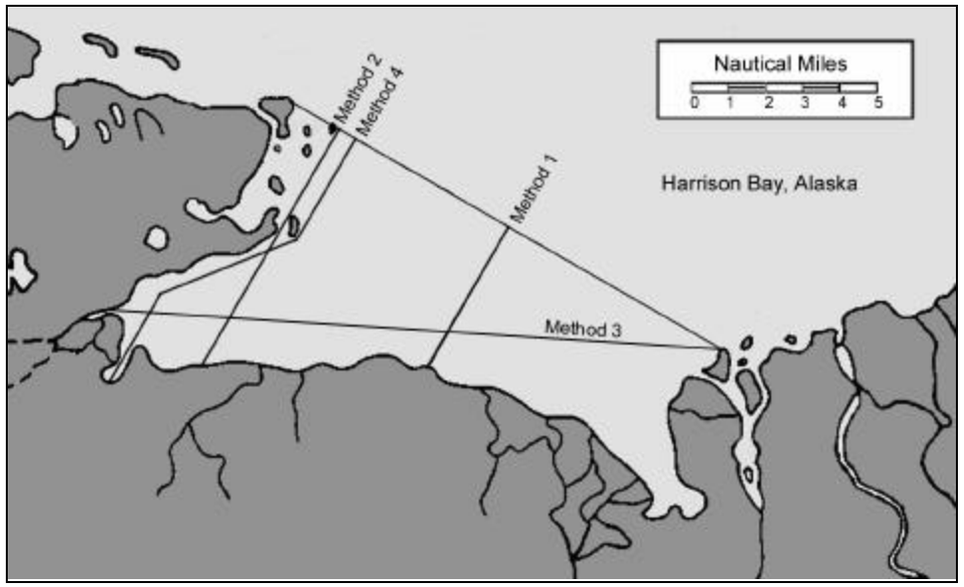

Figure 21. Alternative methods for measuring penetration.

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.

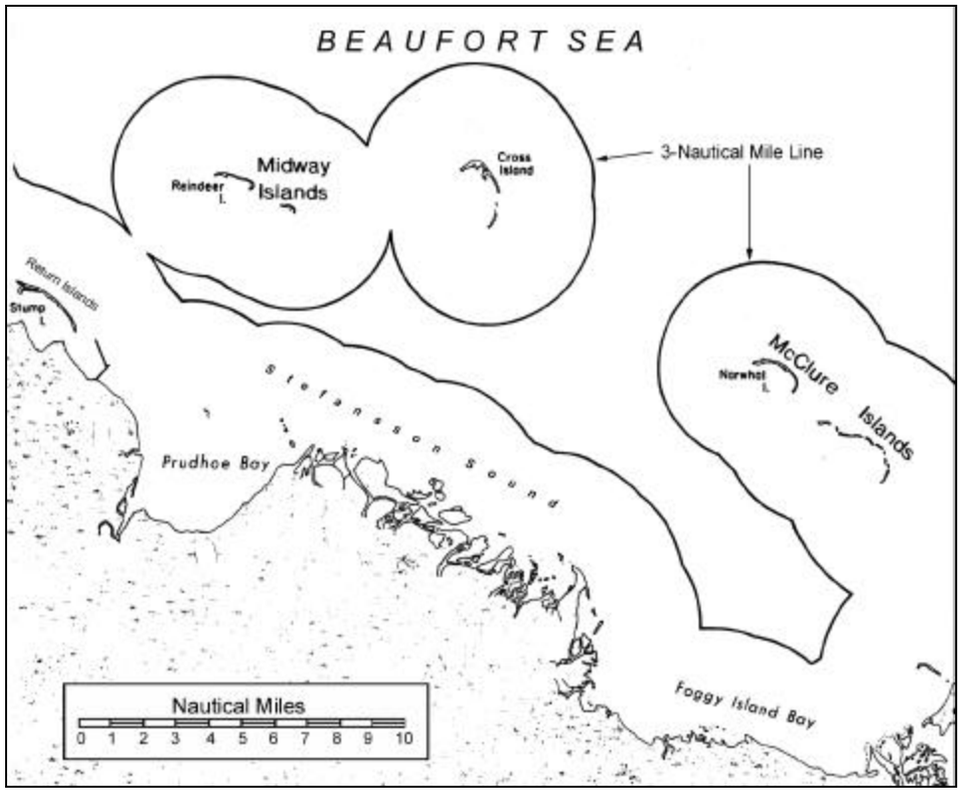

Figure 22. North coast of Alaska. Barrier islands off the north coast of Alaska, such as those illustrated here, were said by the state to enclose inland waters. (*After the Report of Special Master J. Keith Mann, Figure 3.2*)

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

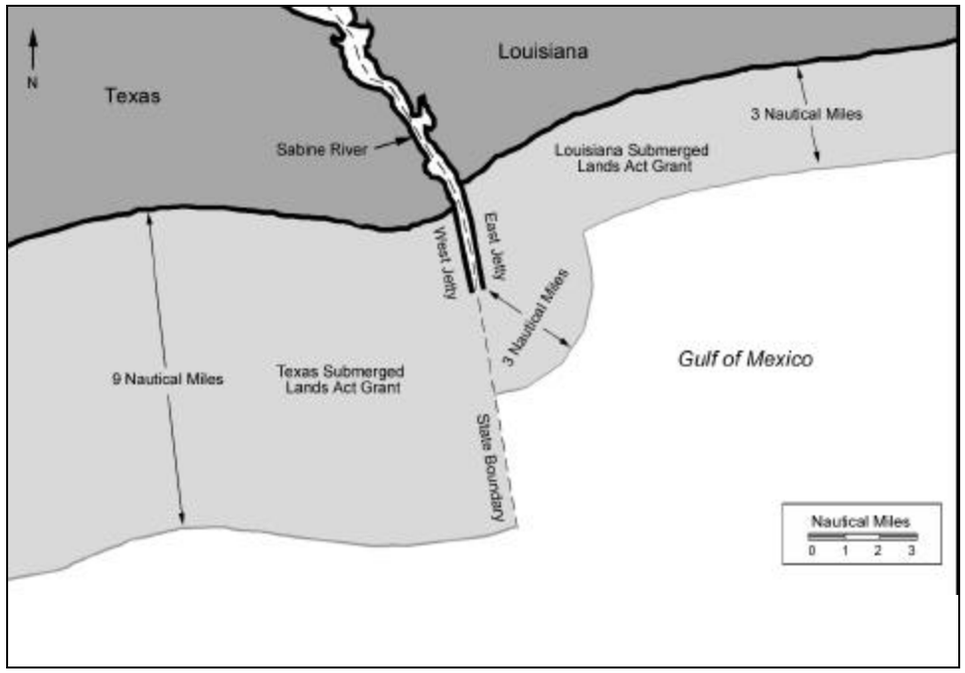

Figure 23. Offshore extension of Texas/Louisiana boundary. Texas's 3-league (9 nautical mile) boundary is measured from the most landward of the modern and historic coast lines; Louisiana's 3-mile boundary is measured from the modern coast line, including jetties.

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.*

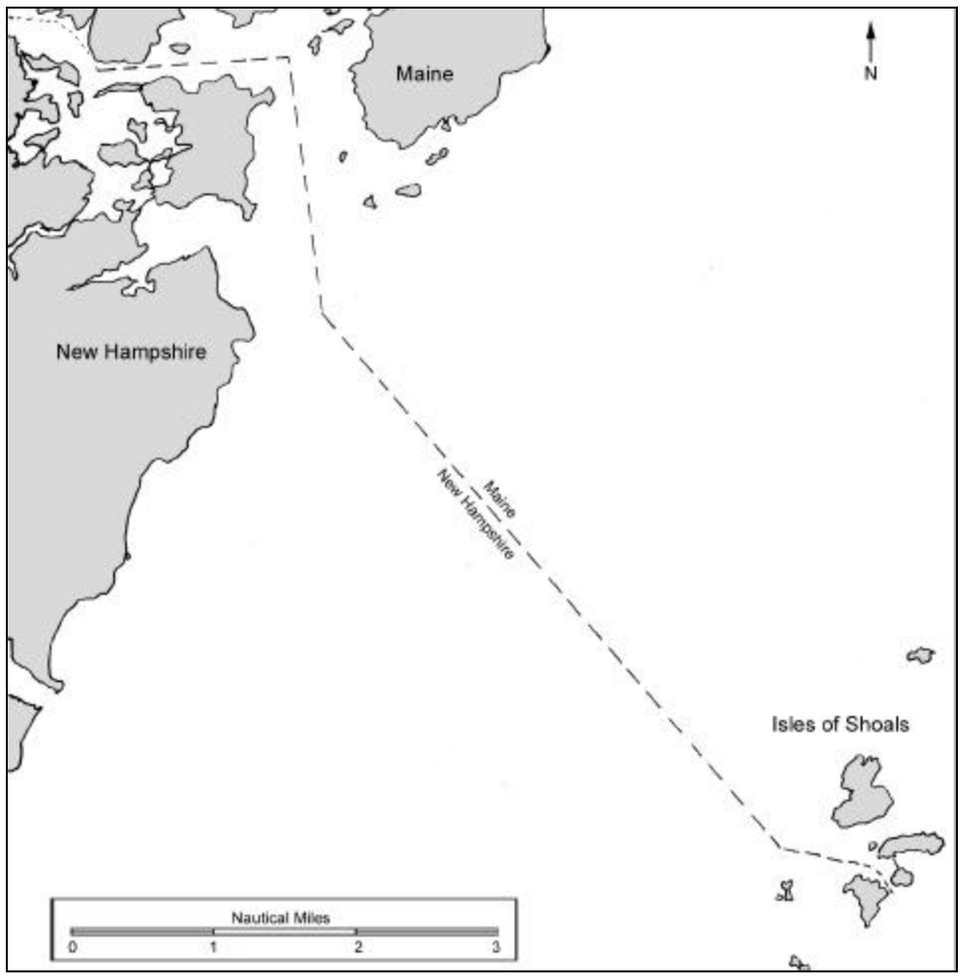

Figure 24. Maine/New Hampshire boundary. The state boundary extends offshore to divide the Isles of Shoals.

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.