IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 6, Original.

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE STATE OF CALIFORNIA.

BRIEF IN RELATION TO REPORT OF SPECIAL MASTER OF MAY 22, 1951.

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BRIEF IN RELATION TO REPORT OF SPECIAL MASTER OF MAY 22, 1951.

SUMMARY OF PRIOR PROCEEDINGS

On October 27, 1947 the Court entered its decree in this case, reading in part as follows:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and

> bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein." (332 U. S. 804)

Jurisdiction was reserved at that time to enter such further orders or Decrees as might be necessary or advisable.

The above quoted decree adjudged that the United States has paramount power in a three mile belt of water which was known to lie offshore but whose limits had not been precisely described. The decree defined the belt only in the following general terms:

(a) it lies "seaward of the ordinary low water mark on the coast of California";

(b) it lies "outside of the inland waters";

(c) it extends "seaward three nautical miles."

Since the general terms of this decree did not define inland waters or low water mark, the decree was not self-executing and further proceedings were required to identify the location of the marginal belt.

In January 1948 the United States petitioned the Court for a supplemental decree to determine the exact location of the marginal belt along three particular segments of the California coast which include all of the submerged lands from which oil is now being produced. These three segments comprise in the aggregate some 100 miles of California's 1100 mile shore line. The petition asked that these three segments of submerged lands be adjudged to constitute "segments of that area underlying the Pacific Ocean described in paragraph 1 of the decree of this court entered on October 27, 1947" in which the United States has "paramount rights and full dominion" (i.e., the 3-mile belt of marginal sea).

California objected to the entry of the supplemental decree on the grounds that all three segments described in plaintiff's proposed decree are not within the marginal sea,

but constitute a part of the inland waters of California. California further alleged that issues of fact exist as to whether any of the segments described in plaintiff's proposed decree are within the marginal belt or constitute inland waters of California. Among these factual issues were questions as to the location of ordinary low water mark along the open coast and as to the existence and location of various bays, harbors, ports, channels, river mouths and other water areas claimed by California to be "inland waters." California prayed for the appointment of a master to take evidence and make findings of fact and conclusions of law (subject to review by this court) as to these issues. Since the Court's decree of October 27, 1947 applies to the entire coast line of California from Oregon to Mexico, California asked that the Master be instructed to make findings of fact and conclusions of law as to the line along the entire coast of California which divides the marginal sea from the inland waters, ports, bays and harbors.

On June 21, 1948, the Court denied California's prayer to have "the entire line" adjudicated "at this time". 334 U.S. 855) But the Court authorized the appointment of a Special Master, to make recommendations to the Court (1) "as to what particular portions of the boundary call for precise determination", and (2) to recommend "an appropriate procedure to be followed in determining the precise boundary of such segments". On July 2, 1948, Honorable D. Lawrence Groner was appointed Special Master. On February 12, 1949, William H. Davis, Esquire, was appointed Special Master to succeed Judge Groner who had been forced to retire because of ill health.

On April 21, 1949 California filed an extensive trial brief with exhibits at the request of Special Master Davis. Although California listed and described 104 segments or areas along its coast of over 1100 miles whose status requires definition, it submitted for inclusion in this proceed-

ing only six segments in addition to the three segments recommended by the Plaintiff.

On June 6, 1949, Mr. Davis filed his first report (dated May 31, 1949). In this report he rejected plaintiff's contention that only the three segments of the submerged lands which contain oil should be adjudicated at this time and recommended in addition the adjudication of four of the six segments proposed by California. This recommendation was based on the ground that,

> "It has seemed to me that a wiser and fairer procedure would be to make now an intelligent selection adequate to present in reasonably significant variety the principal questions that will have to be decided before particular boundary lines or locations can be precisely determined." (p. 3)

Mr. Davis also recommended as an "appropriate procedure" that the Court appoint a master to take evidence as to the lines "which in said seven coastal segments" divide the areas underlying the marginal sea from the areas lying "landward of the ordinary low water mark on the coast of California and within the inland waters of that State, and the proper mode of locating said line, and report the same to the Court, but without findings and conclusions." Mr. Davis felt that it would be inadvisable to entrust to a Master the duty of making such findings or conclusions because of the nature of the "questions of ultimate fact and of law in these proceedings." He recommended that if the Court desired such findings or conclusions, "a special court of federal judges" should be appointed for this purpose.

On June 27, 1949, the Court ordered the report of the Special Master received and filed. (337 U.S. 952) On the same day Mr. Davis was continued in office as Special Master with instructions to proceed with respect to the seven coastal segments enumerated in his report of May 31, 1949, to consider,

"(1) a simplification of the issues;

"(2) statements of the issues and amendments thereto in the nature of pleadings;

"(3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court."

On May 22, 1951, Mr. Davis filed his report in response to the Court's order of June 27, 1949. This report concludes, as did the Master's previous report, that before any survey of the line of demarcation can be undertaken, the following questions must be determined:

1. What is the status (inland waters or open sea) of particular channels and other water areas between mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;

3. By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained.

These questions constitute the "issues" which the Master finds are "involved at this stage of these proceedings." (p. 34)

The report contains a concise statement of the "position" of each party with respect to each of these "issues", and a summary of the nature and form of the evidence proposed to be submitted by each party on each of the three "issues" above stated. The Master concludes that it is impracticable presently to delimit the documentary material outlined in the report "by selection and admission of particular documents or by further admission of matters of fact." (p. 36) The report contains no specific recommendation as to further procedure.

On June 4, 1951, the Court entered its order that the report be received and filed and that

> "Briefs of the parties in relation thereto may be filed . . . " (341 U.S. 946)

This brief is in response to that order.

SCOPE OF BRIEF*‡

From the Court's order that the parties may file briefs "in relation" to the Master's Report, California assumes that the Court desires at this time a statement of our comments on or objections to the Master's Report. We do not understand that the Court desires "at this stage of the proceedings" a complete and final brief on the merits of the issues presented. It is our view that testimony and evidence are essential to a final determination of the issues.

For convenience, California's brief will follow in general the organization of the Master's Report. After a short introductory statement of the nature of the problem of determining the boundaries of the marginal sea, the brief will address itself to the contention which the Master noted but regarded as beyond the scope of his assignment: namely, that the determination of these boundaries is a political and not a justiciable question. Following this, the brief will comment on and amplify the Master's summary of California's position on the three issues stated by the Master. In the course of discussing and expanding the Master's statement of California's position, reference will be made to the nature and form of evidence proposed to be submitted by California. Finally, in view of the fact that the Master made no specific proposal as to future procedure, California will state what it believes to be the most expeditious procedure to terminate this litigation.

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* Emphasis in quotations, throughout this brief, has been added.

‡ This brief will frequently refer to two volumes which were submitted by California at the request of the Special Master and which are now on file with the Court: (1) "Summary of Testimony of Typical Witnesses," and (2) "Citation of Documents." The scope of these volumes is summarized in the Master's Report, p. 11, note 5.

NATURE OF THE PROBLEM

The object of the present proceeding, as stated above, is to identify and describe the limits of the belt of water within which the Federal Government is held to possess "paramount rights" and "full dominion".

The width of this marginal belt, i.e., three nautical miles, is a constant factor and is not in issue in this case.[1] But no criteria were given in the court's decree, (and none exist elsewhere) for ascertaining the "ordinary low water mark" or for defining and locating the seaward limit of the "inland waters". It is these questions which give rise to the "issues" which the Master finds must be disposed of at this stage of the proceeding.

The physical or geographical conditions which exist on any "coast line" may involve two distinct situations. The first occurs where the mainland confronts the open sea and there are no off-lying islands, channels, bays, harbors, or river mouths. In such situations the problem of defining and locating inland waters will, of course, be entirely absent, and the "ordinary low water mark" when ascertained and surveyed will become the base line for measuring the three mile marginal belt.

The other situation occurs where there are bays, harbors, ports, river mouths, channels or off-lying islands which inclose or limit bodies of water which may constitute "inland waters" in a legal and political sense. In such a situation it is necessary to fix and describe a line which constitutes the seaward or outer limits of such bodies of water. The low water mark plays no part in determining such a line except where it is necessary to locate the point at which this line touches the land at the entrance of a bay, or where it touches the islands in cases of channels. Where there

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[1] Despite the fact that many other nations are claiming marginal belts of greater width, the United States has continued to adhere to three miles as the proper width. See Boggs, *National Claims in Adjacent Seas,* 41 Geog. Rev. 183 (1951).

are inland waters, this line constituting their seaward limit when ascertained will become the base line from which the three mile marginal belt must be measured.

When the base line of the marginal belt is determined in the two situations above described, the entire marginal belt will be located and defined, because the seaward limit of this belt is in all places three miles seaward from the base line. Immediately seaward of the marginal belt lies the high seas.[2] Consequently, the fixing of this base line will automatically determine (1) the extent and limits of the inland waters (2) the precise location of the three mile marginal belt and (3) the line of demarcation between marginal belt and high seas.

It is recognized by both parties, that despite the importance of this base line, no criteria for its determination have "heretofore been definitely adopted by the United States or established as existing rules of international law, . . ." (Master's Report, p. 34 and 35; see also p. 8). Strange as it may seem, this baseline, which automatically determines the external boundary of the United States, has never been established by any agency of the Government.

The practices of various nations in defining baselines are widely divergent. Some nations claim the waters of all bays along their coasts as inland waters, regardless of size, while other nations claim only the waters of bays having particular dimensions. Many nations measure the marginal belt from the outermost islands off the coast, while other nations

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[2] The area of high seas or "contiguous zone" lying between the outer limit of this marginal belt and the edge of the continental shelf has in reecnt years become the subject of various claims by maritime nations including the United States. (Proc. 2667 and Exec. Order 9633, both of Sept. 28, 1945.) In this proclamation, the United States asserted jurisdiction over the natural resources of this area but specifically stated that, "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." (See generally, Young, the Legal Status of Submarine areas beneath the High Seas, 45 A.J.I.L. 225, (1951).)

take account only of islands within limited distances from the mainland.

In view of the situation above described, the United States now has a very considerable measure of freedom in determining what are its inland waters and hence what is the baseline from which its belt of marginal sea is to be measured. Within the broad limits which have been generally recognized by the nations of the world, a wide range of choice is open to the United States. It is free to take account of its national interest as determined not only by geographical and historical conceptions, but also by its special position with respect to national defense and international relations.

Whatever agency of the Federal Government eventually fixes the location of our marginal belt must bear in mind the full implications of its decision. Among these are the following:

(a) Any criteria adopted for the seven segments now before the court must be susceptible of application in other comparable parts of the California coast and of every other coastal state. The Master selected these seven segments because, "the development and the application of criteria in the recommended areas might be expected to lead to generalizations applicable without too much difficulty to other areas." (Master's Report of May 31, 1949, p. 344.)

(b) The limits of the inland waters and the marginal sea must be determined on the basis of the same criteria as would be applied if this were a proceeding between the United States and a foreign nation. This is made clear by the rationale of the *California* decision.

The ground on which the United States was held to have paramount power in the marginal sea as against an individual state was that control of that water area is essential to the fulfillment of its responsibilities of national external sovereignty. Primary emphasis was placed by the Court on the statements that actions taken in the marginal belt

involve questions which are "for consideration among nations as such" and which may be the subject of "treaty or similar international obligations." (332 U.S. 19, 35)

In view of this rationale, it is not possible to contend that the boundaries of the marginal belt are at one place as between the United States and an individual state and at another, different place as between the United States and a foreign nation. The reason for this is that under the *California* decision, the rights of the federal government are paramount to those of the state *only* in the "international domain" where the federal government's responsibilities of national external sovereignity exist. If an area should be established to be "inland waters" in a proceeding between the United States and a foreign nation, the area would not be international domain and consequently the United States would not have paramount power as against an individual state. Conversely, if an area is determined to be marginal sea in a proceeding between the United States and an individual state, that is a finding that the area *is* international domain and consequently it would hardly be candid for the United States to contend in a subsequent proceeding with a foreign nation that the area *is not* international domain.

The inconsistency produced by an attempt to apply a double standard in fixing the boundaries of the marginal sea demonstrates the necessity for determining in the present proceeding boundaries *which will come within the limits of international practice* and on which the United States will stand in any international controversy. The necessity for such a single standard is emphasized by the fact that the decisions of the United States Supreme Court, even in cases between private litigants, have been relied upon in international arbitrations to which the United States was a party as decisive of the law of this country, and as admissions against our national interests. This consideration is particularly important at the present time because the United States has accepted the compulsory jurisdiction of the International Court of Justice.

(c) As we have said, the determination of the baseline of the marginal sea will automatically determine the extent and limits of the inland waters, the location of the marginal belt, and the line of demarcation between marginal belt and high seas. Therefore, our national interests clearly require that consideration be given to the powers which may be exercised in and the uses which may be made of each of these three water areas by the United States and by foreign nations.

Inland Waters. The inland waters and the areas above low water mark are the sole and exclusive concern of the nations within whose boundaries they lie. The authority of a nation over its inland waters is, as against other nations, absolute and exclusive. Inland waters are part of the "national domain." Even the right of innocent passage does not exist in inland water.

Marginal Sea. In contrast to inland waters and the areas above low water mark, external considerations are held to be dominant in the three mile marginal belt. The purposes for which this belt exists cover a wide range of national and international interests. Among these are:

(i) the enforcement of neutrality regulations,

(ii) the control of visits of foreign warships, including submarines,

(iii) the exclusive control of airspace above inland waters and marginal sea,

(iv) the exclusion of aliens from fisheries,

(v) the administration of maritime navigation,

(vi) the regulation of pilotage and anchorage,

(vii) the prevention of the pollution of waters, and

(viii) the protection of fortifications and harbor installations.

The contrast between the marginal sea and inland waters is further shown by the Supreme Court's holding in this case that actions taken in the marginal belt involve questions which are for consideration among nations and which may be the subject of international agreements. 332 U.S. at 35. These foreign interests, as the Supreme Court said in *United States* v. *Texas,* are of sufficient scope and importance to place the marginal belt in the category of "international domain." 339 U.S. 707, 719.

High Seas. In the high seas which lie immediately seaward of the marginal belt, the rights and powers of the United States are vastly different from and smaller than its powers in the marginal belt. Conversely, foreign nations can carry on numerous activities in the high seas which are not permissible in the marginal belt. This is strikingly illustrated by the testimony of Attorney-General (now Associate Justice) Tom C. Clark before a Congressional Committee that, "As a matter of fact, a foreign nation can run its battleships up and down just outside the three mile belt." (Joint hearings on S-1988 before the Judiciary Committees of the 80th Congress.) Justice Clark might have added that foreign planes can fly just outside the three mile belt and photograph structures on the shore from that distance.

The above discussion shows that the paramount powers and rights of the federal government in the marginal belt are not limited to the control of oil. National interests exist in this belt which far transcend in importance the question whether state or federal officials shall administer certain oil fields. The marginal belt is, as the Court said, the "protective belt" which is so vital to national defense. It is also the belt which is to be used by the federal government for the many important functions and purposes above described. The problem under consideration requires the determination of the most advantageous location for the exercise by the federal government of *all* its paramount rights and powers.

Moreover, the location of the marginal belt, as we have shown, is not solely a national concern. It fixes the area in which other nations may exercise those rights which give that belt its international character. Since it will determine the proximity to our shores of the areas in which foreign nations may exercise these rights, the location of this belt may well involve questions of high national policy which may be of the greatest importance in the protection of our national interests in this period of international tension and strife.

I. DETERMINATION OF THE LOCATION OF THE MARINGAL BELT IS A POLITICAL AND NOT A JUSTICIABLE QUESTION.

In describing the nature of the problem presented by these proceedings, it was shown that the location of the marginal belt involves questions of international relations for which there are no presently established criteria for a judicial decision. As we shall show, the determination of such questions is beyond the limits of the judicial function.

Very early in our national history, the Supreme Court recognized its inability to decide questions which fall into the category of "political questions." In *Marbury* v. *Madison,* 1 Cr. 137, 165-66 (1803) Chief Justice Marshall said that certain questions cannot be examined by the Court because "the subjects are political; they respect the nation, not individual rights . . ." Since that decision, the Supreme Court has consistently followed that principle.

A. The Location of Our Marginal Belt Involves Questions of International Relations.

Questions involving international relations have uniformly been regarded as "political questions." Decisions illustrating the broad range of questions which have been held to be beyond the limits of the judicial function for this

reason are cited in the margin.[3] The basis of the principle that questions of international significances are political and not justiciable was summed up in *C. & S. Air Lines* v. *Waterman Corp.,* 333 U.S. 103, (1948), where the Court held that orders approved by the President which grant or deny applications for authority to engage in overseas or foreign air transportation are not subject to judicial review because they involve matters of international policy. The Court said,

> ". . . the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.*" (p. 111)

The determination of our national external boundaries or of our sovereignty over any given area falls within the category of questions which, because of their international consequences, are political and not justiciable. This has been established by a long line of Supreme Court decisions.

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[3] (1) Determination of a state of war between foreign nations or of the status of independence or belligerency of a foreign country. *United States* v. *Palmer,* 3 Wh. 610 (1829); *Divina Pastora,* 4 Wh. 52 (1829) (2) Ratification, effect and breach of a treaty. *Doe* v. *Braden,* 16 How. 635, 656 (1853); *Ware* v. *Hylton,* 3 Dall. 199, 260 (1796). (3) "What government is to be regarded here as representative of a foreign state." *Guaranty Trust Co.* v. *United States,* 304 U.S. 126 (1938); *United States* v. *Pink,* 315 U.S. 203, 228-9 (1942). (4) Determination of the end of a war. *Ludecke* v. *Watkins,* 335 U.S. 160 (1948). (5) Immunity from seizure of the vessel of a foreign government. *Ex Parte Peru,* 318 U.S. 578 (1943).

In *Foster* v. *Neilson,* 2 Pet. 253 (1829), the United States claimed certain land in Louisiana on the ground that Spain had ceded the land to France and that France in turn had ceded it to the United States. The defendant in the case contended that Spain had not made such a cession. In holding that the question was not justiciable, the Court, speaking through Chief Justice Marshall, said,

> "A question like this *respecting the boundaries of nations,* is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature."

To the same effect, see *United States* v. *Reynes,* 9 How. 127 (1850); *United States* v. *Arredondo,* 6 Pet. 491 (1832).

This same view was taken in *Jones* v. *United States,* 137 U.S. 202 (1890), where the Court was considering a challenge to the jurisdiction of the United States over the Guano Islands which had been acquired pursuant to an Act of Congress in 1856. The Court said,

> "Who is sovereign, *de jure* or *de facto* of a territory is not a judicial but a political question . . ." (137 U.S. at 212)

Referring to this quotation from *Jones* v. *United States.* the Court in *Oetjen* v. *Central Leather Company,* 246 U.S. 297, 302 (1917), said that, "This principle has always been upheld by this Court, and has been affirmed under a great variety of circumstances." See *Ex Parte Cooper,* 143 U.S. 472, 499-500, 503-4 (1892). As recently as 1948, the Supreme Court recognized the political nature of questions concerning our national external boundaries when it stated in *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, 380 that ". . . the determination of sovereignty over an area is for the legislative or executive departments."

It is the international implications of a determination of our national external boundaries or of our sovereignty over an area that makes such determinations beyond the limits

of the judicial function. This is shown by the Court's opinion in *United States* v. *Texas,* 143 U.S. 621 (1892). That case held that the determination of the *internal* boundary between the State of Texas (after it had entered the Union) and an adjoining State was not a political question. But in so holding, the Court carefully distinguished *Foster* v. *Neilson* and other cases cited above on the ground that "they relate to questions of boundary between independent nations." (143 U.S. at 639). This sharp distinction between questions of internal and external boundaries makes it clear that it is the international significance of the determination of a national external boundary which makes it a political question.

Determination of the baseline of the marginal sea falls squarely with the category of cases which are political and not justiciable because they involve the fixing of a national external boundary. As was pointed out above, the fixing of the baseline will automatically determine (1) the extent of the inland waters of the United States, (2) the precise location of the three-mile marginal belt, and (3) the line of demarcation between the marginal belt and high seas. The location of these boundaries and the limits of our sovereignty are inseparably related; the extent of our sovereignty is necessarily settled when the boundary is ascertained. Consequently, the fixing of the baseline of the marginal belt will determine for the first time the political and geographical frontier of our nation.

Plaintiff concedes that the fixing of the outer limits of inland waters "present[s] problems which have international aspects" (Master's Report, p. 8.) The fact that the location of the marginal sea is a question of international relations is fully demonstrated by the Court's decisions regarding this offshore belt. Indeed, as the Court said in *United States* v. *Texas,* 339 U.S. 707, 719.

> "Yet, as we pointed out in *United States* v. *California,* once low-water is passed the international domain is reached."

Just as the marginal belt is in the "international domain," so the determination of its boundaries is a question which is in the realm of international relations.

In the *California* opinion, the Court repeatedly emphasized the international character of all actions in or relating to the marginal belt. The Court pointed out that the authority of a nation to exercise territorial jurisdiction over the three-mile belt adjacent to the coastline has become a precept of international law only within relatively recent times. (332 U.S. 33)

Not only did the Court emphasize that the existence of the three-mile belt is dependent on international law, but it went on to say that whatever the adjacent nation does in its three-mile belt has an impact on foreign nations. The Court said,

> "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. See *United States* v. *Belmont,* 301 U.S. 324, 331-332. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement." (332 U.S. at 35)

Moreover, the responsibilities of national external sovereignty in this offshore area provided the basis for the Court's decision that California did not own the marginal belt. To enable the federal government to fulfill its responsibilities with regard to international relations, national defense and world commerce, the Court held that it was necessary for the United States to have paramount rights in the marginal belt. That these foreign and external concerns are indeed the rationale of the California decision is best illustrated by a series of brief excerpts from the Court's opinion:

"The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts 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.*" (U. S. v. California, 332 U.S. at 29.)

"The ocean, even its three-mile belt, is thus of *vital consequences 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." (332 U.S. at 35)

"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.*" (332 U.S. at 35.)

"The Government also appears in its capacity *as a member of the family of nations.* In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of 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 the land under it." (332 U.S. at 29)

"and insofar as the nation *asserts rights under international law,* whatever of value may be discovered in the seas next its shores and within its protective belt, will most naturally be appropriated for its use." (332 U.S. at 35)

"Protection and control of it [the marginal belt] has been and is a function of national external sovereignty." (332 U.S. at 34)

The sum of the matter is that the *California* opinion leaves no doubt but that the marginal sea is a creature of international law. It was born of general international acceptance. Activities in the belt are the concern of all nations. The rights of the adjacent nation in the belt are based on considerations of external sovereignty.

Determination of the boundaries of this marginal belt, like all activities in connection with the area, is a matter of international relations. While, as stated above, the United States has a wide range of choice in the determination of the limits of its inland waters and marginal belt, the line must be fixed within the broad limits of international custom and practice. Any other nation may contest action taken by the United States on the ground that it has exceeded these limits. Conversely, the United States' challenge of another nation's inclusion of waters within its inland waters and marginal belt may be resisted on the ground that it has adopted the same criteria as the United States fixes in this case.

Moreover, the distribution of rights among nations will be settled by classifying part of the offshore area as inland water, part as marginal sea, and part as high sea. For instance, if the baseline is fixed on the seaward side of the islands adjacent to our shores, inland waters would occupy a broad belt and the areas in which foreign nations have rights (the marginal sea and the high seas) would be pushed seaward. On the other hand, if the baseline is fixed inside of the offshore islands, or inside the bays and harbors, the inland waters would be narrower and the marginal sea and high seas would be correspondingly closer to the mainland.

To sum the matter up, the fixing of the boundaries of the marginal belt will involve a declaration by the United States of sovereign rights in a precise segment of the offshore area and a determination of the point at which the "international domain" begins. This will *for the first time* define the limits of our sovereignty and is therefore akin to the annexation of new territory into the Union or the establishment of control over a new territory. Such a determination of the geographical and political frontier of the United States for the first time is not the responsibility of the judicial branch of our government.

B. There Are No Criteria for a Judicial Determination of the Boundaries and Location of the Marginal Belt.

The most recent opinion in which the Supreme Court has discussed the factors which make a question political and not justiciable is *Coleman* v. *Miller*, 307 U.S. 433 (1939). There, the Court held that the efficacy of State's ratification of a proposed federal constitutional amendment, where the amendment had been previously rejected by the legislature and where thirteen years had elapsed since the amendment had been proposed, is a political question. In so holding, the Court said,

> "It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions deemed to be political and not justiciable. *In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.* pp. 454-5)

This statement by the Supreme Court makes it clear that a question is political if (1) it is appropriate to attribute finality to the action of the political departments, and (2) there is a lack of satisfactory criteria for judicial decision. We have already shown that this Court has traditionally regarded questions concerning our national external boundaries and involving our international relations as appropriate for final and exclusive action by the political branches of our government.

Both of the parties and the Master agree that there are no legally-established criteria for a judicial decision as to the location of the marginal belt in this case. The Master notes (p. 8),

> "Neither party contends, or proposes to submit any evidence to prove, that the criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitively adopted by the United

States or established as customary rules of international law." (Questions 1 and 2 relate to whether the channels, bays and harbors here in issue are to be considered inland waters.)

The Master emphasized the lack of criteria in summing up his Report of May 22, 1951:

> "* * * *It being conceded that criteria now advanced by the parties have not heretofore been definitely adopted by the United States or established as existing rules of international law,* the questions to be determined assume a character which imports, at least argumentatively, wide latitude of reference to developments in the field of international law and to historical and geographical data pertinent to the coastal segments under consideration." (p. 34)

In summarizing the respective positions of the parties, the Master said:

> "The United States, *absent any such established criteria,* in effect disclaims as 'inland' or 'enclosed' water bays enclosed to the extent measured by the geometric formula it proposes . . ." (p. 34)
>
> "California, *absent such criteria,* contends for a much more extensive area of coastal waters shoreward of the base line of the marginal belt . . . (p. 35)

The reason there are no established criteria for determining the boundaries of the marginal sea is easily explained. It was the view of the Supreme Court that prior to the *California* decision, the respective interests in the marginal belt offshore from the United States had never been authoritatively determined. 332 U.S. at 36. Consequently, there had been no occasion to establish a method of determining the boundaries of the belt.

As pointed out above, no criteria for the determination of the baseline of the marginal sea are supplied by international law. The practices of other nations vary widely. Moreover, the practice adopted by any foreign nation or even a number of foreign nations might be totally unsuit-

able for application in the United States where the economic, political, social, geographical and defense problems are substantially different. S. Whittemore Boggs, Special Adviser on Geography, Department of State, emphasized this lack of existing principles in international law for fixing the boundaries of the marginal belt in an article, *Delimitation of Seaward Areas under National Jurisdiction* in the April, 1951 issue of the American Journal of International Law. The article states,

> "Certainly one of the 'most unsatisfactory portions' of the international law relating to the territorial sea is that with regard to the specific limits of the zones of adjacent sea under national jurisdiction. Problems relating to the limits of these zones fall within two categories: (1) Lack of a generally accepted width of the territorial sea—and perhaps of one or more contiguous zones for specific purposes; and (2) *Lack of well developed, acceptable techniques and principles for the delimitation of the belt of territorial sea, or of any contiguous zone or zones required.*"

The necessity for satisfactory criteria if a question is to be held justiciable is emphasized by the discussion in *Coleman* v. *Miller* as to whether the length of time available for ratification of an amendment is a "political question."[4] The Court said,

> "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. . . . In short, the question of a reasonable time in many cases *would involve,* as in this

[4] Field, *"The Doctrine of Political Questions in the Federal Courts,"* 8 Minn. L. Rev. 485 asserts that the absence of rules by which a judicial decision can be reached is the basic explanation for the classification of questions as political. This article, which was cited by the Supreme Court in the *Coleman* case, states that, ". . . a reading of the cases seems to warrant the statement that the most important factor in the formulation of the doctrine [of "political questions"] is that stated above, namely, a lack of legal principles to apply to the questions presented."

> case it does involve, *an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extention of judicial authority to assert judicial notice* as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable." (pp. 453-4)

These same comments could properly be made with regard to the fixing of the baseline in this case. There are no criteria to be found in Constitution or statute. Just as with the question of a reasonable time, the determination of the baseline of the marginal sea involves "an appraisal of a great variety of relevant conditions, political, social and economic."

The importance of the offshore area is not limited to oil. As the distinguished tribunal in the North Atlantic Fisheries Arbitration said, "Conditions of national and territorial integrity, of defense, of commerce and industry are all vitally concerned with the control of the bays penetrating the coastline." (1 North Atlantic Coast Fishers Arbitration 94.) While this comment had reference only to bays, it applies equally to any inland waters whose outer limits determine the location of the marginal belt. The broad range of peacetime and wartime functions and purposes of the marginal belt has been previously outlined (see p. 11, *supra*). Consequently, the location of its baseline calls for judgments which are "delicate, complex, and involve large elements of prophecy" and which are therefore not within the scope of a judicial proceeding.

The Court itself declared that this protective belt would be of "crucial importance" should it ever "again become impossible to preserve the peace." 332 U.S. at 35. This close relationship between our national security and the

location of the marginal belt makes it vital that the belt be fixed where it will be most advantageous for our national defense. Since there are no satisfactory criteria for the judicial evalution of such vital factors as national security, it must be recognized that this question is political and not justiciable.

C. Nothing in the Opinion In This Case Is Inconsistent with the Contention That Determination of the Boundaries of the Marginal Belt Is a Political Question.

The present proceeding involves the determination *for the first time* of the precise limits of the marginal belt in which the United States has paramount power. The issues and considerations involved in such a determination are markedly different than those which were decided in the opinion of the Court in 1947. Then, the Court was determining the question of the respective interests in a belt of water which was known to be offshore but whose limits had not been precisely defined. Now the question is to determine the specific place in the offshore area in which this belt should be located.

Nothing in the opinion in this case forecloses the contention that the determination of the baseline of the marginal belt is a "political question." This contention was not raised by the briefs or arguments of either party on the merits in this case. Moreover, no consideration was given in the Court's opinion to this issue.

In its brief, California raised the clearly distinguishable issues that there was no case or controversy because (a) there was merely a difference of opinion between state and federal officials as to the respective rights in the offshore area, and (b) it was impossible to identify the subject matter of the controversy. (California Brief in Opposition to Motion for Judgment, pp. 11-12; Appendices, pp. 2-33.) In rejecting these arguments, the Court alluded to the justiciability of the controversy over the rights in the undefined marginal belt. 332 U.S. 24-5. But the context and the cases

cited make it clear that there was no consideration as to whether the fixing of the boundary was a political question.

In fact, the *California* opinion supports the argument that the present proceeding involves political questions not within the limits of the judicial function. In the following statement, the Court recognized that it had to follow in the wake of action taken by the political branches of our Government in determining whether the United States had *claimed* control over an undefined three-mile belt:

> "That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile belt is now a settled fact. . . . and this assertion of national dominion over the three-mile belt is binding on this Court." (322 U.S. at 33-34.)

The determination of the precise location of the marginal belt, since it requires the fixing of the external boundaries of the United States, is even more a political question than was the assertion of the original claim.

II. THE BAYS, HARBORS AND CHANNELS UNDER CONSIDERATION ARE INLAND WATERS AND SHOULD BE SO DECLARED.

If the Court should reject the proposition that the fixing of the boundaries of the marginal sea is a political and not a justiciable question, the Court would then be required to make provisions for the consideration of the evidence and the determination of the location of these boundaries. It is therefore necessary to discuss the proposal submitted by plaintiff's counsel for fixing the boundaries of the marginal sea and the different and additional factors which California believes must be considered in determining those boundaries.

Four of the seven segments here involved are within what California claims constitutes an "over-all unit area of inland waters." If this claim is sustained, these four segments would not have to be considered separately. This

over-all area lies between the mainland and the chain of islands which are part of the State of California and which extend for a distance of approximately 130 miles, roughly following the direction of the shore line of the mainland. Between the islands and the mainland is an "inland passage" extending from Point Conception on the North to Newport Beach or below on the South. These islands establish what is known as an "exterior or political coast line." As we shall presently show, such an exterior coastline drawn from the mainland around the outer edge of such islands is widely used by other nations as the baseline for the marginal belt.

The other three segments lie in Central and Northern California and are entirely outside the over-all unit area. They are Monterey Bay, Crescent City Bay, and San Luis Obispo Bay. A point-to-point description of the respective claims of the parties in each of the seven segments appears in the appendix to the Master's Report, p. 38 et seq. For the convenience of the Court, we shall set forth here a brief description of each segment with an illustrative map, followed by a map showing the over-all unit areas above mentioned.

Monterey Bay. The first map following this page shows the configuration of Monterey Bay which lies about 80 miles south of San Francisco. It is and always has been one of California's most important bays, navigators having used it for shelter since 1595.[5]

The position of plaintiff is that this segment does not in fact constitute a bay and that the base line of the marginal belt should follow the inner curve of the shore line. California maintains that this bay in its entirety is an inland water, the seaward limit of which is the line shown on the opposite map.

Crescent City Bay. The bay and harbor at Crescent City are shown on the second map following this page. This bay

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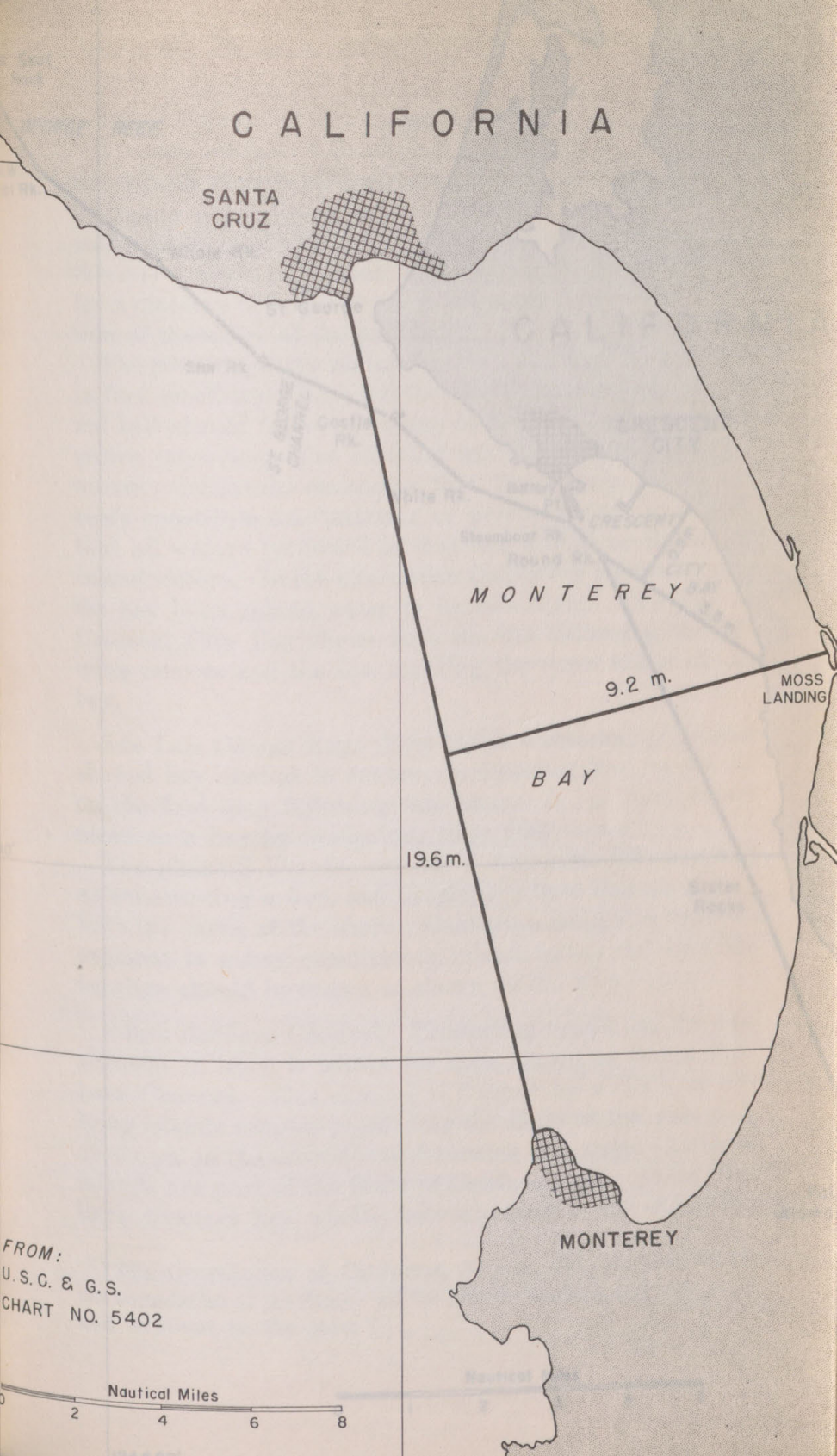
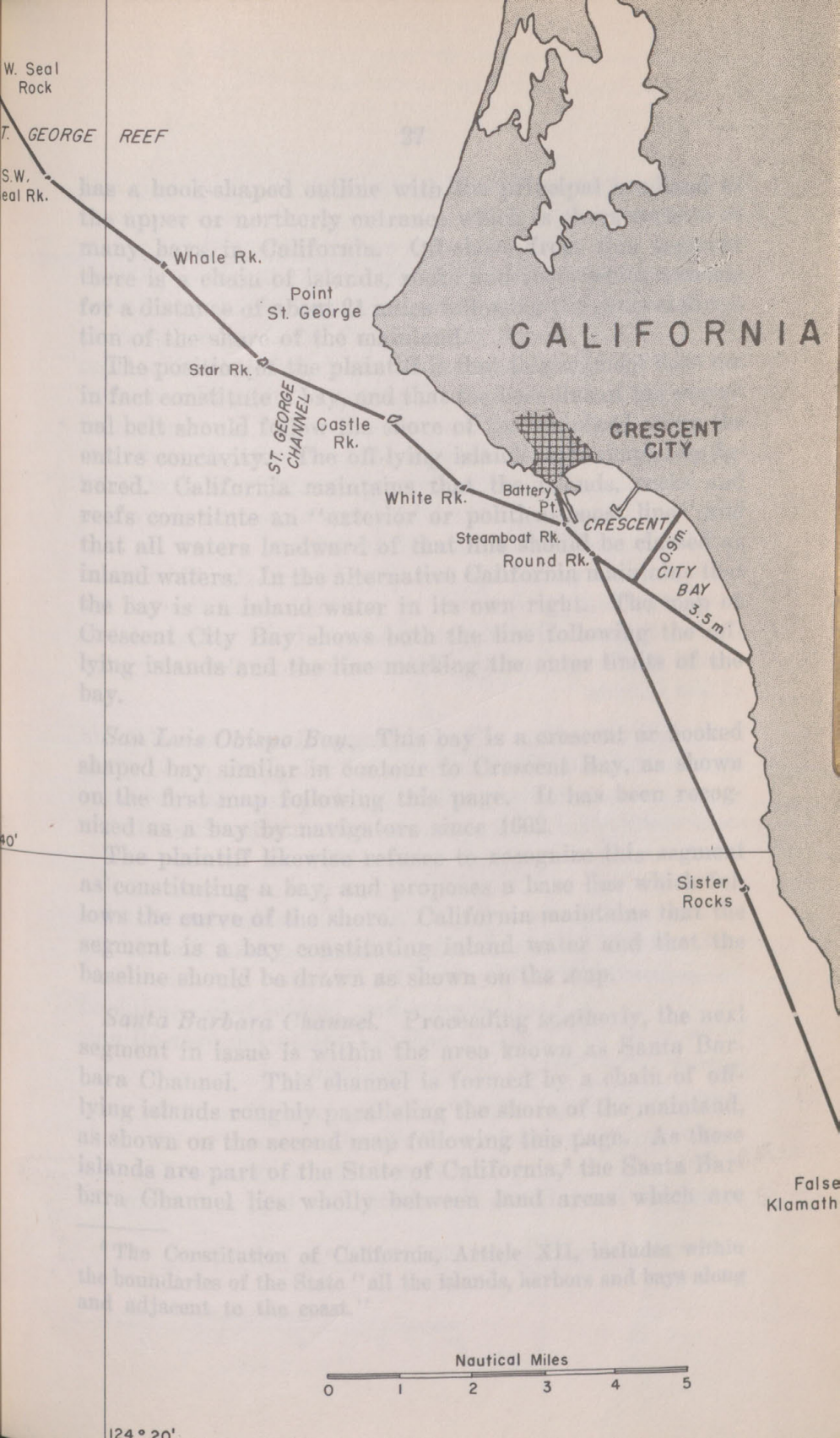
[5] *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235; 252 Pac. 722.


CALIFORNIA
SANTA CRUZ
MONTEREY
9.2 m.
MOSS LANDING
BAY
19.6 m.
MONTEREY
FROM:
U. S. C. & G. S.
CHART NO. 5402
Nautical Miles
0
2
4
6
8


W. Seal Rock
T. GEORGE REEF
S.W. eal Rk.
Whale Rk.
Point St. George
Star Rk.
ST. GEORGE CHANNEL
Castle Rk.
CALIFORNIA
CRESCENT CITY
White Rk.
Battery Pt.
CRESCENT CITY BAY
0.9m
3.5m
Steamboat Rk.
Round Rk.
40'
Sister Rocks
False Klamath
Nautical Miles
0 1 2 3 4 5
124° 30'

has a hook-shaped outline with the principal headland at the upper or northerly entrance which is characteristic of many bays in California. Off-shore from this segment there is a chain of islands, rocks and reefs which extends for a distance of about 21 miles following the general direction of the shore of the mainland.

The position of the plaintiff is that this segment does not in fact constitute a bay, and that the base line of the marginal belt should follow the shore of the mainland along the entire concavity. The off-lying islands are completely ignored. California maintains that the islands, rocks and reefs constitute an "exterior or political coast line" and that all waters landward of that line should be classed as inland waters. In the alternative California maintains that the bay is an inland water in its own right. The map of Crescent City Bay shows both the line following the off-lying islands and the line marking the outer limits of the bay.

San Luis Obispo Bay. This bay is a crescent or hooked shaped bay similar in contour to Crescent Bay, as shown on the first map following this page. It has been recognized as a bay by navigators since 1602.

The plaintiff likewise refuses to recognize this segment as constituting a bay, and proposes a base line which follows the curve of the shore. California maintains that the segment is a bay constituting inland water and that the baseline should be drawn as shown on the map.

Santa Barbara Channel. Proceeding southerly, the next segment in issue is within the area known as Santa Barbara Channel. This channel is formed by a chain of off-lying islands roughly paralleling the shore of the mainland, as shown on the second map following this page. As these islands are part of the State of California,[6] the Santa Barbara Channel lies wholly between land areas which are

[6] The Constitution of California, Article XII, includes within the boundaries of the State "all the islands, harbors and bays along and adjacent to the coast."

within that State. This channel has been recognized and used as an inland protected passage, principally for coastwise and local traffic, since the earliest known times.

The position of the United States is that these islands and this channel must be entirely ignored in fixing the outer limits of inland waters, and that the baseline of the marginal belt should follow the sinuosities of the shore line from Point Conception to Point Hueneme. Plaintiff's counsel recognize that each island may have its own marginal belt. Since the islands are more than six miles distant from the shore line, Plaintiff's proposal would leave a strip of high seas between the three-mile belt along the shore line and the three-mile belt around the islands.

California's position is that these islands should be treated as forming the exterior or political coast line of the United States and that the baseline of the marginal belt should be drawn from the mainland around the outer edge of the islands.

Santa Monica Bay. The next segment is the bay of Santa Monica, shown on the third map following this page. This is an extremely important bay for the purposes of fishing, small commercial navigation, and pleasure boating. It has been recognized as a bay since 1542.[7]

The position of the United States is that no part of this segment constitutes a bay. California maintains that the entire bay is an inland water, whose seaward limit is the line connecting Pt. Dume and Pt. Vicente. California further claims that Santa Monica Bay, besides being an inland water in its own right, is included within the over-all unit area of inland waters above mentioned.

San Pedro Bay. San Pedro Bay is another of the crescent or hook-shaped bays similar in contour to San Luis Obispo and Crescent City Bays. The harbors of Los Angeles and Long Beach lie within this bay, and from the

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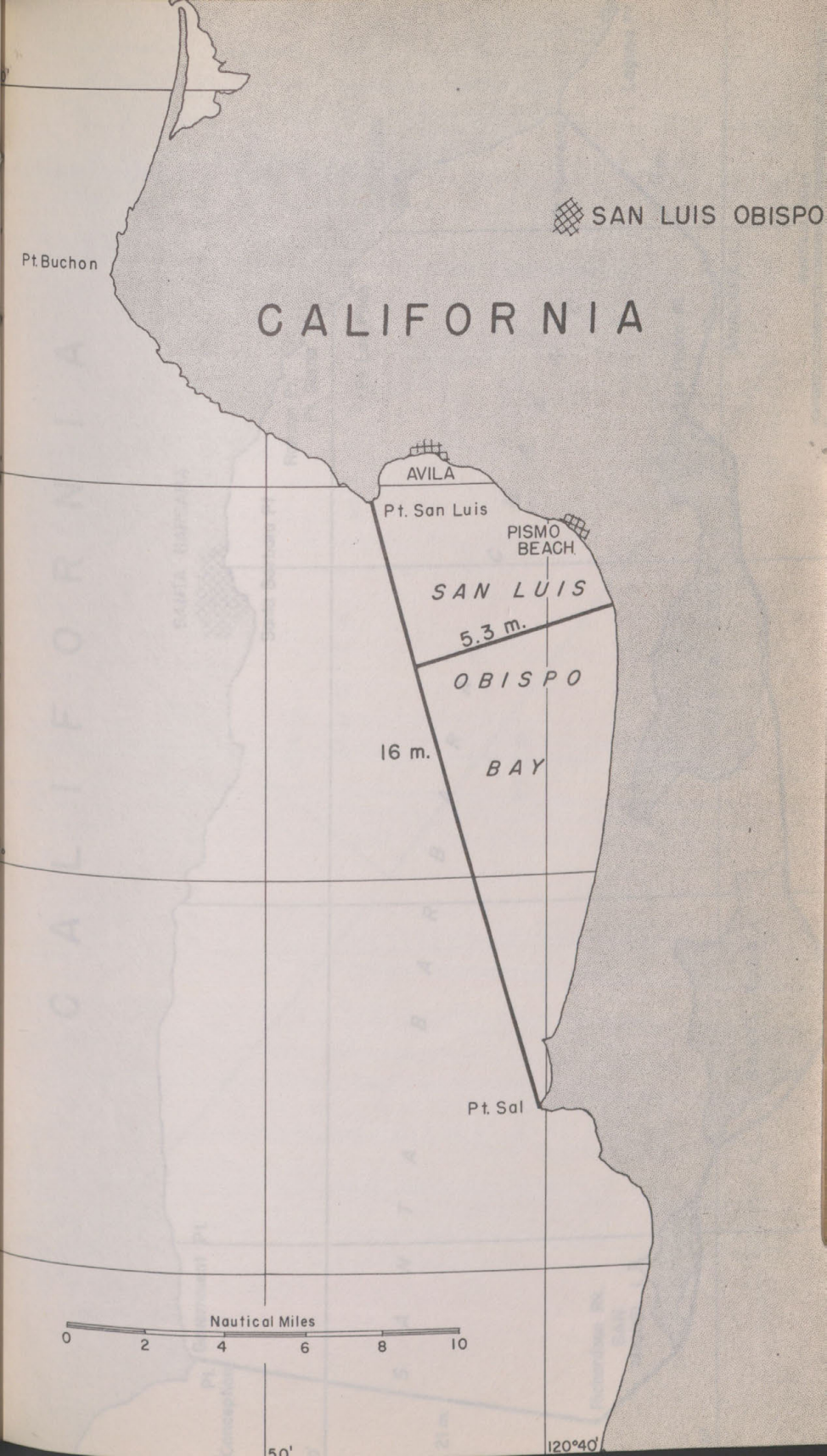
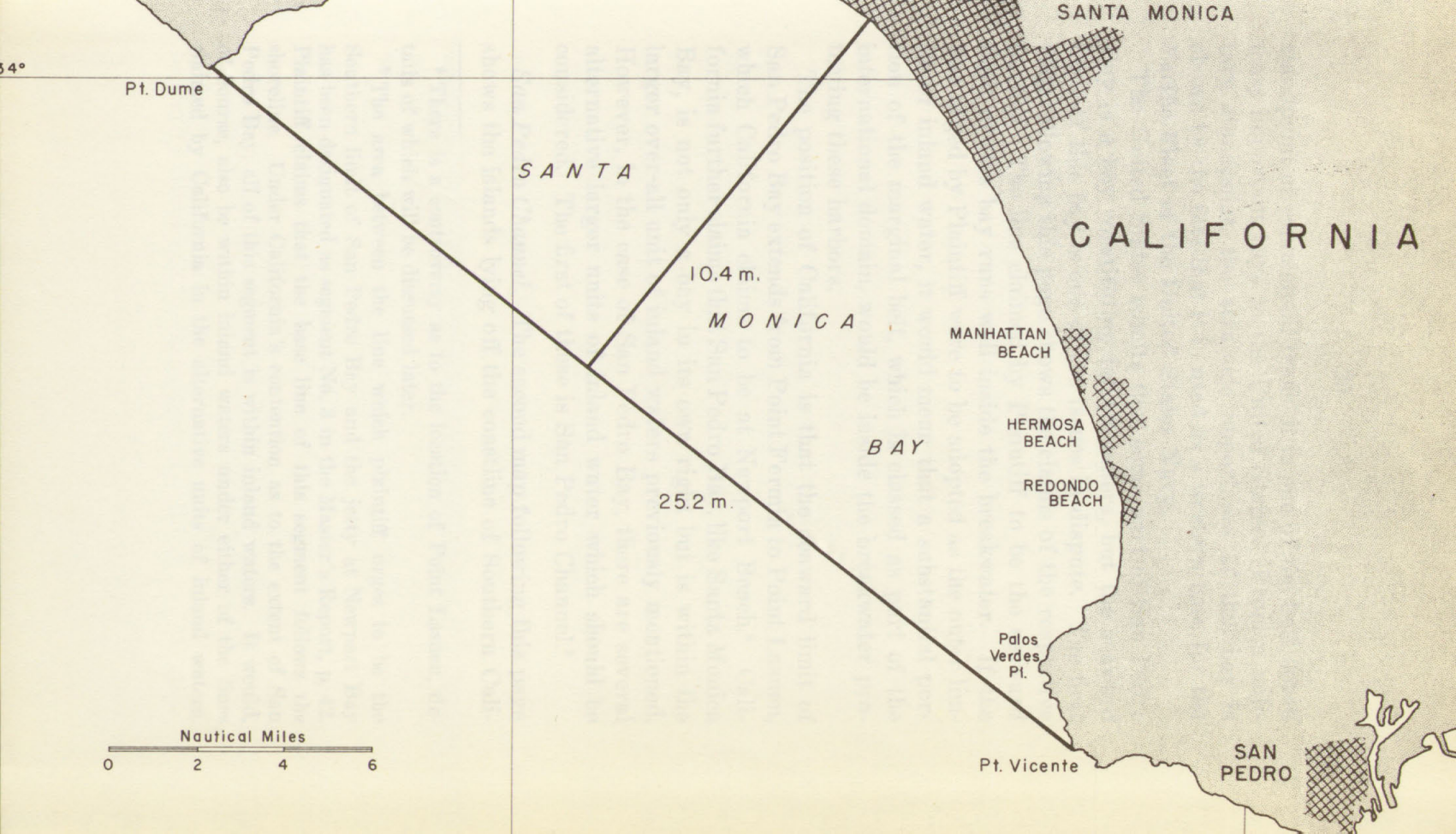
[7] *People* v. *Stralla*, 14 Cal. 2d 617; 96 Pac. 2d 941.


SAN LUIS OBISPO
Pt. Buchon
CALIFORNIA
AVILA
Pt. San Luis
PISMO BEACH
SAN LUIS
5.3 m.
OBISPO
16 m.
BAY
Pt. Sal
Nautical Miles
0
2
4
6
8
10
50'
120°40'


CALIFORNIA
SANTA BARBARA
Pt. Conception
Government Pt.
Santa Barbara Pt.
Rancon Pt.
Pt. Gorda
Pt. Las Pitas
VENTURA
SANTA BARBARA CHANNEL
21 m.
Pt. Hueneme
Richardson Rk.
SAN MIGUEL I.
Laguna Pt.
11 m.
San Pedro Pt.
SANTA CRUZ I.
ANACAPA I.
SANTA ROSA I.
Nautical Miles
0
10
20


34°
Pt. Dume
SANTA MONICA
SANTA
CALIFORNIA
10.4 m.
MONICA
BAY
25.2 m.
MANHATTAN BEACH
HERMOSA BEACH
REDONDO BEACH
Palos Verdes Pt.
Pt. Vicente
SAN PEDRO
Nautical Miles
0 2 4 6

standpoint of commercial traffic it is one of the half dozen most important bays in the United States. From a military standpoint, the strategic importance of this bay is shown by the fact that it is used as a western base for the Pacific Fleet of the United States Navy.

The United States admits that some part of San Pedro Bay is a bay constituting inland waters, but the seaward limit of this bay is one of the issues in dispute. The first map following this page shows the claims of the respective parties. The line claimed by Plaintiff to be the seaward limit of this bay runs well inside the breakwater. If the line urged by Plaintiff were to be adopted as the outer limits of inland water, it would mean that a substantial portion of the marginal belt, which is classed as part of the international domain, would be inside the breakwater protecting these harbors.

The position of California is that the seaward limit of San Pedro Bay extends from Point Fermin to Point Lasuen, which California claims to be at Newport Beach.[8] California further claims that San Pedro Bay, like Santa Monica Bay, is not only a bay in its own right but is within the larger over-all unit of inland waters previously mentioned. However, in the case of San Pedro Bay, there are several alternative larger units of inland water which should be considered. The first of these is San Pedro Channel.[9]

San Pedro Channel. The second map following this page shows the islands lying off the coastline of Southern Cali-

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[8] There is a controversy as to the location of Point Lasuen, details of which will be discussed later.

[9] The area between the line which plaintiff urges to be the Southern limit of San Pedro Bay and the jetty at Newport Bay has been designated as segment No. 3 in the Master's Report, p. 42. Plaintiff claims that the base line of this segment follows the shoreline. Under California's contention as to the extent of San Pedro Bay, all of this segment is within inland waters. It would, of course, also be within inland waters under either of the lines claimed by California in the alternative units of inland waters.

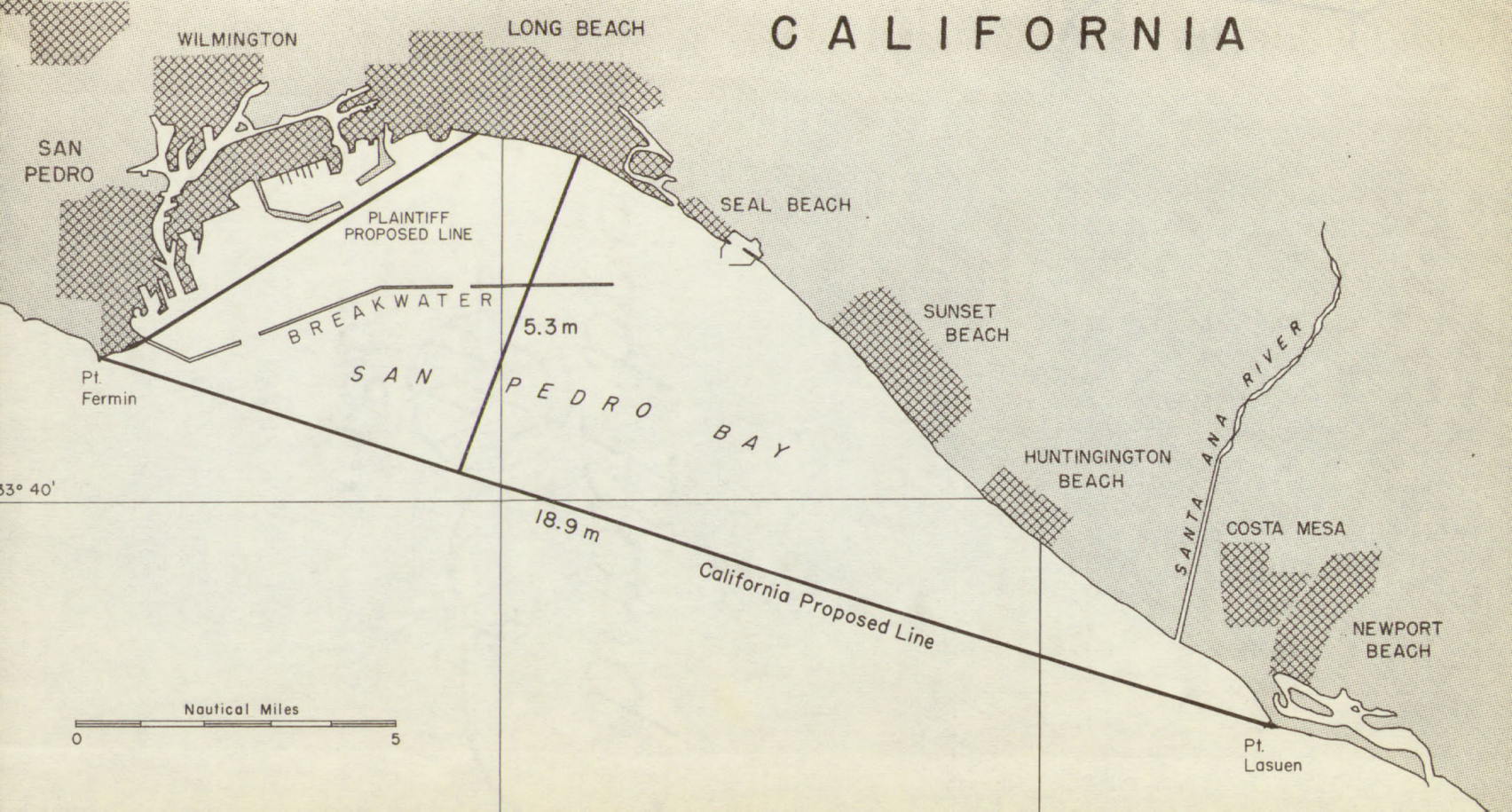
fornia. The body of water lying between Santa Catalina Island and San Pedro Bay is San Pedro Channel. This channel, as is the case with Santa Barbara Channel, has long been recognized and used as a sheltered inner passage along this important strip of California shoreline.

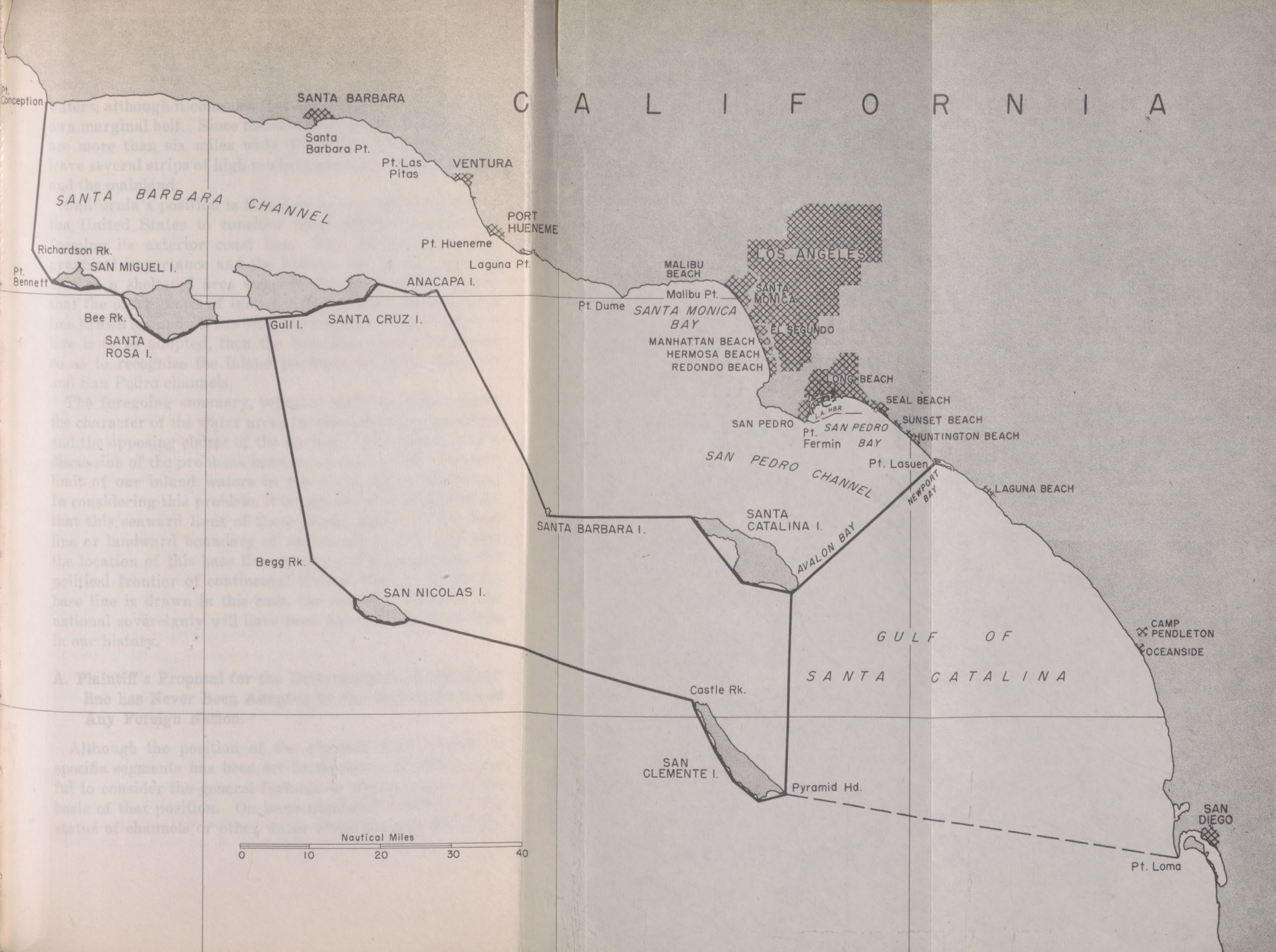
The position of Plaintiff is that this channel and the Island of Catalina are to be completely ignored in determining the outer limit of inland waters, although it concedes that the Island would have its own marginal belt. Since the channel is more than six miles wide, this would leave a strip of high seas between the mainland and the island. California's positon is that this channel, because of its historic use and occupancy, the great extent of shelter which it provides for inland water navigation, and its military importance in relation to the harbors of Los Angeles and Long Beach, constitutes and should be determined to be inland waters of California.

First Alternative Unit Area of Inland Waters. There are a number of other islands lying off the shore which should be taken into consideration in determining the outer limits of inland waters. The first alternative unit area of inland waters is shown on the second map following this page by a solid line running around the islands forming San Pedro and Santa Barbara channels. These channels in fact constitute a continuous inland passage which has long been used and recognized and which should be declared to be one unit area of inland waters.

The Over-All Unit Area of Inland Waters. We come now to the over-all unit of inland waters claimed by California. This over-all unit is formed by a line running around all of the islands in the offshore group. (See outer solid line on the second map following this page.) All of the islands are a part of the counties, townships and school districts of California and are vitally important factors in determining the outer limits of inland waters.

The position of Plaintiff is that all the offshore islands should be ignored in determining the outer limits of inland


CALIFORNIA
WILMINGTON
LONG BEACH
SAN PEDRO
PLAINTIFF PROPOSED LINE
BREAKWATER
5.3 m
SEAL BEACH
SUNSET BEACH
Pt. Fermin
SAN PEDRO BAY
HUNTINGINGTON BEACH
SANTA ANA RIVER
33° 40'
18.9 m
California Proposed Line
COSTA MESA
NEWPORT BEACH
Nautical Miles
0
5
Pt. Lasuen


CALIFORNIA
Pt. Conception
SANTA BARBARA
Santa Barbara Pt.
Pt. Las Pitas
VENTURA
SANTA BARBARA CHANNEL
PORT HUENEME
Pt. Hueneme
Laguna Pt.
Richardson Rk.
SAN MIGUEL I.
Pt. Bennett
ANACAPA I.
MALIBU BEACH
LOS ANGELES
SANTA MONICA
Malibu Pt.
Pt. Dume
SANTA MONICA BAY
Bee Rk.
Gull I.
SANTA CRUZ I.
SANTA ROSA I.
EL SEGUNDO
MANHATTAN BEACH
HERMOSA BEACH
REDONDO BEACH
LONG BEACH
SEAL BEACH
L.A. HBR.
SUNSET BEACH
SAN PEDRO
Pt. Fermin
SAN PEDRO BAY
HUNTINGTON BEACH
SAN PEDRO CHANNEL
Pt. Lasuen
NEWPORT BAY
LAGUNA BEACH
SANTA BARBARA I.
SANTA CATALINA I.
AVALON BAY
Begg Rk.
SAN NICOLAS I.
GULF OF SANTA CATALINA
CAMP PENDLETON
OCEANSIDE
Castle Rk.
SAN CLEMENTE I.
Pyramid Hd.
SAN DIEGO
Pt. Loma
Nautical Miles
0
10
20
30
40

waters, although it concedes that each island would have its own marginal belt. Since the channels in this offshore area are more than six miles wide, Plaintiff's proposal would leave several strips of high sea between the off-lying islands and the mainland.

California's position is that it is in the best interests of the United States to consider these off-lying islands as forming its exterior coast line. The military and geographical importance and the historic use of this over-all unit as a sheltered area support the claim of California that the outer limits of inland waters should be fixed at a line drawn around all the off-lying islands. If any alternative is to be adopted, then the base line should be drawn so as to recognize the inland passages in Santa Barbara and San Pedro channels.

The foregoing summary, together with the maps, shows the character of the water areas involved in this proceeding and the opposing claims of the parties. This bring us to a discussion of the problems involved in locating the seaward limit of our inland waters in the areas above described. In considering this problem, it is important to keep in mind that this seaward limit of these inland waters is the base line or landward boundary of the marginal belt, and that the location of this base line automatically determines the political frontier of continental United States. When the base line is drawn in this case, the seaward limits of our national sovereignty will have been fixed for the first time in our history.

A. Plaintiff's Proposal for the Determination of the Base-line has Never Been Adopted by the United States or Any Foreign Nation.

Although the position of the plaintiff with respect to specific segments has been set forth above, it will be useful to consider the general formula or theory which is the basis of that position. On issue number 1 relating to the status of channels or other water areas between the main-

land and offshore islands, the position of counsel for plaintiff is that the marginal belt must be measured from the shore of the mainland and that none of the channels or other water areas are inland waters.

On issue number 2 concerning whether particular segments are in fact bays or harbors constituting inland water, the position of counsel for plaintiff is that the following formula should be applied to determine whether the segment constitutes inland water or marginal sea:[10]

> "For indentations having pronounced headlands no more than ten nautical miles apart a straight line shall be drawn across the entrance; the envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line shall then be drawn from all points around the shore of the indentation; if the area enclosed by a straight line across the entrance and the envelope of the arcs of the circles is greater than that of a semicircle with a diameter equal to one-half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters; if otherwise, the waters of the indentation shall be regarded as open sea.
>
> "Where the headlands are more than ten nautical miles apart, the line shall be drawn across the indentation through the point nearest the entrance at which the width does not exceed ten miles, and the same procedure shall be employed to determine the status of the waters inside that line (A/15)."

It will be illuminating to consider the origin of Plaintiff's present proposal that in determining the limits of inland waters, offshore islands and channels should *always* be ignored and bays and harbors tested by this rigid mathematical formula. This proposal apparently was first advanced

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[10] Plaintiff concedes that allowances may have to be made for "existing agreements and 'historic' situations" with respect to bays and harbors, but contends that the burden of establishing such exceptions should be on California. California will presently accept this burden and will demonstrate that the five bays, in addition to being bays in every other sense of the word, do constitute "historic bays."

by the United States delegation at The Hague Conference of 1930. That delegation had gone to the Conference without any written instructions and with the understanding that they were not to sign any conventions.[11] The delegation submitted the proposal as a "first attempt" to "be studied objectively" and used "in the interest of finding a formulae."[12] Other nations also made proposals.[13]

The American proposal was never adopted or approved by the Conference or any Committee or Subcommittee thereof. Although the American proposal along with the French counter proposal was printed in an appendix to the report of a sub-committee, the sub-committee stated that it "gave no opinion regarding these systems, desiring to reserve the possibility of considering other systems or modifications of either of the above systems."[14] On April 6, 1930, the Chairman of the American delegation informed the State Department that "in territorial waters there appears no possibility of agreement, with views more openly divergent that they were when discussions commenced."[15] Moreover, Mr. S. W. Boggs, principal author of the American proposals at The Hague, characterized the so-called American proposal as a tentative "first attempt." (24 A.J.I.L. 541, 555 (1930))

At the time this proposal was suggested at The Hague, it did not represent the considered views of the United States. It was not and did not purport to be based on either national or international practice. The fact is that the proposal was offered as a trial balloon for the purposes of discussion.

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[11] United States Foreign Relations, 1930, I, pp. 208-9.

[12] League of Nations Document C. 351 (b). M. 145 (b). 1930. V., P. 195-117.

[13] Idem, p. 195.

[14] League of Nations Document, C. 230. M. 117. 1930 V., p. 12.

[15] United States Foreign Relations, 1930, I, p. 213.

Nothing has happened since 1930 which would justify Counsel for Plaintiff in elevating this trial balloon to the status of "the American method" or a "development of international law." Many nations have taken action with regard to the location of their marginal belt since 1930. But in no instance has the proposal of the American delegation in 1930 been adopted. Indeed, as late as 1948, Sir Eric Beckett, Legal Adviser to the British Foreign Office, described the work of the Hague Conference of 1930 as follows:

> "What in fact is the status of the so-called 'draft convention' of the Hague Conference? So far from being a convention, it was not even an agreed draft. It was a document prepared by a sub-committee of the conference which neither the Second Committee nor the conference itself approved as a draft convention. The Second Committee, owing to pressure of time, was only able to give hurried consideration to the work of its sub-committee, and, without accepting the draft as a formally agreed draft, merely approved that it should be allowed to be transmitted to any future conference as a basis for further study."

B. Plaintiff's Proposal is a One-Dimensional Approach Which Fails to Take Account of Factors Relating to National Security, Economic Requirements, International Practices, Geography, Law Enforcement and Historical Usage.

The fact that no nation has adopted the theoretical proposal made by the American delegation in 1930 strongly suggests that it has serious practical shortcomings. Further consideration of the proposal emphatically confirms this suggestion.

Plaintiff's proposal to determine the outer limits of inland waters solely on the basis of a mathematical formula is fundamentally inadequate because it seeks to apply a one-dimensional approach to a problem which requires the consideration of a great number of factors. No two seg-

ments of coastline any place in the world present exactly the same problems even though they may have similar physical characteristics. With much accuracy, a geographer has said that the use of arcs of small circles to determine boundaries "indicates a state of mind in which the map—the symbol—dominates the earth—the reality."[16] The dynamic, differing nature of our various coastal areas was succintly stated by the Supreme Court in an opinion by Justice Cardozo: "Bays and rivers are more than geometrical divisions. They are arteries of trade and travel."[17]

The futility of trying to frame in abstract terms a universal solution for all varieties of situations is made strikingly clear by the award of the distinguished tribunal in the North Atlantic Coast Fisheries Arbitration.[18] Question 5 taken up by the Tribunal was the interpretation of the terms "bays, creeks, and harbours" in the Treaty of 1818 between United States and England. The Tribunal said,

> ". . . Conditions of national and territorial integrity of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coastline. This interest varies, speaking generally, in proportion to the penetration inland of the

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[16] S. B. Jones, *Boundary-Making* (1945), p. 158.

[17] *New Jersey* v. *Delaware,* 291 U. S. 361, 380 (1934).

[18] The Arbitration was held at The Hague in 1910. The five members of the Tribunal who were selected from the list of the members of the Permanent Court at The Hague were: Dr. H. Lammasch, Professor of the University of Vienna and member of the Upper House of the Austrian Parliament; Jonkheer A. F. de S. Lohman, Minister of State of Netherlands; George Gray, United States Court of Appeals judge; Sir Charles Fitzpatrick, Chief Justice of Canada; and Mr. Luis Maria Drago, former Argentine Minister of Foreign Affairs. Forty sessions amounting to more than 160 hours were consumed in oral argument. Counsel for the United States were George Turner, Charles B. Warren, Samuel J. Elder, and Elihu Root. The published proceedings ran to 12 volumes.

> bay; but . . . no principle of international law recognizes any specific relation between the concavity of the bay and the requirements for the control of the territorial sovereign." (1 North Atlantic Coast Fisheries Arbitration, p. 94)

This statement emphasizes the fact that whether a particular body of water is a bay constituting inland waters must be determined on the basis of the conditions,—geographical, military and economic—which exist in any particular case. The Tribunal's statement that no principle of international law recognizes any specified relation between the concavity of a bay and the requirements for control by the territorial sovereign is a direct repudiation of the American proposal which endeavors to establish as an unvarying rule a definite relation between the concavity of the indentation in question and its status as inland waters. The legal and political status of a bay does not depend upon whether the area between a certain set of arcs of circles and a line drawn across the entrance is greater than the area within a semicircle with a diameter one-half the length of the line across the entrance. The special characteristics and problems of these water areas do not lend themselves readily to the arbitrary application of slide rule techniques.

In summing up its discussion of what constitutes a bay, the famous Tribunal used language which is directly applicable to the issues now before the Court:

> "The interpretation must take into account all the individual circumstances which, for any one of the different bays, are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general." North Atlantic Coast Fisheries Arbitration, Vol. 1, p. 97.

C. Consideration of the Relevant Factors Demonstrate that the Bays, Harbors, and Channels Under Consideration Are and Should Be Declared to be Inland Waters.

The factors which are ignored in Plaintiff's proposal but which must be taken into consideration in determining the base line fall into six categories. (1) national security, (2) economic requirements, (3) international practices, (4) geography, (5) law enforcement, and (6) historical usage. An analysis of these factors will demonstrate that the base line must be fixed in each segment in accordance with the position taken by California.

1. National Security.

The Supreme Court recognized the close relationship between the marginal belt and our national security by pointing out that it was a "protective belt" which will be of "crucial importance should it ever again become impossible to preserve that peace." (332 U. S. at 35.) As this statement by the Supreme Court indicates, the military advantage or disadvantage of any of the suggested locations of the marginal belt is a matter of the highest importance to our national security.

The strategic importance of the California coastal areas is amply demonstrated by mentioning a few of the many military installations which dot the shoreline and the offlying islands of the area in issue here. San Clemente Island has been completely taken over by the Navy and civilians are not permitted to enter. (Summary of Testimony of Typical Witnesses, p. 120.) Defense installations have been made on San Miguel and Santa Rosa Islands in the Santa Barbara Channel. (Summary of Testimony of Typical Witnesses, p. 212.) A substantial part of the facilities on Catalina Island were taken over for defense purposes during World War II.

These islands guard a chain of Army, Navy, and Air Corps bases on the shore of the mainland. Shoreward from

the Santa Barbara Channel lies Point Mugu, an important guided missile installation, and Point Hueneme, which has been tremendously expanded as a Navy base in recent years. (Summary of Testimony of Typical Witnesses, p. 116.) San Pedro Bay is a western base for the Pacific Fleet of the Navy, as well as being adjacent to the Navy Air Station at Reeves Field and the Army's Fort MacArthur. San Clemente Island protects the approach to the major Navy base at San Diego, the Navy Air Station at North Island and the Marine Base at Camp Pendleton.

The presence of these vital military installations in the coastal areas in issue here make it especially relevant to reiterate that the distribution of rights in the offshore area among various nations will be determined by fixing the outer limits of inland water. As we move seaward through the water areas which our nation may designate as its inland waters and marginal belt to the high sea, the rights and powers of the United States diminish, while conversely, the rights of foreign nations increase. This is strikingly illustrated by the rights of foreign warships and airplanes in the respective zones in the offshore area.

Foreign warships and aircraft are at all times wholly unrestricted in their movement on the high seas. The rights of foreign warships in the marginal belt are at present in doubt, as shown by the fact that the International Court of Justice declined to rule on this point in the *Corfu Channel* case.[19] But in its inland waters, the adjacent nation has exclusive and complete control.

The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the

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[19] I. C. J. Reports, 1949, p. 4.

fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases *or* whether those waters are to be set aside for the exclusive jurisdiction of the United States.

The military importance of whether the marginal belt is placed close to shore or as far seaward as possible serves to underscore emphatically the argument made in Section I of this brief that the determination of the baseline is a political and not a justiciable question. The military factors in the determination of the outer limits of inland waters call for the opinion and advice of the National Security Council, Secretary of Defense, and the Secretaries of the Army Navy and Air Force. The decision as to the location of the baseline is an element of our national military strategy, and it may involve information as to our national capabilities and aims. It has long been recognized that the courts have neither the responsibility nor the facilities for weighing such information or reaching such decisions.

But, if the Court rejects the argument that the question is beyond the scope of the judicial function, it will be charged with the duty of weighing in this litigation all the interests of the United States in the location of its marginal belt. In doing so, it would seem improper for the Court to rely solely on the viewpoint of the Department of Justice which is engaged in trying to win a lawsuit. If this issue is to be determined in this proceeding, the testimony of the Defense Department and other concerned agencies should be received under circumstances in which it can be examined not only by the Court but also by the parties.

While California makes no pretense of expressing the authoritative military judgment on the location of the marginal belt, it would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far

seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the off-shore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far seaward as can be done within the limits of international practice. The military importance of keeping these offshore waters free from hostile forces was reflected in the setting up of Naval defense zones in these areas in World War II. There would appear to be a substantial risk of subverting the best interests of our nation by the adoption of a proposal for the location of the marginal belt, such as that offered by Plaintiff, which completely ignores the significance of the areas to our National security.

The value of a broad belt of inland waters for purposes of defense was stressed in the testimony of Colonel Rufus W. Putnam, submitted to the Master. (Summary of Testimony of Typical Witnesses, pp. 200-201.) In light of the military importance of the off-lying islands and the shoreline bases, Colonel Putnam urged that the baseline should be fixed so as to give the United States complete and exclusive control over the waters lying between such outlying islands and the mainland, and to prevent a belt of high seas from existing in the intervening channels. A realistic example of the military importance of fixing the baseline in accordance with this testimony is provided by the incident in World War II in which a Japanese submarine approached the shore near Goleta in the Santa Barbara Channel and fired shells at oil storage tanks. This was the only instance during the war in which the Continental United States was directly attacked. (Summary of Testimony of Typical Witnesses, p. 212.)

The Corfu Channel Case, recently decided by the International Court of Justice, provides an important lesson as to the military significance of the placement of the marginal belt. In that case it was held that the ships of the British Navy had a right under international law to pass through

the narrow channel between Corfu Island and Albania because it was an international strait. Albania was therefore held liable in damages for the destruction of British ships by mines in the Channel. If Corfu Island had been part of the country of Albania, this channel could have been declared inland waters in which the British ships would have had no right of passage whatever. The United States is more fortunate in that the islands offshore from California do not belong to another nation, but in fact form part of our exterior or political coastline. The United States can make this exterior coastline the baseline of the marginal sea, thus insuring that the channel between the islands and the mainland is inland water and under our exclusive control. It seems entirely probable that such a decision would be much more to our military advantage than to adopt plaintiff's proposal which would leave a strip of high seas in our channels and bays in which foreign warships could pass at any time and over which hostile planes could fly without restriction.

The facts relating to the actual uses of San Pedro and Santa Barbara channels will show that there is heavy and constant traffic of military, commercial and pleasure craft in these relatively narrow channels. These channels frequently have all the appearances of inland lakes. First hand examination is essential to a real understanding of the internal character of these waters. Such an understanding would show the incongruity of the Plaintiff's proposal that these waters be determined to be high seas, open to unrestricted passage of the navies and airplanes of all other nations.

2. Economic Requirements

The one-dimensional approach advanced by Plaintiff completely overlooks the fact that the economic life of an entire coastal community may depend on the proper placement of the marginal belt. The vital stake of the fishing industry in the coastal areas affords an example. San

Pedro Harbor, which is in one of the segments at issue in this proceeding, is the home port of the largest commercial fishing fleet in the world. (Summary of Testimony of Typical Witnesses, p. 300.) The fishing industry is also the largest source of maritime commerce in Crescent City Bay. (Ibid., p. 397.)

To promote the welfare of the large fishing population, it may be desirable or even absolutely necessary for this nation to establish a broad belt of inland waters in which the fishermen of this nation would have exclusive rights. By that step, the water areas of the marginal belt and the high seas, in which foreign nations have rights, would be pushed further seaward. The incidents between fishermen from Japan and our nation in the water of the Pacific Coast prior to World War II is a practical example of the keenness of the competition in these offshore areas, demonstrating the importance of the proper determination of the outer limits of inland waters.

In recent years, many other nations have established a broad belt of inland waters for the purpose of protecting their fishing industries. For instance, in 1951, Ecuador located its marginal belt seaward of "the most advanced points of the Ecuadorian coast and adjacent islands" for the protection of its fisheries. In 1950, Iceland promulgated regulations for the conservation of its fisheries which fixed the outer limits of its inland waters as a "line drawn between the outermost points of the Coast, islands and rocks . . . (or) across the opening of the bay." These are only examples of the many instances in which economic interests such as fisheries have caused other nations to fix their marginal belts as far seaward as possible, thus establishing a broad belt of inland waters.

The importance to the fishing industry of the location of the marginal belt is now or soon may be duplicated with regard to other industries which operate in the offshore area. Scientists and engineers are in agreement that we are only in the first stages of the development of the vast

potential resources of this offshore area. (See Carson, *The Sea Around Us*). The Supreme Court itself noticed that the oil problems in this area arose only during the 1930's. 332 U. S. at 39.

Whether the United States will have exclusive rights to the vital mineral resources in any given area of the offshore area depends on the location of the baseline of the marginal belt. Foreign nations will have no rights whatsoever in the area which is determined to be inland waters. But in the marginal belt, the Supreme Court has said that the oil and other substances and minerals "may well become the subject of international dispute and settlement." (*United States* v. *California,* 332 U.S. 19, 35 (1947); see *United States* v. *Texas,* 339 U.S. 707, 719 (1950). And foreign nations will have still greater rights in the resources in the area of the high seas seaward of the marginal belt.

In view of these facts, it is apparent that the maximum amount of the offshore resources can be encompassed within the exclusive jurisdiction of the United States by fixing the outer limits of inland waters as far seaward as possible. To place the baseline of the marginal sea closer to shore would result in a surrender of some of the resources of the sea which the United States could have claimed. Such a surrender might well be a serious detriment to our economic welfare. A shortage of the raw materials present in the offshore area might also be a handicap to our defense efforts.

The close relation between the location of the marginal belt and our economic security again points up the argument made earlier that the questions involved in this proceeding are beyond the scope of judicial inquiry. Whether the United States should surrender exclusive control over the resources from some of the offshore areas is a question which requires the full consultation with the National Security Resources Board and other interested Governmental agencies. But if the Court should reject the contention that this issue is political and not justiciable, California

believes that it is vital that the Court recognize the necessity of the fixing of the baseline from an economic point of view. It is the earnest belief of California that the best interests of our nation would not be served by adopting Plaintiff's proposal and thus claiming for the exclusive jurisdiction of the United States only a bare minimum of the offshore resources.

3. International Practices

It has already been shown that the marginal belt must be located within the limits of international practice. This is confirmed by the Master's statement that the United States recognizes that a determination of the outer limits of inland waters "presents problems which have international aspects . . ." (p. 8) The practices of other nations have importance in two respects:

(1) In determining for the first time in its history the outer limits of its inland waters, the United States should be guided by the lessons and experience of other maritime nations which have considered this problem over a long period of time.

(2) In determining the location of the seaward limit of inland waters, the United States must consider the range of choice which would be within the limits of international practice and must fix lines on which it would be willing to stand in an international controversy.

For the purposes of showing the range of international practice, California will discuss the general concept of inland waters both as to channels and bays, and will set forth a number of examples of the laws of other nations with illustrative maps showing the application of those laws to their coastal areas.

General Concept of Inland Waters.

To locate the seaward limit of inland waters, it is necessary to distinguish between the "physical coast" of any body of land and the "political coast" of a state or nation. These terms were defined by the United States in the statement of its "Counter Case" in the Alaska Boundary Arbitration, as follows:

> "*physical coast,* the line where water ends and land begins."
>
> "*political coast,* the line adopted in international law as the basis for the extension of municipal jurisdiction over portions of the high seas contiguous to the territory of a nation;" (4 Alaska Boundary Arbitration 31.)

Thus the physical coastline is synonymous with the shore line, whereas the political coastline crosses bays and arms of the sea and extends around islands and is sometimes referred to as the "outer or exterior" coastline.

The principle of the exterior coastline is further explained by the following excerpts from the United States case in the Alaska Boundary controversy:

> "The political coast line (since all arms of the sea not exceeding six miles, *and in some cases more,* in width, and all islands are practically treated as portions of the mainland) extends outside the islands and waters between them." * * *
>
> "It should also be noted that there are no 'inland waters' composed of salt water within the physical coast line, but within the political coast line there are a great number of straits, sounds and inlets, formed by the contour of the continent and the proximity of the islands to it and to one another."

Under the principle of the political or exterior coastline all waters which lie landward of that coastline are inland waters. Therefore, the fixing of the political coastline is

the governing factor in the determination of the seaward limits of both bays and channels. Because it marks the outer limits of inland waters, the political coastline constitutes the baseline of the marginal sea in areas where the mainland does not confront the open sea.[20] In presenting this general concept of inland waters, we will first discuss the application of this exterior coastline principle to channels and other waters which lie between the mainland and the off-lying islands, rocks and reefs.

Channels.

Position of the United States in relation to Cuba. The United States recognized the principle of the exterior or political coastline as early as 1863 in a letter by Secretary of State Seward to the Spanish Minister concerning the territorial waters of Cuba. Secretary Seward's letter was prompted by a dispute between Great Britain and Spain concerning the extent of Cuban inland waters. Cuba was Spanish territory at that time, and Britain protested Spain's claim to the waters between the mainland of Cuba and the off-lying islands. The map following this page shows that there are a large number of islands lying offshore from Cuba, many of them a considerable distance from the mainland, some as many as 70 miles. Secretary of State Seward said in part:

> "The undersigned has further ascertained, as he thinks, that the line of keys which confront other por-

[20] Although the principle of the exterior coast line was ignored by the tentative American proposal at The Hague in 1930, Mr. S. W. Boggs, the principal author of that proposal, has now changed his position. Writing in the April 1951 issue of the American Journal of International Law, Mr. Boggs stated that the marginal belt should be located seaward of off-lying islands, and the example he gives in the article shows that he now believes that islands should be taken into consideration even though they are more than six miles apart. 45 A. J. I. L. 240, 254-255.


24°
HABANA
CUBA
GOLFO DE BATABANO
Cayos de San Felipe
22°
C. Frances
ISLA DE PINOS
BANCO JARDINES
C. Corrientes
Cabo Frances
Cayo Largo
ARCHIPIELAGO DE LOS CANARIOS
Cayo Breton
Cayo Grande
Cayo Anclitas
Nautical Miles
0
100
20°

> tions of the Cuban coast resemble, in dimensions, constitution and vicinity to the mainland, the keys which lie off the southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the *exterior coast line,* and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the *exterior sea front of those keys''* (1 Moore's Digest of International Law, p. 711).

This letter from Secretary Seward shows that the United States recognized the merits of Spain's claim. Shortly thereafter, Britain revised its position and not only accepted the Spanish claim but asserted similar claims concerning the islands and inner waters of the Bermudas, the Bahamas, and Jamaica. (See Opinions of the Law Officers of the Crown, 18 March 1869 and 12 October 1872. Citation of Documents, p. 168.)

The principle that the base line of the marginal belt should coincide with the exterior coastline of off-lying islands has been consistently followed in Cuba up to the present time. In 1901, while Cuba was temporarily under the dominion of the United States, an ordinance was promulgated by the United States Secretary of War Elihu Root which applied the principle of the exterior coastline announced by Secretary Seward. (Citation of Documents, p. 99) This ordinance provided, in part, as follows:

> ''The jurisdictional waters of Cuba extend for four leagues from the coast of the island *or from the cays belonging to it.''*

While this ordinance fixes four leagues as the jurisdictional area for customs purposes, the crucial point is that this jurisdictional area is to be measured from a base line drawn outside the outermost islands and rocks.

In January, 1934 a ''decree-law'' was adopted in Cuba reaffirming in more specific terms the principle that the

waters inside the exterior coastline are inland waters.[21] This "decree-law" reads in part as follows:

> "Article 6.—The territorial waters or maritime frontiers of Cuba extend for six miles from the coast *or from the line of cays which surrounds it.*
>
> "The waters included between the islands, islets or cays and the mainland of the Republic are interior waters and their use for navigation, fishing, and other modes of utilization shall be determined by the laws and rules in force or which may be established." (Citation of Documents, p. 100)

As late as 1938, this law was reenacted, with the addition that the same rule was applied to the airspace over these waters.[22]

These laws furnish a graphic example near at hand of the treatment accorded off-lying islands and intervening channels. It appears that no nation in the world has ever protested Cuba's claim to these bodies of water as inland waters. On the contrary, this claim, and the principle of the exterior coastline upon which it is based, has been widely recognized throughout the world.

In its counter case before the Alaskan Boundary Tribunal, the United States cited the example of Cuba in support of its argument that the seaward limit of inland waters is the political or exterior coast line, as follows:

> "*Distinction Between the Outer and Inner Coast Line.*—An eminent English publicist has said that 'certain physical peculiarities of coasts in various parts of of the world, where land impinges on the sea in an

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[21] Decree-Law No. 108 of 8 January 1934, concerning the Functions and Reorganization of the Navy. (La Jurisprudencia al Dia, 1934, Section de Legislacion (Habana, 1934), p. 28.)

[22] Code of Social Defense, 1938, Book I, Title 1, Chapter 2, Section 2, Article 7 (D) and (E). (1 J.M. Bustamante y Morejoh and A. Segura Bustamante, Codigo de Defensa Social y su Legislacio'n Penal Complementaria, Publicacion autorizada por el Gobierno (Habana, 1938) p. 11.)

unusual manner, require to be noticed as affecting the territorial boundary. Off the coast of Florida, among the Bahamas, *along the shores of Cuba, and in the Pacific,* are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water. To take a specific case, on the south coast of Cuba the Archipielago de los Canarios stretches from sixty to eighty miles from the mainland to La Isla de Pinos, *its length from the Jardines bank to Cape Frances is over a hundred miles.* * * * In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. *Each must be judged upon its own merits.* But in the instance cited, there can be little doubt that the whole Archipielago de los Canarios is a mere salt-water lake, *and that boundary of the land of Cuba runs along the exterior edge of the banks."* (Citing Hall, Int. Law, p. 129-130) Alaska Boundary Tribunal, Vol. 5, pp. 14 and 15, Senate Document 162, 58th Congress, 2nd Session.)

The fact that the waters off Cuba are comparatively shallow does not detract from the principle of the exterior coastline. The depth of the waters is only one of many factors which must be taken into consideration by a nation in the determination of the limits of its inland waters. *Each case must be judged on its own merits.* As we have pointed out, the weakness of the system proposed by the United States is that it focuses solely on one factor and ignores all other relevant considerations. Indeed, if Plaintiff's proposal were applied to Cuba, the Cuban archipelago would be ignored and the marginal belt would follow the shoreline of the mainland.

Position of the United States in relation to Alaska. The United States' acceptance of the principle of the exterior coastline is illustrated in the Alaska Boundary Case. A reduction of a U. S. Coast and Geodetic Survey map of the Alaskan Archipelago, which formed one of the exhibits of the United States in that case, is inserted following this page. In describing the seaward boundary in this part of Alaska, Counsel for the United States said,

> "It thus appears that from *the outer coast line* of a maritime state, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska, that is, the exterior boundary from which the marine league is measured,—runs along the outer edge of the Alaskan or Alexander Achipelago, embracing a group composed of hundreds of islands." Citing Hall, Int. Law, pp. 129-130) (Pp. 14-15, Italics in the original, Alaska Boundary Tribunal, Vol. 5, pp. 14 and 15, Senate Document 162, 58th Congress, 2d Session).

The map will show that this exterior boundary establishes as inland waters all the straits, bays and channels of the Alaskan Archipelago. It is equally vital that the channels and bays within the exterior coastline of California should be determined to be inland waters.

A great many other nations have recognized the principle that the exterior or political coastline constitutes the baseline of the marginal sea. A partial compilation containing the text of 92 laws of other nations is set forth in the Citation of Documents, pages 12-314. From this it will be seen that among countries which have fixed their baselines along the seaward side of some or all of their off-lying islands, islets, rocks and reefs, are the following:

Australia	Finland	Norway
Canada	France	Russia
Denmark	Hawaii	Saudi-Arabia
Ecuador	Iceland	Sweden
Fiji	Iran	


ALASKA
CANADA
58°
56°
Cross Sound
Chatham Strait
Norfolk Sound
ALASKA ARCHIPELAGO
Christian Sound
Iphigenia Bay
Clarence Strait
PORTLAND CANAL
DIXON ENTRANCE

From this list, the examples of Denmark, Yugoslavia, Ecuador, Australia and Norway will show the application of the principle in a variety of situations.

Denmark. As the above list shows, all of the Scandinavian countries have long followed the practice of extending their exterior coastlines around adjacent islands. Denmark is an excellent example. In 1913 Denmark defined its inland waters to include waters now "situated between and inside the islands, islets, and reefs not permanently under water."

The extent of the Danish islands included in this decree and the waters surrounding them is shown on the first map following this page. It will be seen that these islands lie in the sea-way between the North and Baltic seas. To accommodate international traffic, the Denmark decree makes a specific exception of certain designated channels "which form the natural route of traffic between the North and Baltic seas . . . [and which are] not included in the inland waters." (Citation of Documents, pp. 110 et seq.) Otherwise the waters between the islands and the main land and between the islands are specifically declared to be inland water of Denmark.

Yugoslavia. In 1948, the Federative People's Republic of Yugoslavia enacted a law establishing its exterior coast line and the base line of the marginal sea as the line extending around all islands within its jurisdiction. After defining this exterior coast line point by point, this law provided:

> "The territorial sea of the Federal People's Republic of Yugoslavia embraces the sea zone in the width of six nautical miles in the direction of the open sea, reckoning from the border of the internal sea waters, or from the line of the lowest ebb-tide on the land coast *or on the coast of the Islands* outside the internal sea waters of the Federal People's Republic of Yugoslavia."

The second map following this page shows the approximate location of this "exterior coastline", as defined by

the Yugoslavian statute. (Copy of this statute was received too late to include in the "Citation of Documents.")

Ecuador. An example of the size of water areas which may be included within an exterior coast line is found in the case of the laws of Ecuador regarding the Galapagos (Colon) Islands. In 1938 Ecuador enacted regulations declaring that the marginal belt should be measured from "the lowest low water mark on the most salient points of the outermost Islands which form the outline of the Colon (Archipelago.)" (Citation of Documents, p. 129 et seq.) The above regulations were reenacted with some variations in the form of a "decree-law" on February 22, 1951. (Copy of this decree was received too late to include in the "Citation of Documents.")

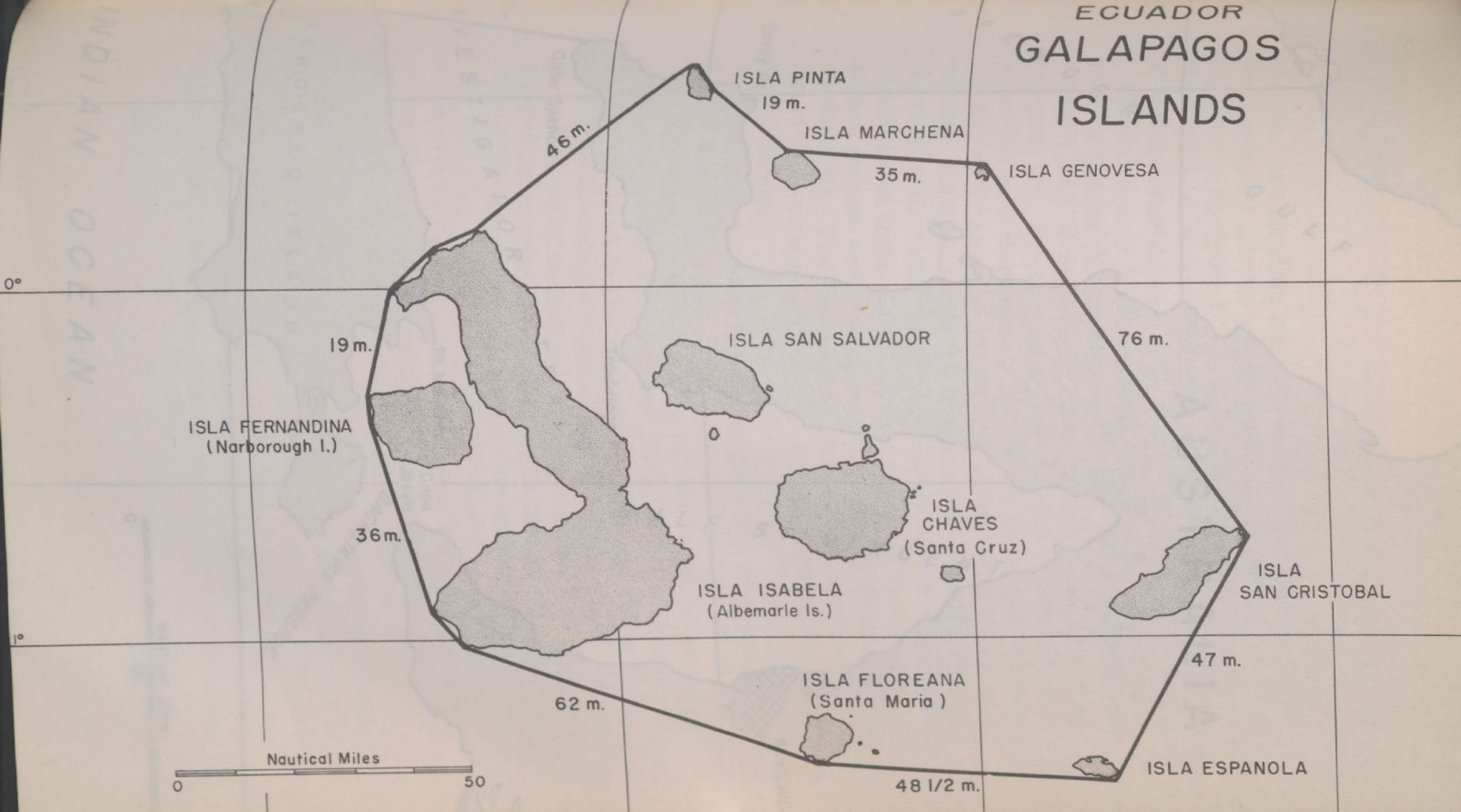
The baseline defined in this statute extends across water areas varying in distances from 16 to 76 miles, as shown on the third map following this page. To our knowledge, no nation has protested this claim.

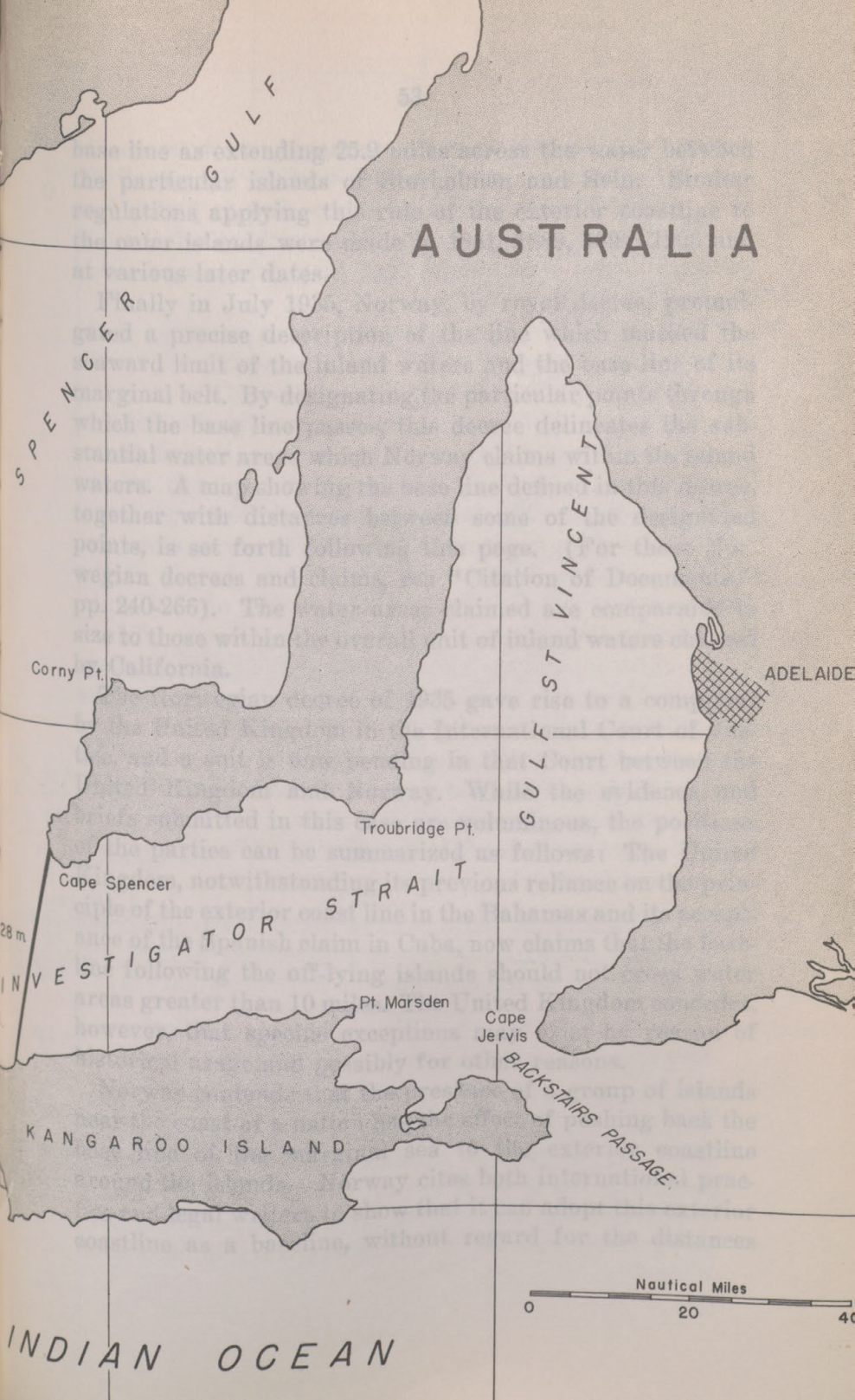
Australia. The application of this exterior coast line principle to a strait or channel lying between a mainland and a single large off-lying island is shown on the map of South Australia, which is the fourth map following this page. The strait and passage shown connect the open waters of the Indian Ocean. The width of this channel is greater than San Pedro or Santa Barbara Channels offshore from California. The large body of water of Investigator Strait, together with the Gulf of St. Vincent, constitute part of the inland waters of South Australia. (Citation of Documents, p. 65b; See Counter Memorial of Norway in Anglo-Norwegian Fisheries case, Par. 380, citing Charteris, Chapters on International Law (1940) p. 99.)

Norway. As early as 1812, Norway established a line drawn around the islands or islets farthest from its mainland as its exterior coastline and as the base line for the measurement of its marginal sea. In a decree dated October 1869, Norway more precisely defined one segment of this


NORWAY
SWEDEN
Nautical Miles
0 10 20 30 40 50
KATTEGAT
SKAGERRAK
Laeso
Anholt
DENMARK
SAMSO BELT
STORE BELT
THE SOUND
SJAELLAND
FYN
LITTLE BELT
AERO
Langeland
LOLLAND
BALTIC SEA
GERMANY


45°
Pt. Kamenjak
Unje Is.
Premuda Is.
Dugi Otok
YUGOSLAVIA
ADRIATIC SEA
ITALY
Zirje Is.
Solta Is.
Hvarski K.
Vis Is.
Korculanski K.
Lastovski K.
Nautical Miles
0
50


ECUADOR
GALAPAGOS
ISLANDS
ISLA PINTA
19 m.
ISLA MARCHENA
46 m.
35 m.
ISLA GENOVESA
0°
19 m.
ISLA SAN SALVADOR
76 m.
ISLA FERNANDINA
(Narborough I.)
ISLA
CHAVES
(Santa Cruz)
36 m.
ISLA ISABELA
(Albemarle Is.)
ISLA
SAN CRISTOBAL
1°
47 m.
ISLA FLOREANA
(Santa Maria)
62 m.
Nautical Miles
0
50
48 1/2 m.
ISLA ESPANOLA


AUSTRALIA
SPENCER GULF
GULF ST VINCENT
Corny Pt.
ADELAIDE
Troubridge Pt.
Cape Spencer
STRAIT
INVESTIGATOR
28 m.
Pt. Marsden
Cape Jervis
BACKSTAIRS PASSAGE
KANGAROO ISLAND
Nautical Miles
0
20
INDIAN OCEAN

base line as extending 25.9 miles across the water between the particular islands of Storholmen and Svin. Similar regulations applying this rule of the exterior coastline to the outer islands were made in 1881, 1889, 1896, 1906 and at various later dates.

Finally in July 1935, Norway, by royal decree, promulgated a precise description of the line which marked the seaward limit of the inland waters and the base line of its marginal belt. By designating the particular points through which the base line passes, this decree delineates the substantial water areas which Norway claims within its inland waters. A map showing the base line defined in this decree, together with distances between some of the designated points, is set forth following this page. (For these Norwegian decrees and claims, see "Citation of Documents," pp. 240-266). The water areas claimed are comparable in size to those within the overall unit of inland waters claimed by California.

The Norwegian decree of 1935 gave rise to a complaint by the United Kingdom in the International Court of Justice, and a suit is now pending in that Court between the United Kingdom and Norway. While the evidence and briefs submitted in this case are voluminous, the positions of the parties can be summarized as follows: The United Kingdom, notwithstanding its previous reliance on the principle of the exterior coast line in the Bahamas and its acceptance of the Spanish claim in Cuba, now claims that the baseline following the off-lying islands should not cross water areas greater than 10 miles. The United Kingdom concedes, however, that specific exceptions may exist by reason of historical usage and possibly for other reasons.

Norway contends that the presence of a group of islands near the coast of a nation has the effect of pushing back the base line of the marginal sea to the exterior coastline around the islands. Norway cites both international practice and legal writers to show that it can adopt this exterior coastline as a baseline, without regard for the distances

between the islands and the continent, or between the islands themselves. (Counter-Memorial of Norway, ¶ 442-453) While Norway says that its baseline is justified on the principle of the exterior coastline without reference to historical data, it contends that historical usage would also sustain its position.

While this Anglo-Norwegian case is an example of the international materials which must be examined by the United States in determining the baseline of its marginal belt, it is clear that there is nothing even in the claim of the United Kingdom which forecloses the United States from giving proper consideration to the islands off the California coast. The fact that the Anglo-Norwegian controversy involves maritime nations which are in close contact on opposite sides of the North Sea sharply distinguishes the problems involved off the coast of California. Considering the strategic location of the islands offshore from California and the historic uses of the Santa Barbara and San Pedro Channels, there is no reason to suppose that any other nation bordering on the Pacific Ocean would find any legitimate objection if these waters were officially declared by law to be what they have always been in practice, namely, inland waters of California.

The foregoing summary of the practice of foreign nations with regard to off-lying islands demonstrates:

1. That many nations have found it advantageous to adopt the exterior coastline extending around off-lying islands as the base line for their marginal sea;

2. That the system of the exterior or political coast line contravenes no principle of international law;

3. That the use of the exterior coast line as a base line for the marginal sea does not depend on any arbitrary or limited distance that such a line may extend across a water area. The line in each case is a political line based upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance;


12°
14°
16°
18°
20°
22°
24°
26°
KNIVSKJERODDEN
AVLOYSINGA 19m
STABBEN
SKAGHOLMEN
27m
RUNDSKJERET
20m
DARUPSKJERET
44m
Nautical Miles
0
100
VESTERFALLET
SANNIFALLET
OUTER FISKEBAEN
JUBAEN
16m
SALTBAEN
20m
KJOLVA
TOKKEBAEN
SVEBAAN
SKREINGAN
FLESAN
16m
FLESA
FLOHOLMAN
UTFLESSKJERET
23m
KVERNA
W. SKARVHOLMAN
W. STRANDFLESA
13 1/2m
NORDBOEN
15m
FLESA
HOMBOEN
TORRBOEN
AVBOEN
FLESJAN
16 1/2m
SKJORTBAKEN
41m
BREMHOLMEN
ROHOLMEN
OVARDEN
NORWAY
FINLAND
SWEDEN
DRAWING SHOWING APPROXIMATE BASELINE ESTABLISHED BY NORWEGIAN DECREE OF 1935

4. That the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters.

Bays.

Plaintiff recognized that bays constitute inland waters in its statement accompanying the original complaint filed in this case in October, 1945, where it said,

> "This suit does not involve any bays, harbors, rivers, or other inland waters of California, . . . "

Of the seven segments under consideration in this proceeding, five are within areas claimed by California as to constitute bays. We have already shown that two of the five claimed bays are within what California claims to be the over-all unit of inland waters formed by the exterior coastline extending around the off-lying islands. If the Court sustains this claim, it will be unnecessary to consider the question of bays in these two segments. But, in any event, in at least three segments, an important question will be how to define a bay.

The term *bay* has long defied attempts to define it in precise terms. In its brief in support of its original motion for judgment in the present case, Plaintiff made use of the term *true bay* in an attempt to distinguish certain bays, which the United States had previously admitted to constitute inland waters, from other bays which Plaintiff classed as "doubtful." For example, bays such as San Francisco Bay and Chesapeake Bay, even though the latter is more than 10 miles wide at its entrance, were classed as true bays. But bays such as Massachusetts Bay, Santa Monica Bay and Monterey Bay were classed as "doubtful." In making this distinction between true bays and doubtful bays, Plaintiff's counsel conceded that there are some bays which may be classed as inland waters on purely

historical grounds, regardless of their physical configuration.

The difficulty of defining a bay is apparent in the article by S. W. Boggs, Geographer of the State Department, in the American Journal of International Law in which the proposal now advanced by Plaintiff for determining the baseline of the marginal belt is explained and discussed. Mr. Boggs first retreated from his attempt to define a bay by falling back on such terms as *bona fide bay* and *true bay,* and later he gave up the effort altogether. (24 A.J.I.L. 541 (1930).)

The impossibility of erecting a precise mathematical test to determine whether a particular water area is a bay is borne out by the fact that, apart from the question of bays fixed by historical usage, there is no general rule either in American or international law for determining what constitutes a bay.

The United States has never officially committed itself to any fixed definition of a bay. The absence of any fixed rule in American law is demonstrated by the so-called Liquor treaties concluded between Great Britain and the United States, January 23, 1924.[23] An Article of that treaty reads as follows:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limit of territorial waters."

The phrase "extending from the coastline outwards" was inserted at the request of Secretary of State Charles Evans Hughes, "in order to avoid a detailed statement with respect to ports, bays, harbors, etc." (U. S. Foreign Relations, 1923, I., p. 22). This request reflects the lack of an authoritative test for determining what constitutes bays or harbors.

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[23] U. S. Treaty Series, No. 685.

The lack of any fixed standard for defining bays prompted Charles Chenney Hyde to suggest the following with regard to the bays of Alaska:

> "The coast of Alaska is indented by certain bays of broad dimensions which, by reason of their relation to the land, appear to belong in a geographical sense to the sovereign thereof. Kotzebue Sound (facing the Arctic Ocean) or the inner portions of it, Golofnin Bay inside of a line from Cape Nome to St. Michael Island, Kuskokwim Bay, Bristol Bay (inside of a line drawn from Igagik to Protection Point), Cook Inlet from a line drawn between Cape Elizabeth and Kaguyak, and Yakutat Bay inside of Ocean Cape, are instances. They are water areas which, *regardless of the distance between headlands,* it is believed that the United States may formally claim to be its own without violating any requirement of international law." (International Law (vol. I, pp. 473 et seq.))

Reference to a map of Alaska will show that the particular bays and sounds mentioned in the above quotation are vastly larger than any of the water areas claimed by California as inland waters.

There is likewise no fixed definition for bays in international law. M. A. H. Charteris in an article presented to the International Law Society discussing the North Atlantic Coast Fisheries Arbitration observed that that distinguished tribunal unanimously agreed that *"a general rule for bays does not exist in international law"*. The lack of any settled standard concerning bays is well summed up in the memorial of Norway in the Anglo-Norwegian Fisheries case now pending before the International Court of Justice. In the section of this memorial which sets out the practices of many nations with regard to bays, Norway says:

> "Since the practice of the States constitutes the principal element of proof which must be taken into account in establishing the existence of a custom, it is necessary, if an exact idea of the state of international

law in the question of bays is to be had, to see whether the States in fact conform to the 10-mile rule (or to any other rule fixing a determined limit for the opening of territorial bays). But if one proceeds in this examination, one realizes, even better than in the light of the doctrine, that such a rule does not exist.

"Very numerous are the bays over which riparian States proclaim and in fact exercise their sovereignty without submitting in this respect to any mathematical formula, and, among these bays, there are frequently bays whose opening is sensibly larger than the measures specified in the British memorial.". (¶ 378)

The lack of any established rule of international law as to the definition of the term bay is shown by the decision of the tribunal in the North Atlantic Coast Fisheries Arbitration. This arbitration, which arose out of a dispute over a treaty between the United States and Great Britain, has special importance because it is one of the rare occasions—if not the only instance—in which an international tribunal has considered the term *bay.* The Treaty, which was entered into in 1818 for the purpose of regulating fisheries in the North Atlantic, provided that the United States renounced forever the right or liberty,

" . . . to take, dry, or cure fish on, or within three marine miles of any of the coasts, *bays,* creeks, or harbours of His Britannic Majesty's dominions in America . . . "

Under this provision it was necessary for the tribunal to define the term "bay" and to determine the seaward limit of all bays in the disputed area.

The United States contended that the indentations whose entrance was broader than six miles did not constitute bays. Great Britain contended that the word *bay,* when unqualified as it was in the treaty, meant "all bays generally." The Tribunal decided the word *bay,* as used in this treaty,

"must be interpreted in a general sense as applying to every bay in the case in question that might be rea-

sonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing."

To illustrate the size and configuration of some of the water areas which were held to be bays by the Tribunal, two maps reproduced from the official records of the Arbitration proceeding are set forth following this page. Egmont Bay, which is shown on the first map following this page, illustrates a semi-circular type of bay which, like some of the California bays here in issue, is wider at its mouth than between any of the points in its circumference. The six mile line shown on the map is the line which was claimed by the United States to be the outer limit of the bay. It is doubtful if any part of Egmont Bay would be found to be a bay under Plaintiff's formula. But the entire Bay which is 17 miles wide at its entrance was held to be a bay by the Tribunal.

Miramichi Bay, which is shown on the second map following this page, is another wide-mouth indentation which was determined to be a bay. Even the part inside the chain of islands would probably not be a bay under Plaintiff's formula.

The decision of the Tribunal also designated a dozen or more other bays which are more than ten miles wide at their mouths. The varying sizes and shapes of these bays illustrates the complete absence of any fixed criteria for determining what constitutes a bay.

While the United States has never defined the term *bay* and its definition is not fixed in international law, a great majority of other maritime nations have enacted laws or decrees which either claim certain bays as inland waters or set up definite criteria for determining what constitutes a bay. Examination of examples of the laws of other nations will show the wide variation in the definition and criteria adopted. More important, these examples will show that water areas of a wide range of sizes and configurations are claimed by other nations to be bays. They demonstrate beyond a doubt that there is no limitation in

international law as to the width or depth of bays or the amount of water which may be claimed.

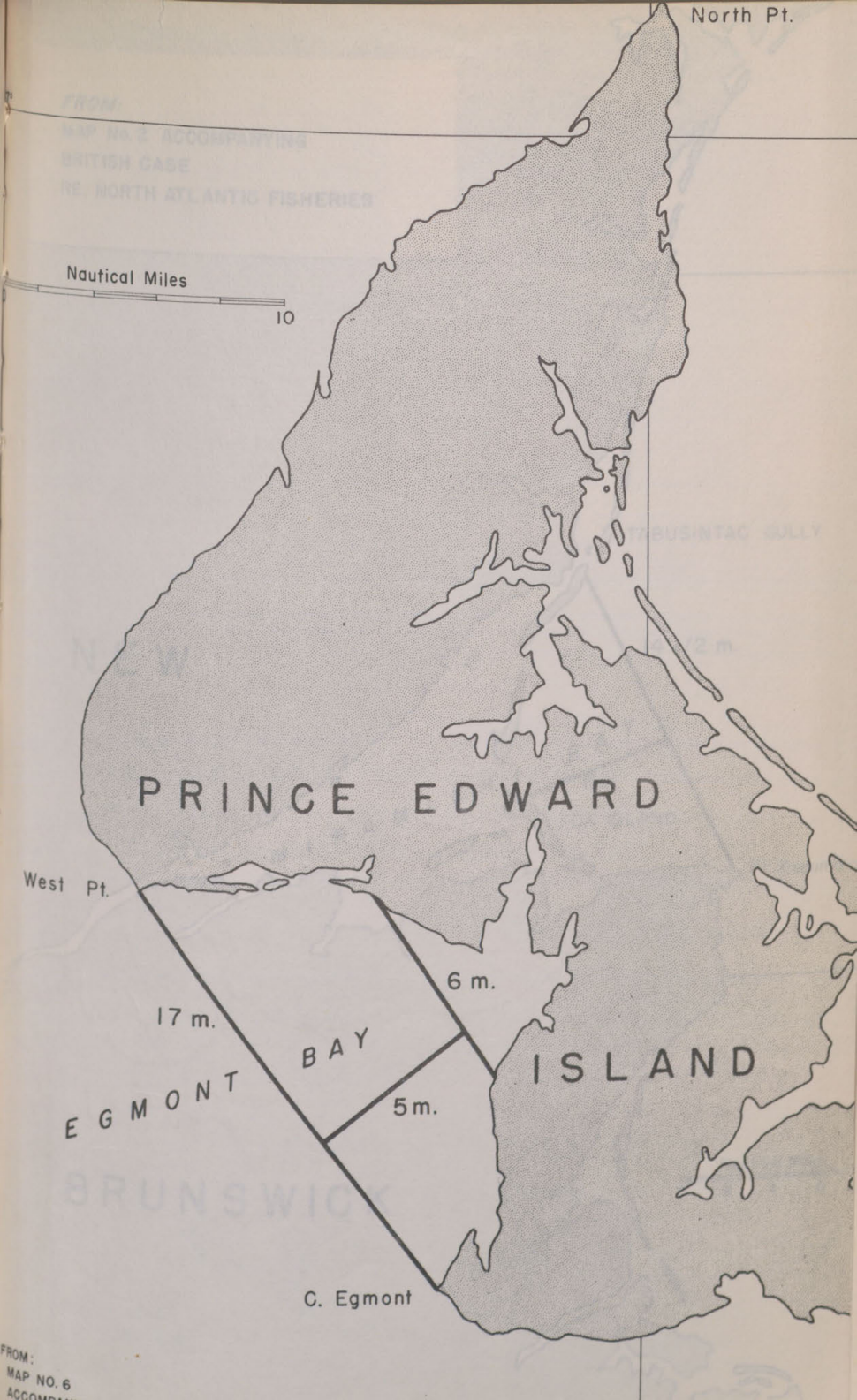
Canada. There is no law in Canada restricting the claims of that country with regard to the size of its bays or the width of their entrances. But, without regard to dimensions, Canadian laws do name certain bays which are claimed as inland waters. For instance, Hudson Bay which has an entrance about sixty miles wide, was claimed by the Act of 1906. (Citation of Documents, p. 83.)

The position of Canada with regard to the Gulf of St. Lawrence is an excellent example of a broad claim to a bay made by a neighboring nation. In 1948 the limit of the inland waters of this Gulf was established as a line from Cap des Rosiers to West Point, Anticosti Island (about sixty-two miles) and from West Point to the north shore (about twenty-five miles). This Act amended a prior statute which had placed the inland water limit further west at a narrower part of the Gulf. In other words, in 1948, Canada, by Act, extended the limit of this inland water area to the line above described.

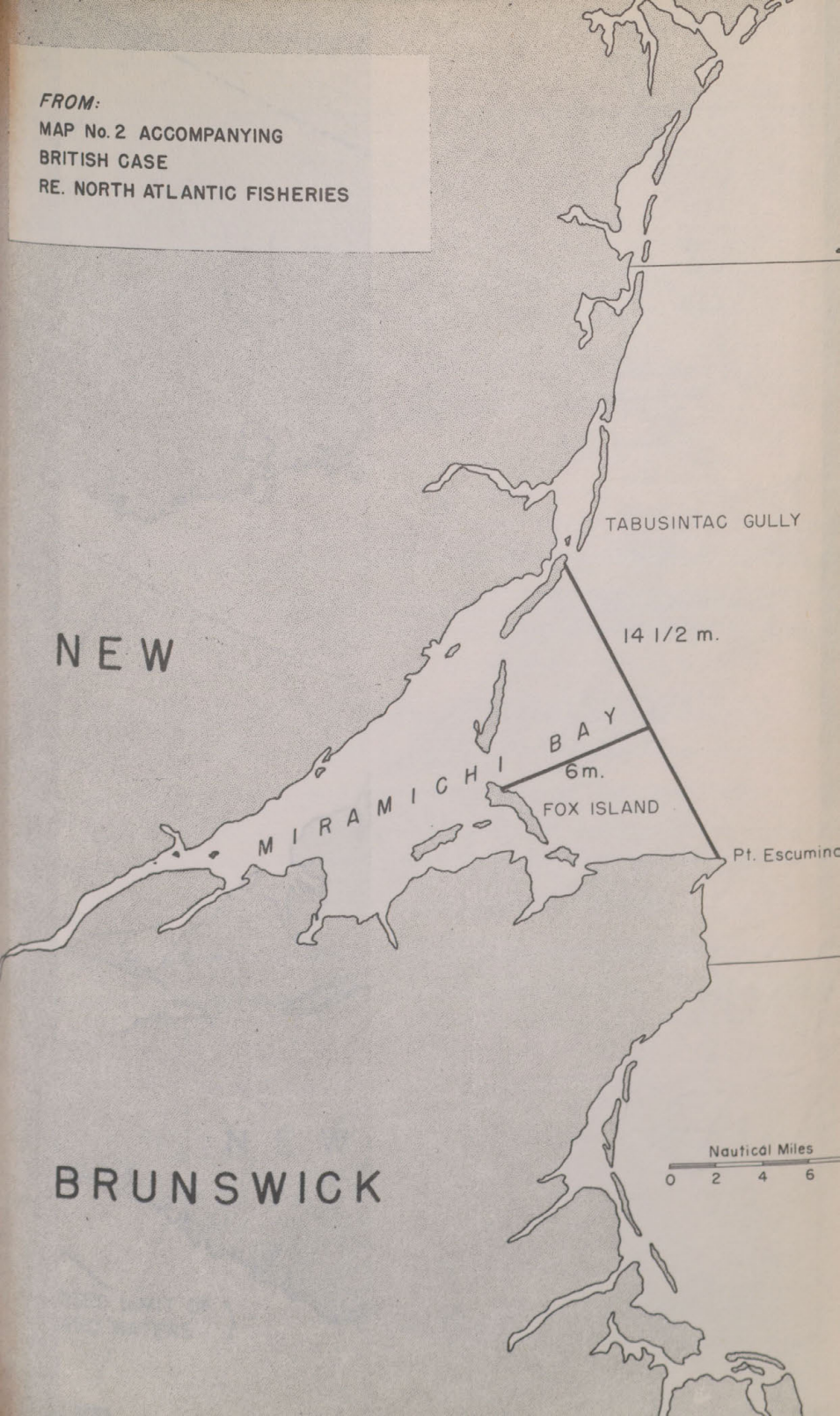
Shortly after the annexation of Newfoundland to Canada in 1948, the Prime Minister of Canada made a statement in the House of Commons, reading in part as follows:

> "We intend to contend, and hope to be able to get acquiescence in the contention that waters west of Newfoundland constituting the Gulf of St. Lawrence shall become an inland sea." (Citation of Documents, p. 88.)

The line described in the 1948 Act and the line further seaward which was indicated by the Prime Minister are shown on the third map following this page. It will be seen that the effect of the 1948 law and of the proposal of the Prime Minister would be progressively to enlarge and extend seaward the inland waters of that country. The size of these water areas shows that Canada recognizes no arbitrary limit for the size of its bays or the width of the channels.



FROM:
MAP NO. 6
ACCOMPANYING BRITISH CASE
RE. NORTH ATLANTIC FISHERIES


FROM:
MAP No. 2 ACCOMPANYING
BRITISH CASE
RE. NORTH ATLANTIC FISHERIES
TABUSINTAC GULLY
14 1/2 m.
NEW
MIRAMICHI BAY
6m.
FOX ISLAND
Pt. Escuminac
Nautical Miles
0 2 4 6
BRUNSWICK


Q U E B E C
SAINT LAWRENCE RIVER
25 m
West Point
MINGAN PASSAGE
GASPÉ PASSAGE
62 m
ANTICOSTI ISLAND
PENINSULA OF GASPÉ
Cap des Rosiers
(PRESENT LIMIT OF INLAND WATERS)
INE
NEW
BRUNSWICK
GULF OF
SAINT LAWRENCE
MAGDALEN ISLANDS
PRINCE EDWARD
ISLAND
CABOT
Cape Ray
42 m
13 m
ST. PAUL IS.
Cape North
STRAIT
(PROPOSED LIMIT OF INLAND WATERS)
CAPE BRETON
ISLAND
NOVA SCOTIA
Table Head
16 1/2 m
BELLE ISLE
STRAIT OF BELLE ISLE
14 1/2 m
Cape Bauld
(PROPOSED LIMIT OF INLAND WATERS)
NEWFOUNDLAND
52°
50°
Nautical Miles
0 25 50 75 100

Argentina. The first map following this page shows two bays on the east coast of Argentina, namely, the Gulf of San Matias and the Gulf of San George. These have been declared to be and recognized as bays since the Argentina decree of 1907 (Citation of Documents, p. 61). It will be seen that the Gulf of San George, although much larger than Santa Monica Bay, is similar to it in contour and proportions.

Tunisia. Another example of a large, wide-mouth bay is the Golfe de Gabes in Tunisia, which is about fifty miles wide at its entrance. (See second map following this page) (Citation of Documents, p. 147) This gulf is cited in the counter-memorial of Norway in the Anglo-Norwegian Fisheries case (¶ 383).

Ceylon. An interesting variation of an inland water definition is found in Ceylon's law relating to the Gulf of Mannar. Ceylon has claimed all waters within the one hundred fathom line, which extends up to sixteen miles from land, to be inland waters. A map of the Gulf of Ceylon and the hundred fathom line is shown on the third map following this page. Palk Bay is also claimed by Ceylon as inland waters (Citation of Documents, p. 90 et seq.).

French Equatorial Africa. On the west coast of Africa there are a number of very wide-mouth and shallow bays. The two examples shown on the fourth map following this page—Baie de Loango and Baie de la Pointe Noire—are of the crescent or hook-shape type found on the California coast. Two other bays in this country which are extremely wide in relation to the general contour of the bay are Baie de Cap Lopez and Baie de Mondah. (See fifth and sixth maps following this page) (Citation of Documents, p. 147b; see Norwegian Counter-Memorial ¶ 382)

Australia. Australia has many large bays which are claimed as inland waters. One of these, Roebuck Bay, is shown on the seventh map following this page. This bay is of the hook-shape type with only one pronounced head-

land. (Citation of Documents, p. 65) This is also cited in the counter-memorial of Norway (¶ 380).

Russia. Russia likewise claims many large bays. One of the best examples is the White Sea. As the eighth map following this page shows, Russia claims not only the White Sea but the entire broad channel approaching it. The entrance to this channel is 89 miles in width. Although it is impossible to do so within the confines of this brief, it would seem highly pertinent to examine all of the claims of Russia as to other bays. A number of references are found in the Citation of Documents, p. 305, et seq.

Iceland. A 1925 Iceland statute provided that the base line of the marginal belt should be measured "from the outermost reefs and islets which project above the sea." The same law also provided that bays and fjords are inland waters within the outermost line which is not more than twelve miles long. (Citation of Documents, p. 200). This law, of course, applied as a general rule to the entire coast of Iceland. However, by the special enactment of regulations in April 1950, Iceland laid down a new base line along the northerly coast of the island, connecting twelve points which are named in the regulations. This line follows the principle of the exterior coast line, running along the outer side of all islands and crossing all indentations from point to point whether they are specifically classed as bays or not. The ninth map following this page shows the line as defined by this regulation and the width in miles of the enclosed water areas.[24]

The case of Iceland illustrates the point that inland waters are not necessarily limited to bays in the historic or conventional sense. Any water area lying within the exterior coast line may be declared by the sovereign to be inland waters.

The practices of the nations of the world with regard to bays may be summarized as follows: While this summary

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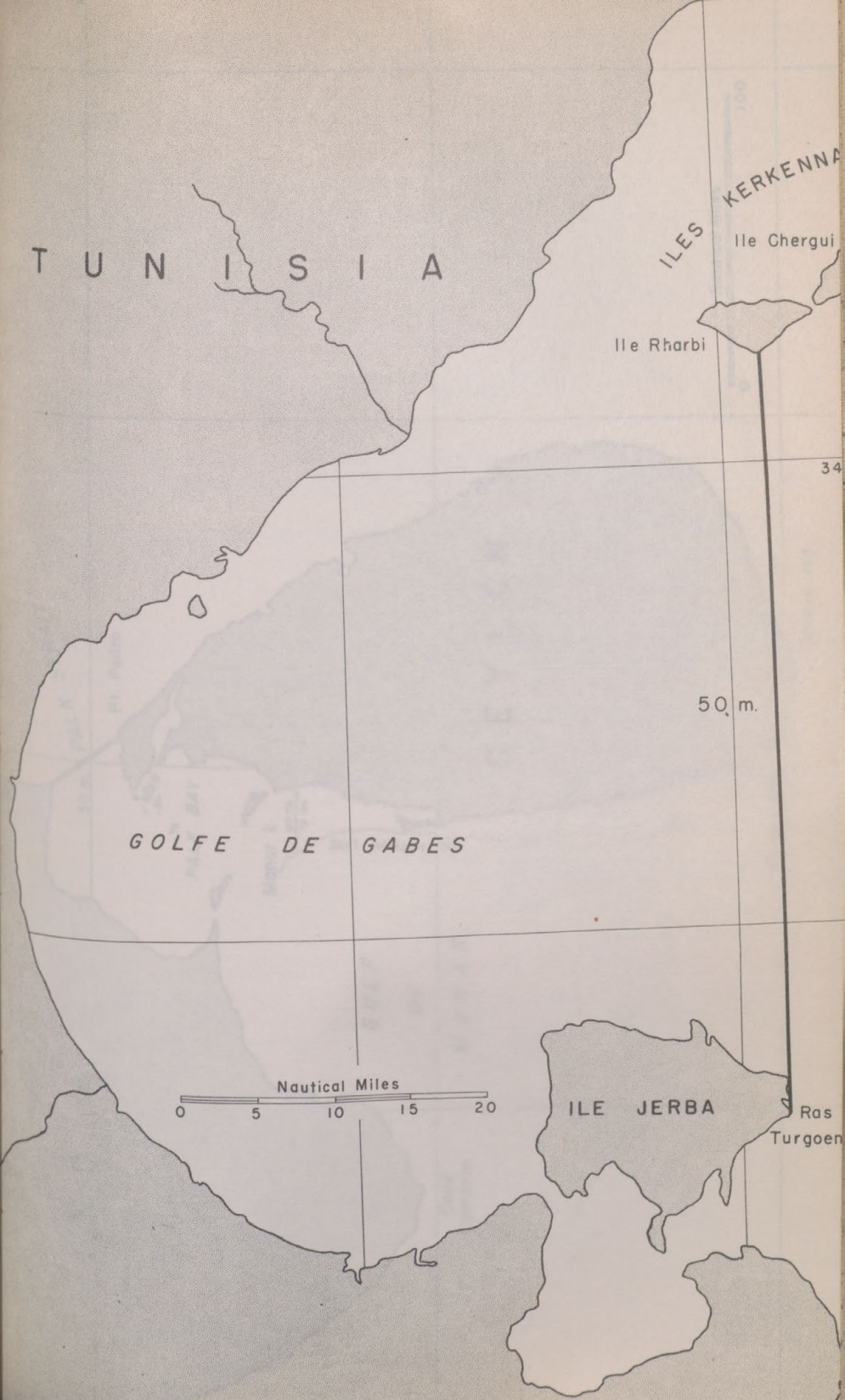
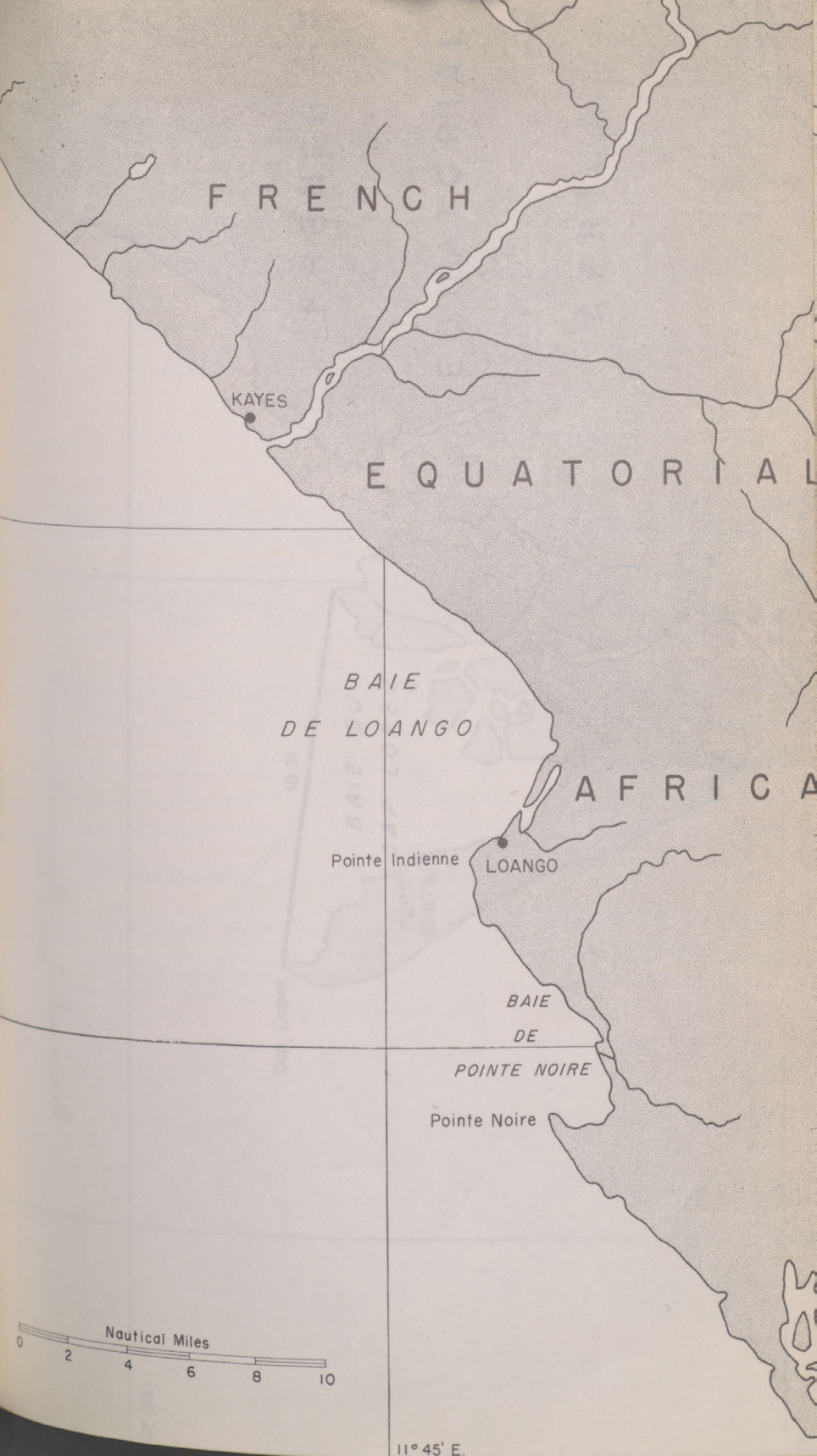
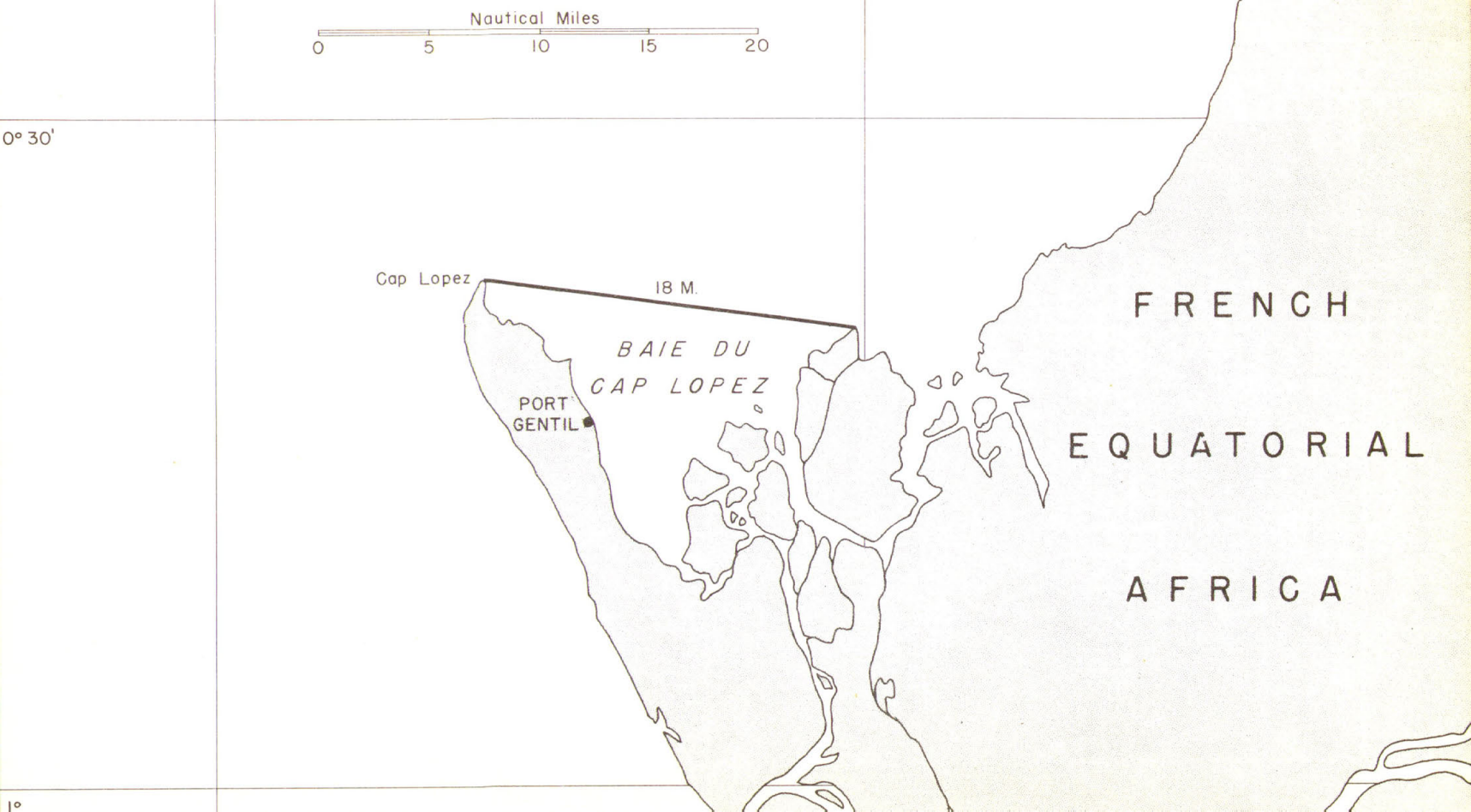
[24] This regulation was received too late to incorporate in the Citation of Documents.

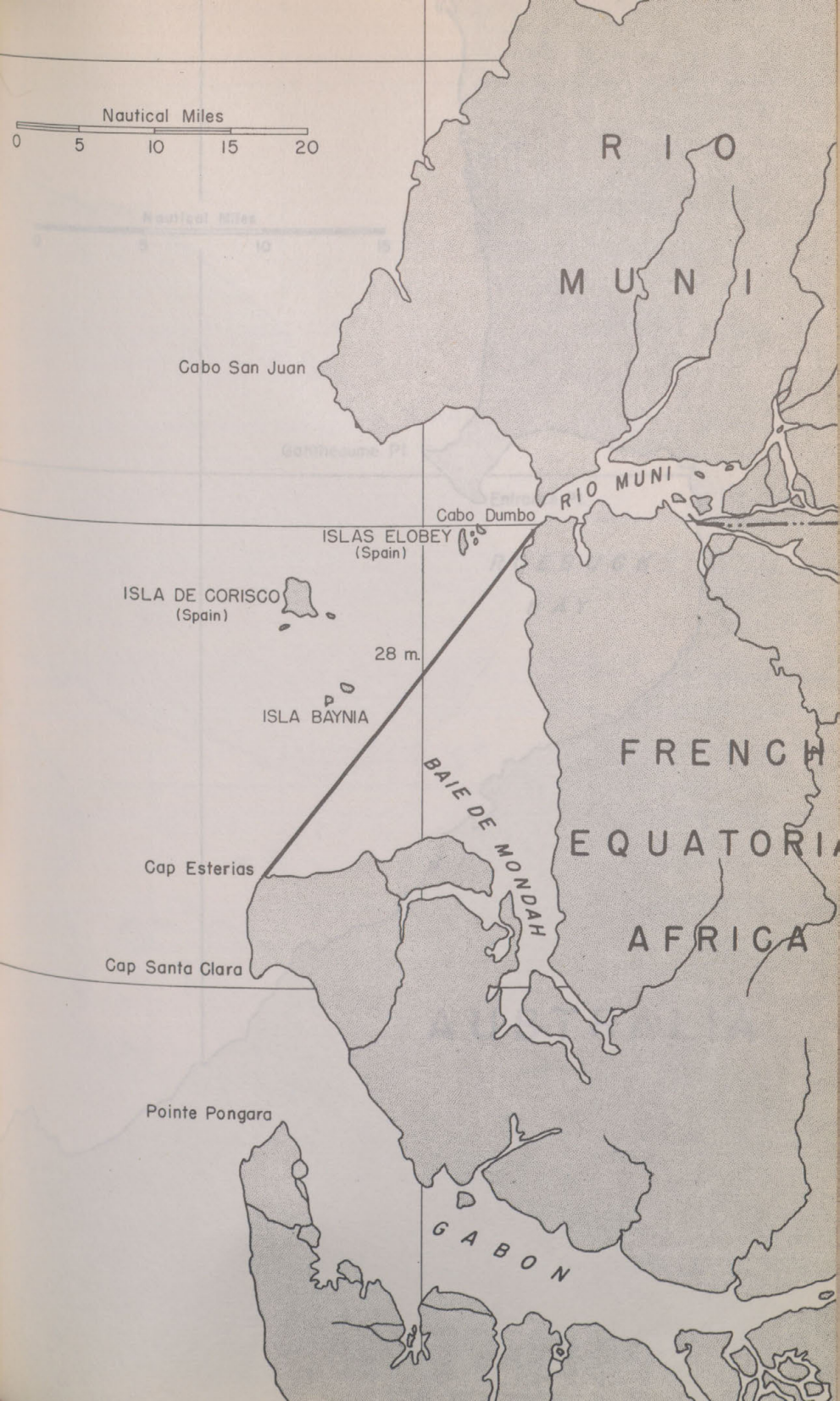

ARGENTINA
GOLFO SAN MATIAS
55 m.
Pta. Bermeja
Pta. Norte
Peninsula Valdes
Pta. Delgada
C. dos Bahias
125 m.
GOLFO SAN JORGE
C. Tres. Puntas
Nautical Miles
0
50
100


TUNISIA
ILES KERKENNA
Ile Chergui
Ile Rharbi
34
50 m.
GOLFE DE GABES
Nautical Miles
0 5 10 15 20
ILE JERBA
Ras
Turgoen


INDIA
30 m.
PALK STRAIT
Pt. Pedro
PALK BAY
Manar I.
UP TO
16 M.
100 FATHOM LINE
GULF
OF
MANAR
Cape
Comorin
CEYLON
Nautical Miles
0
100
Pt. de Galle
Dondra Hd.
10°
8°
6°


FRENCH
KAYES
EQUATORIAL
BAIE
DE LOANGO
AFRICA
Pointe Indienne
LOANGO
BAIE
DE
POINTE NOIRE
Pointe Noire
Nautical Miles
0
2
4
6
8
10
11° 45' E.


Nautical Miles
0
5
10
15
20
0° 30'
Cap Lopez
18 M.
BAIE DU
CAP LOPEZ
PORT
GENTIL
FRENCH
EQUATORIAL
AFRICA
1°


Nautical Miles
0 5 10 15 20
RIO MUNI
Cabo San Juan
RIO MUNI
Cabo Dumbo
ISLAS ELOBEY
(Spain)
ISLA DE CORISCO
(Spain)
28 m.
ISLA BAYNIA
BAIE DE MONDAH
FRENCH EQUATORIAL AFRICA
Cap Esterias
Cap Santa Clara
Pointe Pongara
GABON


122° E.
Nautical Miles
0
5
10
15
Gantheaume Pt.
Entrance Pt.
ROEBUCK
BAY
AUSTRALIA


Nautical Miles
0
100
Cape Kanin
89 m.
Svyatoi
U.
S.
S.
R.
WHITE
SEA


Horn
11
Irabodi
9
Drangasker
10
32
Selsker
Asbudarif
32
Siglunes
23
Flatey
19
Lagey
19
Raudinupur
8
Rifstangi
4
Hraunhafnartangi
37
Langanes
ICELAND
REYKJAVIK
65°N
Nautical Miles
0
50
100
Figures shown are in miles

is not exhaustive, it will illustrate the range and variety of practices of the nations of the world.

(i) Nations which claim all bays without regard to size or configuration

Australia	New Zealand	Saudi Arabia
Brazil	Norway	Sweden
Ceylon	Peru	Venezuela
Denmark	Russia	Hawaii (prior to annexation to the United States.)

(ii) Nations which claim particular bays of very large dimensions

Argentine Republic	France	Norway
Bulgaria	Guatemala	Russia
Canada	Japan	Spain
Egypt	North Borneo	Sweden

(iii) Nations which claim bays of limited dimensions but wider than ten miles

Greece	20 miles
Italy	20 miles
Morocco	12 miles
Peru	20 miles
Spain	12 miles

(iv) Nations which claim bays of dimensions limited to ten miles

Brazil	Iran
Germany	Netherlands
Great Britain	Uruguay

There are, of course, hundreds and perhaps thousands of bays along the coast of the world's oceans. Perhaps no two of these bays are precisely alike in size, shape or dimensions. Enough of these bays, however, have been illustrated in this brief to show that:

(1) Many nations have found it advantageous to claim as bays, constituting inland waters, bodies of

water of the same general configuration, and larger in dimensions than those claimed by California;

(2) A general rule for bays does not exist in international rule;

(3) The question whether a particular body of water is or is not a bay does not in any way depend on the size or configuration of the area or on the amount of water which may be involved. A bay may be long and narrow, or wide and shallow, but the seaward limit in every case is a political line based upon laws or decrees of a sovereign state and not upon any mathematical formula or any arbitrary limitation of distance;

(4) The United States is free, if it finds that it is in its national interest to do so, to recognize and declare that all the waters within the five bays claimed by California are wholly inland waters.

Ports and Harbors.

In its statement in support of its motion to file this action in October, 1945, Plaintiff also stated that ports and harbors constitute inland waters when it said,

> "This suit does not involve any . . . harbors . . . or other inland waters of California."

Again in the opening brief, the United States represented to the Court that "no claim is here made to any lands under ports, harbors, . . ." And in the *California* decision, the Court noted that inland waters, which were not claimed by the United States, included ports and harbors (332 U. S. at 25-26).

Despite these statements, Plaintiff now proposes a method for determining the baseline of the marginal sea which fails to make any provision whatsoever for treating ports and harbors as inland waters. Plaintiff's pro-

posal would exclude from inland waters such ports and harbors as those at Newport Beach, Ventura, and Santa Barbara.

The failure of Plaintiff's method to take into account ports and harbors creates an especially serious situation in the Los Angeles-Long Beach harbor in San Pedro Bay. The Master's Report states that the Plaintiff proposes a baseline for the marginal belt which "cuts through the outer reach of the existing government breakwater at San Pedro." (P. 6.) The map of San Pedro harbor following this page shows that under Plaintiff's proposal, a large area within San Pedro Harbor works is excluded from inland water and placed in the marginal belt.

There is neither authority nor reason to support Plaintiff's position. The Master's Report points out that Plaintiff maintains the propriety of fixing the baseline inside the breakwater notwithstanding the fact, "that the American proposals at the Hague Conference upon which it relies for the delimitation of bays, estuaries and river mouths provided with respect to ports that the outermost permanent harbor works shall be regarded as part of the coast in determining the baseline of the marginal belt." (p. 6.) The exact wording of the American proposal relating to ports is as follows:

> "In front of ports, the outermost permanent harbour works shall be regarded as a part of the coast in determining the extent of the territorial waters." (Basis of Discussion No. 10.)

Where the tentative American proposal at the Hague Conference of 1930 suits its purpose, Plaintiff seeks to elevate the proposal to the status of the "American Method" or of a "development in international law." But when part of the proposal does not correspond with its claim, Plaintiff takes the paradoxical position that the proposal can be completely ignored.

There is no evidence that Plaintiff's proposal to place the baseline inside the outermost harbor works is supported

by the practice of any foreign nation. The fact is that most harbors are either assumed to be in inland waters or are contained in a bay or other unit of inland water. This is true of San Pedro Harbor which is claimed by California to be completely within San Pedro Bay as well as within the over-all unit of inland waters formed by the off-lying islands. But every nation which is known to have defined the status of its ports has placed the baseline of the marginal belt either at or beyond the outermost harbor works. An Egyptian decree of January 1951 provided that the baseline of the marginal sea shall be as follows:

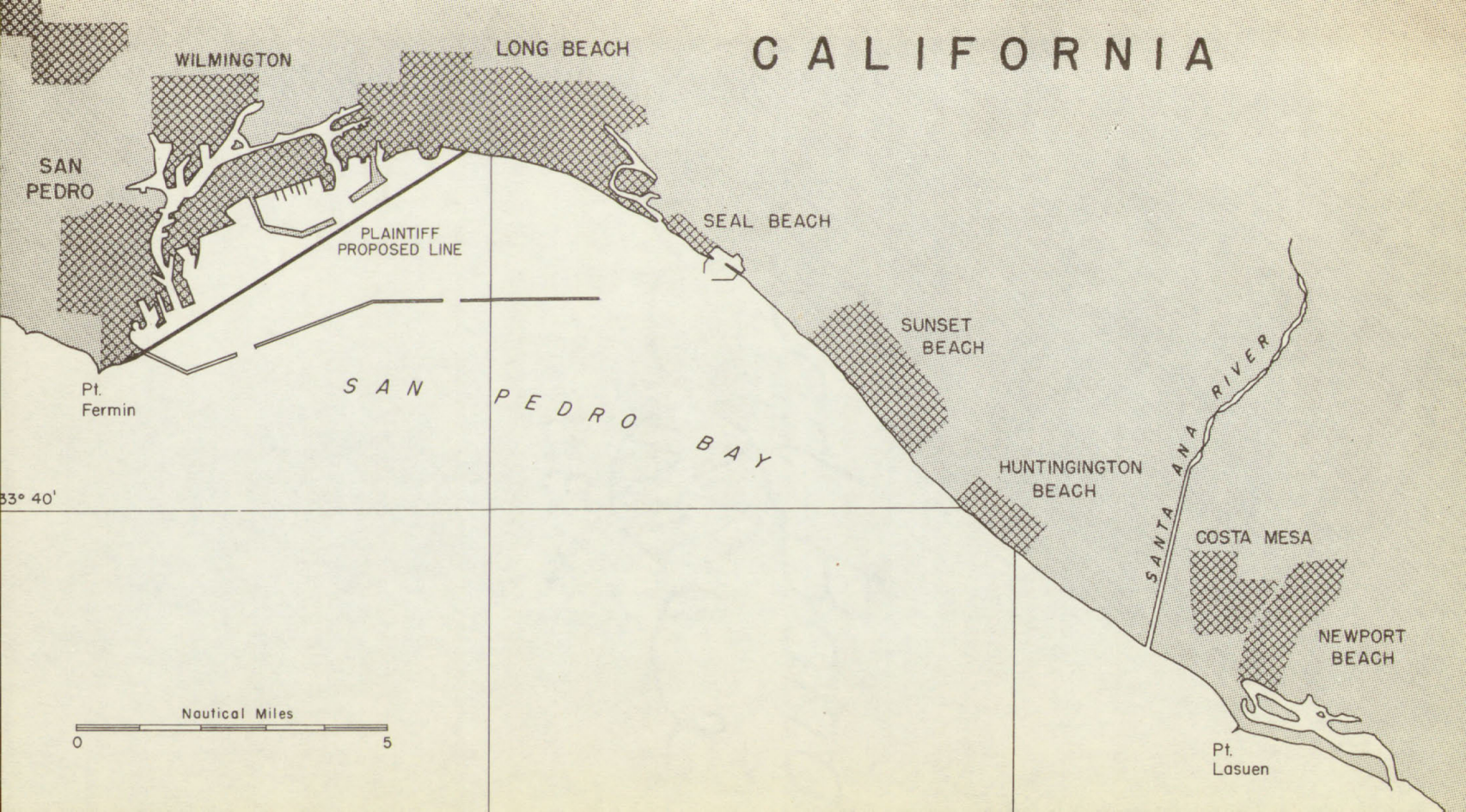
> "In the event that a port or harbor confronts the sea: lines drawn along the seaward side of the outermost works of the port and harbor and similarly lines drawn between such works." (Article 6 (d)).

In the harbor at Gibraltar, Great Britain has fixed the baseline of the marginal sea 200 yards outside the outermost harbor works. (Citation of Documents, p. 179). Many other examples will be found in the Citation of Documents.

The full inconsistency of Plaintiff's proposal to fix the marginal belt inside San Pedro Harbor can only be appreciated by reference to the nature of the marginal belt. The Supreme Court said that whatever a nation does in the marginal belt is a question for consideration among nations as such and a subject upon which nations might enter into treaty or similar obligations. (332 U. S. at 35) Indeed, the rights of foreign nations in the belt are such that the Supreme Court said that it is in the "international domain." (*United States* v. *Texas,* 339 U. S. 707, 719.) Under plaintiff's proposal, this area of the international domain is fixed inside the permanent harbor works of one of our most important military and commercial ports.

The Master's Report states the Plaintiff's argument in support of its proposal concerning San Pedro Harbor, as follows, (p. 6):

> "It takes the position that if prior to the construction of these harbor works the seaward boundary of the in-


CALIFORNIA
WILMINGTON
LONG BEACH
SAN PEDRO
PLAINTIFF PROPOSED LINE
SEAL BEACH
SUNSET BEACH
Pt. Fermin
SAN PEDRO BAY
HUNTINGINGTON BEACH
SANTA ANA RIVER
COSTA MESA
NEWPORT BEACH
Pt. Lasuen
33° 40'
Nautical Miles
0
5

> land waters of the bay were properly fixed at the line which the United States presently suggests, then the subsequent construction of the harbor works would not operate as a transfer of title to or dominion over the area embraced by the expanded harbor works, even though under The Hague proposals the extension might perhaps change the rights of the United States as against foreign countries (Transcript of Proceedings before the Special Master, p. 122)."

Analysis of this statement will show that it involves three fallacies:

1. Plaintiff's position is based on the erroneous assumption that the baseline of the marginal belt should be determined at some time prior to the construction of the harbor works at San Pedro Harbor. In a subsequent section we shall show that the rationale and the language of the *California* decision demonstrate that the marginal belt must be determined on the basis of present conditions in the coastal areas. The prior assurances of the President and other Government officials that present docks, piers and harbor installations would not be claimed by the United States show it was their intention that the location of the marginal belt should be determined on the basis of present conditions.

In view of the fact that the location of the marginal belt must be determined on the basis of present conditions, there is no problem as to any transfer of sovereignty over an area by the construction of harbor works. If the marginal belt is farther seaward today than it would have been determined to be in 1900, that fact stems directly from the concept of the marginal belt, as set forth by the Supreme Court in this case. The marginal belt is a *belt of water* in which the Court said the Federal Government must have paramount power to fulfill its responsibilities of national external sovereignty. As the character of the shoreline and harbors is changed by man and nature, the exact location of this belt will change to enable the Federal Government to continue to fulfill the responsibilities which are the basis

of the Government's paramount power in this three-mile belt.

(2) The breakwater at San Pedro Harbor was constructed by the United States under the direction of the United States Army Engineers. Any change in the location of the marginal belt that might have resulted from the construction of the breakwater was thus fully authorized by the Federal Government.

(3) Plaintiff proposes a double standard by saying that the breakwater might perhaps change the rights of the United States as against foreign countries, but would not have such an effect as against the states. Earlier in this brief, we have pointed out the inconsistency of such a double standard. The paramount powers of the United States in the marginal sea depend upon the existence of foreign rights in that belt. If the construction of the breakwater pushes seaward the area in which foreign nations have rights (as the Plaintiff says), then it removes the basis of the Federal Government's paramount rights in the area from which the foreign nations have been ousted. In any area where foreign nations have no rights, the reasons for the federal paramount power are not present and the rights of the state will exist as in any other inland water area.

Geography.

Another factor which is ignored in the Plaintiff's proposal is the geographical differences between various coastal areas. Plaintiff's formula for bays starts with the arbitrary assumption that for an identation in the coast line to constitute a bay, it must be deeper than it is wide at the entrance. As we have shown by many examples, this arbitrary assumption is contrary to the actual practice of almost every maritime nation. The reason for this is that the determination of what constitutes a bay in other nations is based on human needs rather than on geometrical formulae.

It is true that bays on the Atlantic Coast are generally

deep in relation to their width. That is due to the fact that the Atlantic Coast is rugged and irregular. But it does not follow that bays on all coasts must be deep in relation to their width.

Whether a particular identation constitutes a bay must be considered in relation to the geographical character of the particular coast line and coastal area in which it occurs. A coast line that is rugged and irregular will naturally have different types of bay than are found on a fairly regular coast line. This important geographical fact is pointed out and the reason for it given in the summary of testimony of Dr. U. S. Grant IV, as follows:

> "This difference (in the coastlines) is due to the very different recent geologic histories of the two oceanic margins of the United States. Along the Atlantic coast subsidence of the land in late geologic time has produced an inundation of many broad river valleys by the sea, producing large embayments such as Chesapeake Bay, Narragansett Bay, etc. In the north, glacial features produced by the continental glacier have resulted, in many cases, in the existence of islands relatively close to shore behind which protected waters exist in the nature of "inland waters". In Boston Bay and north and south thereof, the glacial features—for example islands—afford protection for shipping and suitable sites for piers, etc. Along the California coast landlocked bays are exceptional. The shoreline is one that has been produced in large part by elevation of the land with respect to the sea with subsequent marine erosion responsible for the minor irregularities." (Summary of Testimony of Typical Witnesses, p. 141).

As a result of these geologic factors, bays on the California coast tend to be of the wide-mouth and semi-circular type (such as Monterey and Santa Monica Bays) and of the crescent or hook-shape type with a pronounced headland at one end and a considerably smaller headland at the other (such as San Pedro, Crescent City, and San Luis Obispo bays.) Such bays as San Francisco and San Diego are marked exceptions to this general rule. The examples al-

ready pictured from the west coast of Africa and Australia show that the semi-circular crescent or hook-shape bay is characteristic of a fairly regular coast line.

A proper recognition of the geographical differences between the East and West coasts of the United States would reflect the fact that indentations which provide suitable shelter for ports and harbors are relatively scarce on the California coast in contrast to the many which exist on the Atlantic shore. In the California coastal area where places of shelter are at a premium, it is vital to designate every useful indentation as a bay within the exclusive jurisdiction of our nation. This situation is well stated in the summary of the testimony of Dr. U. S. Grant, as follows:

> "The 1100 miles of coast line bordering the State of California on the west is notable for its few bays and harbors compared to equivalent lengths of the coast line of the eastern United States bordered by the Atlantic Ocean."
>
> * * * * * * * * * *
>
> "The relative scarcity of embayments along the California coast makes it vital to recognize the value of such as exist in a nearly natural condition suitable as harbors to facilitate commerce, national defense and to provide refuge to navigators." (Summary of Testimony of Typical Witnesses, pp. 140-142.)

To ignore the relative scarcity of sheltered indentations on the Pacific coast and determine what constitutes a bay with an arbitrary formula based on the assumption that a bay must be deeper than it is wide is to make the geography of one coast dominate the human necessities of people on other coasts. Given the wide range of choice which the United States has in determining what constitutes a bay, it is indefensible to deprive one part of the country of the valuable asset of bays (inland waters under their exclusive control) because the configuration of one coastline produces a different type of bay than is found elsewhere.

The channels between the California mainland and the off-lying islands also have special importance because of

geographical conditions. As the Summary of the Testimony of Typical Witnesses shows in detail, these offshore channels constitute sheltered inland passages.[25] The testimony of these witnesses who have had practical experience in navigation in this area also shows that the water outside these channels may be rough and dangerous.[26] It is the existence and special characteristics of these sheltered areas —and not any arbitrary distance between islands—which should be a determining factor in the location of the outer limits of inland waters.

The amount of shelter is the component of a number of different weather and water factors, including wind, temperature, tides and wave action. All of these factors are completely excluded from consideration under the method proposed by Plaintiff. Yet each of them may have a bearing on whether any given indentation or channel could afford shelter or port facilities and therefore should be determined to be within inland waters.

The proximity of neighboring nations is another factor in which the sharp geographical variance from nation to nation ought to be taken into consideration in determining the boundaries of the marginal sea. Where a nation has maritime neighbors only a short distance across an ocean or other body of water, sound diplomacy may dictate that the nation make a modest claim as to the outer limits of inland waters to insure that its marginal belt does not encroach on the rights of the neighboring nation. But where there is a vast expanse of ocean between a nation and its maritime neighbors, as is the case of the Coast of California, there is no need for inhibitions in claiming a broad belt of inland waters if that course seems desirable in light of other factors.

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[25] Summary of Testimony of Typical Witnesses, pp. 214-278.

[26] Ibid., pp. 229, 238.

LAW ENFORCEMENT.

Attention should be given in determining the location of the marginal belt to the effect it will have on the apprehension of law violators. The offshore area has traditionally played a vital role in attempts to smuggle narcotics, aliens, and liquor into this country. Law-enforcement officials would be aided in minimizing such smuggling if the high seas are pushed far from the mainland by a broad belt of inland waters. The method proposed by plaintiff, however, would not enable the Court to take this fact into consideration in fixing the outer limits of inland waters.

The importance of the location of the marginal belt to effective law enforcement is demonstrated by the three decisions which will be cited in the following section to show the historical usage of Monterey, Santa Monica and San Pedro Bays. (*Ocean Industries* v. *Superior Court,* 200 Cal. 235; 252 Pac. 722; *People* v. *Stralla,* 14 Cal. 2d 617; 96 Pac. 2d 941; *United States* v. *Carrillo,* 13 F. Supp. 121 (S. D. Cal. 1935).) In each of those cases, the issue was whether a certain ship was within the regulatory jurisdiction of the State or Nation. Two of the cases involved gambling ships and the third involved an illegal fishing vessel. If a narrow belt of inland waters is established, the adjoining state will be powerless to regulate these and other harmful activities in the areas close to its shores.

HISTORICAL USAGE.

The lone exception to the Plaintiff's complete reliance on the mathematical formula in locating the marginal belt is in the matter of historical usage. The Master's Report states that in determining whether particular segments are bays or harbors constituting inland waters,

> "The United States recognizes that allowances may have to be made for 'existing agreements and historic situations,' but it contends that the burden of establishing such exceptions should be upon California."

The making of such an exception was virtually compelled by the precedents recognizing historical usage. The distinguished tribunal in the North Atlantic Coast Fisheries Arbitration referred to the concept of the "historic bay". (1 North Atlantic Coast Fisheries Arbitration 95.) The proposal of the American delegation at the Hague Conference made provision for the recognition of historical usage. Similar recognition was made in Institute of International Law in 1894.[27] and the International Law Association in 1895.[28] In the Anglo-Norwegian Fisheries case now pending before the International Court of Justice, Great Britain is conceding that an exception to the rigid system it proposes must be made for historic bays. (Memorial of the United Kingdom, ¶ 75.)

Each one of the five bays in issue in this proceeding has long been recognized and used as a bay. They have been considered and accepted as bays both officially and in a popular or general sense. A summary of the evidence showing the long and consistent recognition and use of these water areas as bays is contained in the testimony of John W. Caughey which will be found in the Summary of Testimony of Typical Witnesses, segregated in accordance with each of the various bays. The importance of this general acceptance is indicated by the holding of the tribunal in the North Atlantic Coast Fisheries Arbitration, that the term bay should "be interpreted in a general sense as applying to every bay * * * that might be reasonably supposed to have been considered as a bay . . . " (1 North Atlantic Coast Arbitration, p. 92.)

Three of the five bays—San Pedro, Santa Monica and Monterey—were discovered by Cabrillo in 1542 and were designated by him as bays. All three of these bays were again designated and recognized as bays by Vizcaino in 1602. These bays have been continuously recognized as

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[27] Article 3 of 1894 draft (13 Annuaire, p. 329).

[28] Article 3 of 1895 draft (Report of 17 Conference, p. 109).

such by all navigators and extensively used for commercial purposes under three sovereigns—Spain, Mexico, and the United States. It is doubtful if there is any bay on the Atlantic Coast, with the single exception of the approach to the James River, that has as long and continuous recognition and use as these three Pacific Coast bays. Moreover each of the three bays mentioned has been the subject of a Court decision which establishes beyond all doubt that they are historic bays.

Monterey Bay. Monterey Bay was the subject of a decition of the California Supreme Court in *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722 (1927). In this decision the Court was called upon to construe the provision of the California Constitution stating that "all the lands, harbors, and bays in and adjacent to the coast," are included within the boundaries of the state. The particular issue was whether a certain vessel named "Peralta" was within a "bay" as used in this Constitutional provision when it was conducting fishing operations three and one-half miles off the shore in the indentation between the cities of Monterey and Santa Cruz.

This opinion begins its discussion of this issue by stating that Monterey Bay was discovered in 1542 by Juan Cabrillo, the "bold navigator" who was the first to sail north of Lower California. It fell to Sebastian Viscaino, another Spanish navigator, to take formal possession of the coasts of the bay in 1602 and christen it Monterey Bay. After pointing out that the body of water "satisfies the definition of a 'bay' given by the lexicographers," the Court then traced the history of the bay from Spanish through Mexican to American control. The Court concluded that the body of water between the headlands at the cities of Santa Cruz and Monterey is a "bay" and therefore within the jurisdiction of California. The opinion contains such a careful analysis of the facts which make the indentation a bay constituting inland waters that a long excerpt from the decision has been set forth in Appendix A.

Other authorities have considered Monterey Bay a classic example of a bay constituting inland waters. In a debate in the Senate in 1852, Senator (later Secretary of State) Seward argued that an arbitrary 6-mile rule for determining the outer limits of inland waters was undesirable because it "would surrender the Bay of Monterey". (Cited in 9 North Atlantic Coast Fisheries Arbitration 173.) The Counter Memorial of Norway in the Anglo-Norwegian Fisheries case now pending before the International Court of Justice cites Monterey Bay as an example of an indentation within the exclusive jurisdiction of the United States.

Santa Monica Bay. Santa Monica Bay was the subject of the decision of the California Supreme Court in *People* v. *Stralla,* 14 C. 2d 617, 96 Pac. 2d 941 (1939). The issue in that case was whether the gambling ship Rex was within the jurisdiction of California when it was anchored four miles seaward from the City of Santa Monica. As mentioned above, under the California Constitution, the state's jurisdiction extends to bays. Consequently, the Court said that the issue posed three questions: "Is this body of water a bay geographically? Is it a bay historically? Is it a bay legally?"

After reviewing the various definitions of a bay, the Court concluded that the body of water was a bay geographically. The historical case, the Court found to be even stronger.[29] Explorers Cabrillo and Viscaino, said the Court, identified the body of water as a bay in their voyages in 1542 and 1602, respectively. Histories, atlases and the United States Coast Pilot referred to it as a bay. Harbor works were constructed in the indentations and there was a long fight over whether San Pedro or Santa Monica Bay

[29] In connection with the historical usage of this bay, we refer the Court particularly to testimony of A. G. Johnson because, through inadvertence, this testimony was not summarized in the Master's Report. See Summary of Testimony of Typical Witnesses, pp. 336-343.

should be developed as the Port of Los Angeles. The discussion of the Court in this case is of such pertinence that a long excerpt from the opinion is set out in Appendix A. It is appropriate here, however, to quote the conclusion reached by the Court after its careful examination:

> "We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the state by the Constitution."

San Pedro Bay. San Pedro Bay was the subject of the decision of the United States District Court in *United States* v. *Carrillo,* 13 F. Supp. 121 (S. D. Cal., 1935). This case involved the indictment of Carrillo and others for committing acts of piracy and robbery on the gambling ship Monte Carlo, anchored off the coast from San Pedro. A motion to dismiss all counts of the indictment required the Court to determine whether the ship was within the territorial jurisdiction of California and the United States.

The Court pointed out that under the California Constitution and the practices of nations, the jurisdiction of the State and Nation extends three miles seaward from a line joining the headlands of bays. The Court was thus called upon to determine whether the body of water in question was a bay. After a "consultation of old discovery and navigation maps of the Spaniards and as well the English," and a review of Atlases and geographical data, the Court decided that,

> " . . . the Bay of San Pedro is that body of water lying landward from a line drawn from Point Lasuen to Point Fermin . . . "

California believes that this decision is so relevant to the issues in this proceeding that a long excerpt from the opinion has been set out in Appendix A.

In describing San Pedro Bay in the Carrillo case, Judge Stephens said that it was,

> " . . . that portion of the Pacific Ocean lying between the bluffs, now the site of the City of Huntington Beach, and until lately called Point Lasuen, on the east and Point Fermin on the West."

The location of Point Fermin is not in dispute. Moreover, it cannot be disputed that San Pedro Bay extends to Point Lasuen. But California believes that in referring to Point Lasuen as being "the bluffs, now the site of the City of Huntington Beach," Judge Stephens made an error which though immaterial in the case before him is important in these proceedings. California believes that an examination of the coastline, the charts of United States Geodetic Service, and other official sources, would show that there is no point at or near Huntington Beach, and that Point Lasuen was and is a point at Newport Beach just west of the entrance to Newport Bay.

The correct location of Point Lasuen, however, is a complex question of fact. It involves the consideration of a large amount of documentary evidence and testimony as to physical conditions of the shoreline which it would be difficult, if not impossible, to set forth in proper detail in this brief. Because of the importance of correctly locating this point, which has always been regarded as the easterly headland of San Pedro Bay, we believe we should set forth here briefly a summary of the elements of this problem.

The dispute as to the location of Point Lasuen in no way affects the validity of Judge Stephens' decision that San Pedro Bay extends from Point Fermin to Point Lasuen. The precise location of Point Lasuen was not an issue in the Carrillo case, and the decision of the Court would have been the same whether Point Lasuen was located at Huntington Beach or at Newport Beach. The Court found that

the alleged offense was "within the territory of California" because it was committed within three miles of the line drawn from Point Fermin to Huntington Beach. If the line had been drawn from Point Fermin to Newport Bay, the territorial waters would have extended even further seaward and the result in the case would have been the same.

An examination of the authorities referred to in the Court's decision in support of the statement that Point Lasuen is located at "the bluffs, now the site of the City of Huntington Beach" will show that the Court did not make any exhaustive examination of the evidence of the location of Point Lasuen. The first authority cited, "The Pacific Coast Pilot," 1889, contained no map of San Pedro Bay. It does contain a mileage calculation which, if followed, would place Point Lasuen some distance westward of Newport Bay. However, the next authority cited is U. S. C. & G. S. Chart No. 5101, dated February, 1933, which does not contain any reference whatever to Point Lasuen and furnishes no support for the statement that Point Lasuen is at Huntington Beach. The Chart does show a point at Newport Beach, but the words Point Lasuen are not printed at any place.

Thompson's Atlas of 1814, the next authority cited, squarely contradicts the Court's statement by designating Point Lasuen exactly at the point near Newport Bay, as claimed by California. Rand-McNally's Atlas of 1878 likewise specifically designates Point Lasuen at the Newport Beach point claimed by California. The 1899 edition of this Atlas does not contain the words Point Lasuen at any place. These maps, therefore, while they support the Court's finding that Point Lasuen is the easterly point of San Pedro Bay, also support California's contention that that point is the point which actually exists at Newport Beach and not the low bluffs at the site of the City of Huntington Beach.

The first record historically of Point Lasuen is the so-called Vancouver chart, which was referred to by the Court.

This chart was made by George Vancouver in 1793. A facsimile of the map showing Pt. Lasuen to be the eastern headland of San Pedro Bay is shown as the first map following this page.

The first official United States chart of San Pedro Bay was made by the U. S. Coast Survey in 1853. This chart (No. 601) was revised from time to time down to 1882. This chart and every revision shows that Point Lasuen is at Newport Beach, sometimes called Newport Landing. The 1853 chart of San Pedro Bay, revised to 1878, is reproduced in facsimile as the second map following this page. The words "San Pedro Bay" and "Pt. Lasuen" are exactly as they appear on the original chart. This chart indicates that San Pedro Bay extends to Point Lasuen and that the Point is at Newport Landing. Superimposed on this map are the dash line from Pt. Fermin to Pt. Lasuen and the dotted line from Pt. Fermin to the bluffs at Huntington Beach.

The fact that Pt. Lasuen is at Newport Beach is borne out by various other maps. Among these are a detailed hydrographic survey of this entire coast line made by the U. S. Coast and Geodetic Survey in 1878 and the map issued by the General Land Office, dated 1913, which was "compiled from official records." Another U. S. Coast and Geodetic Survey chart which also shows with great clearness the precise location of Pt. Lasuen at Newport Beach was used in March 1897 to accompany the minority report of the Deep Water Harbor Board, Senate Document 18, 55th Congress, 1st Session. (See third map following this page.) In this report both majority and minority recognized that Pt. Lasuen is the easterly headland of San Pedro Bay.

This long official recognition of the Newport Beach location as the true Point Lasuen would seem to be conclusive and to control over any uncertainty that may have existed as to Vancouver's original intentions.

San Luis Obispo Bay. This bay was first designated and described by the Spanish explorer, Sebastian Viscaino, in

1602. After the San Luis Obispo mission was founded in 1772, the bay was in regular use by Spanish ships which carried passengers and supplied the mission. Vancouver's map shows the tracks of his ship in the bay in 1793, and by the middle of the Nineteenth century, coastwise steamers and schooners were making regular calls. Through the later half of the Nineteenth century, the city of San Luis Obispo was almost entirely dependent on the Bay for its connection with the outside world. During that period, large quantities of grain, lumber, rock, and general merchandise were shipped by water in and out of the Bay. (See Summary of Testimony of Typical Witnesses, pp. 345-351, 354-355.)

The Bay continues to play an important part in the commercial life of the area. The port at Avila is a major exporter of petroleum. Harbor improvements exceed more than a million dollars in value. A substantial fishing fleet operates out of the Bay. (Summary of Testimony of Typical Witnesses, pp. 352-353.)

Cresent City Bay. This sheltered body of water has been continuously used as a bay since it was discovered in 1850 by Douglas Ottinger. During the 1850's, supplies and materials for the gold mines in the interior flowed into the Bay. Soon thereafter, steamers and sailing vessels made regular calls at the Port. A wharf was built during this period and a breakwater was constructed in 1925. (Testimony of Typical Witnesses, pp. 388, 391-394.)

Since the Cresent City still has no railroad connection, the Bay continues to play a vital role in the life of the community. The fishing industry is the major source of maritime commerce. Lumber shipments are also substantial. (Summary of Testimony of Typical Witnesses, p. 397.)

Channels. While Plaintiff's concession as to the importance of historical usage was made with respect only to bays and harbors, it is clear that historical data must be taken into consideration in determining the status of chan-


La Purisima
Sta. Barbara
Point Felipe
CANAL de Sta BARBARA
Sn. Buenaventura
Pta. Conversion
Ya. de Sta. Cruz
Encapah
Yª. de Sta. Rosa
Novr. 25th 1793
Point Dume
S T O T
Point Vincente
Point Fermin
Bay of St. Pedro
Point Lasuen
Sn. Gabriel
Sn. Ju
Ya. de Sta. Barbara
Ya. de Sta. Catalina
A CHART
Shewing part of the
COAST OF N.W. AMERICA
With the Tracks of
HIS MAJESTY's SLOOP
DISCOVERY and Armed Tender CHATHAM
Commanded by GEORGE VANCOUVER Esqr. and prepared
The parts shaded Red are taken from the Spanish Authorities.
Spanish Missions
Spanish Presidios

U. S. COAST SURVEY

A.D.BACHE Superintendent

RECONNAISSANCE OF THE

WESTERN COAST OF THE UNITED STATES

(LOWER SHEET)

SAN FRANCISCO to SAN DIEGO

By the Hydrographic Party

under the command of Lieut JAMES ALDEN USN Assist.

Geographical Positions by G.DAVIDSON Assist.

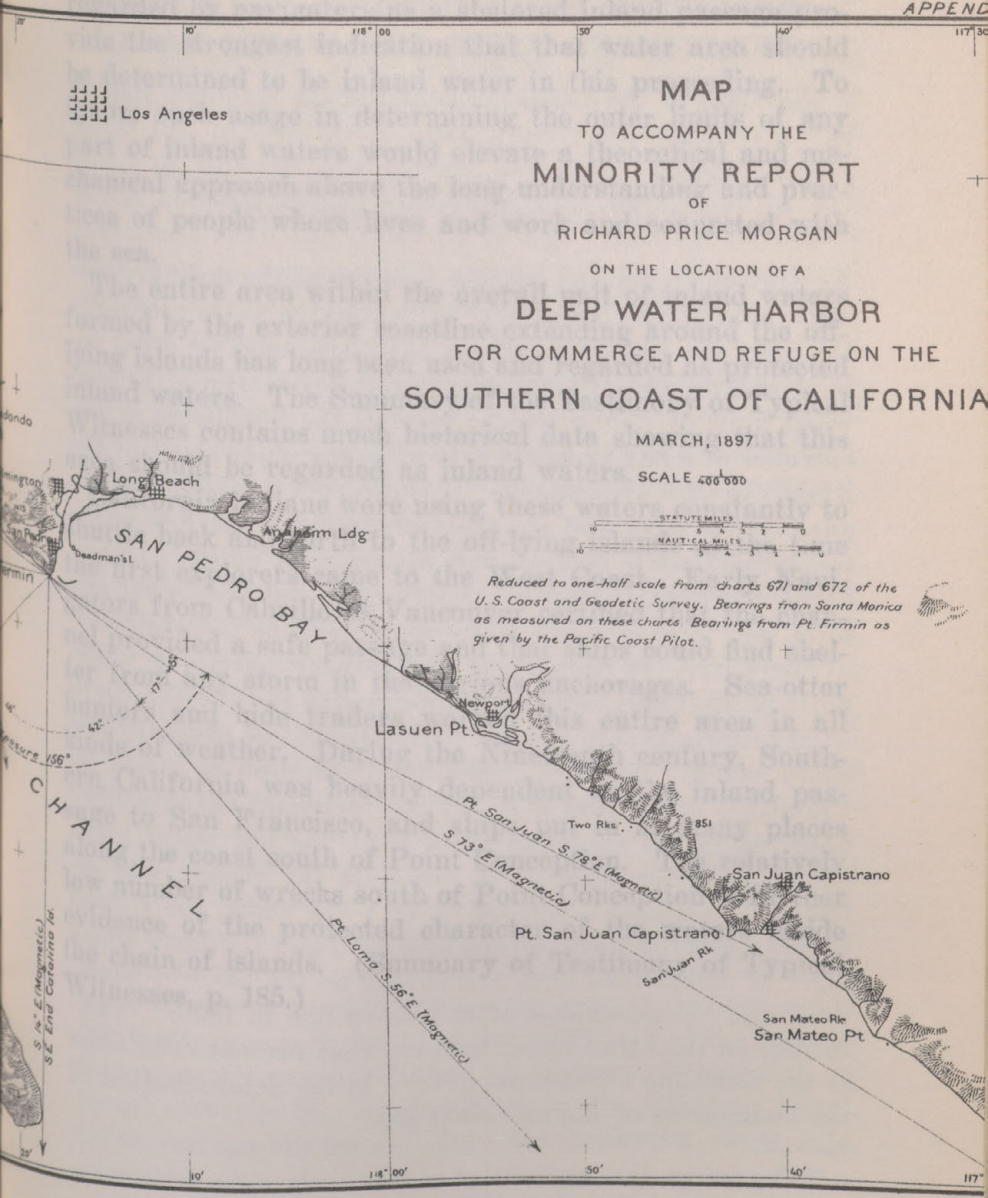
Scale 1:80,000

1853

Edition of 1870

Issued to Aug. 1870 C.P.PATTERSON Superintendent
Verified J.E.HOLCOMB Assistant in charge of Office

Aids to Navigation corrected to 1882


Los Angeles
MAP
TO ACCOMPANY THE
MINORITY REPORT
OF
RICHARD PRICE MORGAN
ON THE LOCATION OF A
DEEP WATER HARBOR
FOR COMMERCE AND REFUGE ON THE
SOUTHERN COAST OF CALIFORNIA
MARCH, 1897
SCALE 1/400 000
STATUTE MILES
NAUTICAL MILES
Reduced to one-half scale from charts 671 and 672 of the U. S. Coast and Geodetic Survey. Bearings from Santa Monica as measured on these charts. Bearings from Pt. Firmin as given by the Pacific Coast Pilot.
Long Beach
Anaheim Ldg
SAN PEDRO BAY
Deadman's I.
Newport
Lasuen Pt.
Two Rks.
851
Pt. San Juan S. 78° E. (Magnetic)
S. 73° E. (Magnetic)
San Juan Capistrano
Pt. San Juan Capistrano
San Juan Rk.
San Mateo Rk.
San Mateo Pt.
Pt. Loma S. 56° E. (Magnetic)
CHANNEL
S. 74° E. (Magnetic)
S.E. End Catalina Isl.
118° 00'
50'
40'
117° 30'

nels as well. Facts showing that a channel has long been regarded by navigators as a shetered inland passage provide the strongest indication that that water area should be determined to be inland water in this proceeding. To ignore such usage in determining the outer limits of any part of inland waters would elevate a theoretical and mechanical approach above the long understanding and practices of people whose lives and work and connected with the sea.

The entire area within the overall unit of inland waters formed by the exterior coastline extending around the off-lying islands has long been used and regarded as protected inland waters. The Summary of the Testimony of Typical Witnesses contains much historical data showing that this area should be regarded as inland waters.

California Indians were using these waters constantly to shuttle back and forth to the off-lying islands at the time the first explorers came to the West Coast. Early Navigators from Cabrillo to Vancouver certified that the channel provided a safe passage and that ships could find shelter from any storm in the various anchorages. Sea-otter hunters and hide traders worked this entire area in all kinds of weather. During the Nineteenth century, Southern California was heavily dependent on the inland passage to San Francisco, and ships put in at many places along the coast south of Point Conception. The relatively low number of wrecks south of Point Conception is further evidence of the protected character of the waters inside the chain of islands. (Summary of Testimony of Typical Witnesses, p. 185.)

III. THE BASELINE OF THE MARGINAL SEA SHOULD BE DETERMINED ON THE BASIS OF THE PRESENT LOWER LOW WATER MARK.

The third of the issues presented in the Master's Report is,

> "By what criteria is 'the ordinary low-water mark on the Coast of California' to be ascertained."

As previously pointed out, the location of the ordinary low water mark is pertinent only (i) where the shore confronts the open sea and there are no bays, channels, or other inland waters, and (ii) and where the line marking the seaward limit of inland waters touches the headlands at the entrance of a bay or where it touches the outer shore of the islands in case of channels. If California's contentions regarding its bays and channels are upheld, the low water mark will have to be fixed only at the latter points. In any event, however, it may be important to know by what criteria the "ordinary low water mark is to be ascertained."

There are two important preliminary questions which must be discussed before we can examine the question as to what criteria should be used to determine the ordinary low water mark. The first preliminary question is raised by Plaintiff's contention that, "where artificial changes have occurred in the shoreline since 1850, the low water mark should be determined as of the date the change was effected." (Master's Report, p. 30.) In short, the United States views the marginal sea as a fixed and rigid belt which must be determined once and for all on the basis of conditions and circumstances of the shore line in 1850.[30] California, on the other hand, believes that present conditions in the shoreline areas must govern in the determination of the boundaries of the marginal sea.

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[30] The parties have agreed that at places where the only change in the shoreline is due to gradual accretions or relictions which are entirely natural, the marginal belt should be determined on the basis of present conditions. (Master's Report, p. 30).

A. The Low Water Mark Should Be Determined on the Basis of Present Conditions in the Shoreline Areas.

In the century since California was admitted to the Union, man and nature have brought many changes in the coast line of California. Large areas of beach have been filled to provide recreational facilities. Highways, railroads and commercial structures have been built on land reclaimed from the ocean by filling. Harbors have been developed to accommodate a large volume of commercial and naval vessels by the erection of breakwaters and piers. In some places, the shore line has been extended seaward by accretions formed by gradual and imperceptible degrees but brought about by artificial structures such as piers and wharves. These changes in the shore line of California reflect the rapid industrial development and general advancement of the State since 1850.

In these proceedings, the United States is claiming that all land which has been added to the shoreline during California's development in the last century, by filling or by accretions that are not entirely natural, must be included in the marginal belt. This contention reveals what appears to be an unwillingness on the part of the Plaintiff to give full effect to the rationale and the language of the *California* decision. Moreover, we shall show that in making its argument, the United States is disregarding the expressed intentions and prior assurances of the President and other Government officials.

In enunciating the paramount rights of the United States in the marginal sea in the *California* case, the Court squarely placed the decision on the ground that control of *that water area* is essential to the fulfillment of the Federal Government's responsibilities in matters of national external sovereignty. As described by the Supreme Court, these responsibilities fall into the following three categories:

(1) International relations, as to which the Court said:

". . . 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.*" 332 U. S. at 25.

". . . *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.*" 332 U. S. at 35.

". . . The very oil about which the state and nation here contend *might well become the subject of international dispute and settlement.*" 332 U. S. at 33.

(2) World commerce, as to which the Court said:

"The ocean, even its three-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." 332 U. S. at 35.

(3) National defense, as to which the Court said:

". . . The three-mile rule is but a recognition of the necessity *that a government next to the sea must be able to protect itself from dangers incident to its location.*" 332 U. S. at 35.

"The ocean, even its three-mile belt, . . . becomes of crucial importance should it ever again become impossible to preserve that peace." 332 U. S. at 35.

This articulated rationale of the *California* decision makes it clear that the United States has paramount rights in the area in which these responsibilities *now* exist, not in the area in which they might have existed in 1850. The area which comprised the marginal sea in 1850 may now contain a substantial amount of dry land, due to gradual accretions and reclaiming operations. Under the Plaintiff's contention, the marginal sea would include this presently dry land.

Plaintiff's contention that the marginal sea includes land which is not at present submerged is incompatible with the Supreme Court's reliance on the international obligations in the marginal sea as a basis for the United States' paramount power. What a nation does on the dry land of its mainland is not "a question for consideration among nations as such" as the Supreme Court said was true in the open sea. Nor is any area which is not now under the ocean likely to become the subject of international disputes or settlements. While the court held that foreign nations have certain rights in the marginal sea, such as the right of innocent passage, it has never been suggested that any similar rights exist in the dry land on the shore of a nation.

The reliance of the Supreme Court on the responsibilities of the United States relating to commerce likewise does not fit the Government's conception of a marginal sea composed partly of dry land. It hardly need be said that ocean vessels do not pass through an area which is no longer submerged.

Nor is the Government's theory consistent with the Supreme Court's reliance on responsibilities of national defense as a basis for the Government's rights in the marginal sea. While the three-mile ocean area may have a special importance to our national security which requires that the State's ownership be ousted in favor of the Federal Government's paramount rights, the area which is now upland clearly does not involve the same considerations as the ocean area. Indeed, if the Government's theory concerning the marginal belt were to be established, there would be a harmful effect on national defense. If land produced by filling or by accretions which are not entirely natural is to be included in the marginal belt, it would necessarily mean that the protective belt of water around the nation would be less than three miles in width and might even disappear entirely.

It is thus apparent that the rationale of the California decision is inconsistent with the Government's contention that the boundaries of the marginal sea are to be deter-

mined as of 1850 and that the marginal sea now includes land which is not submerged now but which was submerged at that time.

The language of the Court in the *California* opinion provides further evidence that low-water mark is not to be determined as of 1850 and that the belt does not include presently dry land. In its opinion, the Court referred to or described the subject matter of the litigation in the following excerpts:

> "The Government complaint claims an area extending *three nautical miles from shore.*" (332 U. S. 19, 23, Note 1.)
>
> ". . . several thousand square miles of land *under the ocean* off the coast of California." (332 U. S. at 25.)
>
> ". . . lands under the marginal *sea.*" (332 U. S. at 29.)
>
> ". . . lands under the *ocean.*" (332 U. S. at 31.)
>
> ". . . the *ocean area*" (332 U. S. at 31)
>
> ". . . in the *seas* next to its shores and within its protective belt . . ." (332 U. S. at 35.)
>
> "The *ocean,* even its three-mile belt . . ." (332 U. S. at 35.)
>
> ". . . the soil beneath the *ocean* . . ." (332 U. S. 36.)
>
> ". . . lying to the *seaward* [of the low-water mark] in the three mile belt." (332 U. S. at 37)
>
> ". . . the three-mile belt under the *ocean.*" (332 U. S. at 38)
>
> ". . . the bed of the *sea* . . ." (332 U. S. at 38.)
>
> ". . . the Federal Government rather than the state has paramount rights in and power over that [marginal] belt, an incident to which is full dominion over the resources of the soil *under that water area,* including oil." (332 U. S. at 38.)
>
> ". . . in *this ocean area* . . ." (332 U. S. at 40)

In each of these 13 excerpts, the Court made it clear that the area in which the United States was held to have paramount power is a submerged area of the ocean. None of the excerpts give any indication that the boundaries of

the area are to be determined at any time other than the present. The excerpts emphasize what a study of the rationale of the decision made clear: the marginal sea does not include any land which is not submerged at any given time, whether now or in the future, when the area of the marginal sea comes into controversy.

Just as the present circumstances in the coast line must govern in determining low-water mark, so the present conditions in the harbor areas must be controlling in determining the seaward limits of inland water. Harbor improvements which have been completed in the century since California was admitted to the Union cannot be ignored in the determination of the boundaries of the marginal sea. This is simply an application of the settled principle of international law that the marginal sea is measured from the seaward extremity of the harbor works.

Any other rule would produce results which would not be in the best interests of the United States. Harbor improvements, such as the breakwater at Long Beach, were constructed only after the approval of United States officials and they were often erected at least in part through the use of federal funds.[31] To hold that those improvements are in the marginal sea would, as the Supreme Court said, make them the proper subject for international disputes and settlements.

Reference to the concept of the "historic bay" emphasizes that present conditions, not those of 1850, must be controlling in determining the limits of inland water. Since the status of a bay as inland waters depends in part on custom and usage, it is clear that it would be inaccurate to regard seaward limit of a bay as a rigid line which would be finally determined on the basis of conditions in 1850. On the contrary, the concept of the historic bay which depends on custom and usage shows that certain bays may have be-

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[31] 33 U. S. C. A. § 541; See e.g. Act of March 3, 1925 (43 Stat. ch. 467); and see Answer of State of California, No. 12 Original, 1945 Term, p. 187-193.

come established as inland waters between 1850 and the present date. This fact makes apparent the necessity for examining present conditions in determining the limits of inland waters.

The principles of the *California* case were extended and applied in *United States* v. *Louisiana,* 339 U. S. 699 (1950) and *United States* v. *Texas,* 339 U. S. 707 (1950). Those cases provide further evidence that the boundaries of the marginal sea must be determined in light of the conditions and circumstances prevailing at present in the coastal area, rather than on the basis of 1850 conditions.

In the *Texas* case, the Court said that the marginal belt was part of the "international domain." (339 U. S. at 719). If the Court were to hold that harbor works or additions to the coast line since 1850 are part of the marginal belt, those improvements would be part of the "international domain." Such a result would clearly be deleterious to the interests and security of the United States.

The decrees in the *Louisiana* and *Texas* cases provide that the paramount power of the United States extends to "the lands, minerals and other things underlying the Gulf of Mexico, *lying seaward of ordinary low water mark . . .*" This again emphasizes the fact that the marginal belt does not include any land which is not now submerged.

In asserting that changes and improvements in the shore line which have occurred since 1850 are to be regarded as in the marginal belt and thus under the federal paramount power, the United States is disregarding the assurances of the President and other government officials. Testifying in 1946 before the Senate Judiciary Committee on the so-called quitclaim bills, the then Secretary of Interior Ickes said:

> "Structures, such as docks or piers, which may have been erected on the submerged lands and the *surface ownership of filled-in areas* should not be disturbed if

> they were erected or filled in accordance with the Federal or State law." (Hearings, Senate Judiciary Committee, on S.J. Res. 48 and H.J. Res. 225, 79th Cong., 2d Sess., pp. 10-11.)

The brief for the United States in support of the motion for judgment in this case quoted the above statement by Secretary Ickes (p. 145) in discussing a recognition of the equities in the offshore area. The Government's closing brief stated that the President had authorized the Attorney General to say that there was no desire on the part of the Government to confiscate or destroy bona fide investments or improvements in the coastal areas. That same thought was expressed in oral argument by the Attorney General with the sanction of the President. (Tr. p. 24.)

In spite of these clear assurances, the United States is now contending that improvements and investments on filled lands made in reliance on state ownership are now subject to the paramount power of the United States. A just result, and one that would be consistent with the Court's decisions and the prior promises of Government officials, would be reached by determining the boundaries of the marginal sea on the basis of present conditions prevailing in the shore line areas.

B. Even Assuming Solely for the Purposes of Argument That 1850 Conditions Must Be Considered in Determining the Boundaries of the Marginal Belt, Accretions on the California Shore Line Formed by Slow and Imperceptible Degrees but Caused by Man-Made Structures Should Not Be Included in the Marginal Sea.

The second preliminary question is raised by Plaintiff's assertion that the Court must decide "whether the California rule that accretions artificially induced do not accrue to the adjoining landowner or the Federal rule that such accretions do accrue to the owner of adjoining land is to be applied." (Master's Report, p. 30) As shown above, it is the position of California that the marginal sea does not include any of the shore-line area which is not presently submerged and that the boundaries of the marginal sea must be determined on the basis of present conditions in the shore-line area. Consequently, California believes that there is no occasion for choosing between the Federal and California rules on accretions.

Assuming, however, solely for the purposes of argument that the marginal sea does extend to land which is not presently submerged, California believes that the Court should adopt the federal rule that accretions formed by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land.

The basis of the federal rule is the common law principle that natural accretions belong to the riparian or upland owner, while artificial accretions do not. Under the federal rule, accretions formed by slow and imperceptible degrees are held to be natural and not artificial even though the impelling cause is the erection of some artificial structure or some other work of man. *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 66-69. The federal view that such accretions are natural and not artificial reflects the English common law rule to that effect. *Brighton and Hove Gen-*

eral Gas Co. v. *Hove Bungalows Ltd.* (1924), 1 Ch. 372, 381, 383-390, *Doe* v. *East India Company* (1856), 10 Moore P.C.C. 140, 14 Eng. Reprint 445. States other than California have generally taken the same view as the federal courts. See e.g., *Burke* v. *Commonwealth* (Mass. 1933), 186 N.E. 277, 279; *Hanson* v. *Thorton* (Ore. 1919), 179 Pac. 494, 496; *Tatum* v. *City of St. Louis* (Mo. 1894), 28 S.W. 1002, 1003.

California courts have carved out a narrow exception to this view of the federal courts, the English common law, and the majority of American state courts. In the special circumstances where there is a controversy between an upland owner and the State of California or its grantee, it is held that accretions formed by gradual and imperceptible degrees but indirectly caused by a man-made structure are "artificial" and hence do not belong to the upland or riparian owner. *Carpenter* v. *City of Santa Monica,* 63 Cal. App. 2d. 722 (1944).

There are ample reasons why this exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California. As pointed out above, the California rule is contrary to that adopted by the courts of most other states. Consequently, if state law is to be applied in determining the boundaries of the marginal sea, there would be a different result in different states. In view of the international importance of a nation's policy with regard to the width of this belt, it would seem especially undesirable for the United States not to have a consistent policy concerning its boundaries. Since the limits of the marginal sea are a national problem arising all along this country's ocean boundary, the application of the uniform federal rule would seem preferable.

Moreover, the considerations in this proceeding between California and the United States concerning the limits of the marginal sea are substantially different from those involved in the controversy between the State and an upland owner in the case where the exceptional California rule was

enunciated. The California rule was adopted to enable municipalities to improve their harbor areas without having to condemn the accreted areas and to protect the interest of California citizens in the tidelands (held in trust for them by the State). *Carpenter* v. *City of Santa Monica,* 63 C. A. 2d at 794. Application of the California exception in the present proceedings would not serve the purposes for which it was created. Here, the California rule would be destructive, rather than protective, of the interests of California citizens and municipalities in the tidelands. Consequently, it would seem improper to apply in this proceeding the California rule which was devised for application in substantially different circumstances.

C. Lower Low Water Mark Should Govern in the Determination of the Baseline.

We now come to the question as to what criteria are to be used in determining the ordinary low water mark on the coast line of California.

A problem exists in California which does not exist on all shores, namely, that there are two low tides daily—a "lower low tide" and a "higher low tide." In many places, especially where there is a gently-sloping beach, the distance between the lower low water mark and the higher low water mark is substantial and may in some cases involve very valuable property.

Plaintiff takes the position that the phrase "ordinary low water", as used in the Court's decree, must be interpreted as the mean or average of all the low waters to be established by the United States Coast and Geodetic Survey from observations made over a period of 18.6 years. California is in agreement that the 18.6 year period is a proper period for determining correctly the average of the low waters. But California also maintains that there is no authority in the United States, and no rule of international law, which requires that low water mark be interpreted as

meaning the average of all the low tides. California maintains that the United States is free to use as its base line the average of the *lower* low waters rather than the average of all the low waters, and that it will be in the national interest to place the low water mark as far seaward as possible.

In support of its position, the United States relies wholly upon the decision of the Supreme Court in *Borax, Ltd.*, v. *Los Angeles,* 296 U. S. 10, 26-27. This case involved the construction of a federal patent covering a small island in the "inner bay of San Pedro." The court held that for the purpose of construing a federal patent to a private individual, the court will, in the absence of other criteria, follow the common law rule in locating a boundary which borders on a bay or on the sea. The court held that where

> "the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails."

The court interpreted the common law rule as meaning that the "ordinary high water mark" means "a mean of all the high tides."

In California there are two high tides daily—higher high tide and the lower high tide—just as there are two low tides. In the *Borax* case all the *high tides* were averaged to determine the "ordinary high water mark." Plaintiff urges that from this holding it must follow that the average of all the *low tides* must be used in determining the base line of the marginal sea. California maintains that this is a *non sequitur.*

The question of locating the base line of the marginal sea along the open coast is, as we have shown, a question of policy which involves the determination of the political frontier of the United States. This question is certainly not controlled by a decision which involved a land grant to a private individual. On the contrary the United States may choose any criteria for determining its low water mark that

it deems to be in its best interests. This choice that will have to be made by the political branches of our government or by this court, if it should decide to perform this function.

In making this choice, the United States is not bound by any international precedent. The practices of other nations regarding this question are widely divergent. Many nations use the line of their lowest low waters as the base line of the marginal belt (See Citation of Documents, pp. 131, 203, 314). The "basis of discussion" at the Hague Conference of 1930 contains the following comment on low water:

> "The terms 'low water' and 'low tide', as used in this Convention, mean the low water base-line which is employed by the coastal State for the particular coast, whether it be the line of mean low water, the line of lower low water, the line of mean low water spring-tides, or some other similar line of reference."

This emphasizes that each nation may adopt its own definition or criterion for low water and the one that it adopts shall be accepted as the base line.

While as above stated the United States has not officially adopted any criteria, it has uniformly followed the practice of using the mean of the *lower* low waters as the datum for its hydrographic surveys. (Summary of Testimony of Typical Witnesses, pp. 205-208.) In all official hydrographic surveys, the depth of the water is given in the number of fathoms below the mean of the lower low waters. Since these are the charts used for navigation, it would seem logical that the marginal sea should be measured from the same line. The Summary of Testimony also shows that the mean of the lower low waters is used as the datum by the Corps of Engineers for the construction of harbor works and similar purposes. (p. 205)

It is therefore California's position that it will be in the national interest to adopt the mean of the lower low

waters as the criterion to be used in this case for determining the base line of the marginal sea.

IV. A HEARING IS NECESSARY TO DETERMINE THE LOCATION OF THE MARGINAL BELT.

The two preliminary references to the Special Master in this proceeding have now been completed by the filing of his reports. These references comprehend, generally speaking, (1) the ascertainment of the segments as to which the lines should be determined at this time, and (2) a report as to the issues presented, with a statement of the positions of the respective parties and the nature and form of the evidence by means of which they propose to establish proof of their positions. California believes that the time is now here, if indeed it is not long overdue, when it should be accorded a hearing.

California's request for a hearing does not stem from any desire for delay. From the day of the filing of plaintiff's motion for a supplemental decree fixing the baseline of the marginal belt, California sought a reference to a Special Master and requested a trial or a hearing at which evidence might be adduced on the important issues involved in this case. This request for its day in Court has been made in every brief and paper which California has filed in this proceeding. This is recognized in the Report of the Special Master (p. 29).

California submits that it has made a forthright and prompt response to every request of the Special Master. At the request of the Master, California summarized the nature of its proposed oral testimony, both expert and factual, and "indicated what is intended to be proved by the many documents to which it proposes to refer."[32] (Mas-

[32] Footnote 3 on page 4 of the Special Master's Report, due no doubt to a typographical error, mistakenly refers to a footnote on page *18* thereof. The footnote referred to appears on page *11* instead.

ter's Report, p. 11). It submitted to the Special Master two volumes which were filed with the Court accompanying his Report: (I) a "Summary of Testimony of Typical Witnesses," of some 400 pages, which also contains the Statement of California in response to the Special Master's letter of June 29, 1949 addressed to counsel for both parties, and other memoranda and comments, and (II), a "Citation of Documents," of some 600 pages, with statements as to what is intended to be proved by them. In addition to these volumes, California has filed "a large number of official charts and maps."

California's effort to comply promptly and fully with all the Special Master's requests reflects its belief that the determination of what constitutes inland waters transcends any mere academic consideration. Plaintiff's opposition to a hearing seems to California to be based on an attempted over-simplification of the important issues involved. We believe that a failure to hold the requested hearings would limit the Court's appreciation of both the local and the international conditions which are affected by the issues in this case. The fact that the Court is here exercising original, not appellate, jurisdiction makes it especially appropriate and necessary for it to grant a full hearing of the evidence.

In maintaining throughout this proceeding that a trial or hearings should be held, California has urged that the hearing be held on the West Coast to enable the Court to gain a full understanding of the geographical, physical and legal background of this case by hearing oral testimony and by visiting the scene. While California has no desire to criticize the Master's Report, the difficulties attending a condensation of even a summary of the testimony of typical witnesses are apparent.

There is precedent in international law for a visit to the scene by the Justices of this Court. In 1909, a visit to the scene was made by a Tribunal of the Permanent Court of Arbitration in the *Grisbadorna Case,* a water-boundary

case between Norway and Sweden,[33] and in 1937, the Permanent Court of International Justice made a visit to the scene in the *Diversion of the Waters of the Meuse Case* between the Netherlands and Belgium.[34] Such a visit would produce a firsthand impression and an understanding of the problems involved in this case which not atlas, no map, no chart would impart.

No definite recommendations upon the subject of a trial or hearings are contained in the Master's Report. If the Court rejects California's argument that the question before the Court is political and not justiciable, California urgently requests the Court to grant a trial or hearings in California for the presentation of evidence in this case, whether it be before a three-judge court, a commission, a special master, or some other form of tribunal.

Respectfully submitted,

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Dated July 31, 1951.

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[33] Scott, Hague Court Reports, p. 121.

[34] 4 Hudson, World Court Reports, p. 172.

APPENDIX A.

Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 Pac. 722.

RICHARDS, J.—

" . . . The preliminary questions thus presented for our solution are, first, as to whether the ship 'Peralta' upon which the petitioner herein is engaged in conducting its aforesaid operations and upon which it intends to continue the same unless prevented from so doing by the preliminary injunction proposed to be issued by the respondents herein, is at its admitted place of anchorage, within or without the boundaries of the state of California; second, whether the aforesaid operations of said petitioner upon said vessel and at said point, if within the boundaries of the state of California, are in violation of its laws. The precise point in issue under the first of these propositions has been made very definite by the presentation on behalf of both of the parties hereto in their pleadings and upon the hearing hereon of certain maps and plats delineating the boundaries and dimensions of the bay of Monterey, as well as the exact location of the ship 'Peralta' within the headlands of said body of water, but more than three nautical miles from low-water mark along the shore line thereof. If it shall be found as a matter of law that the entire area of the bay of Monterey, so called, extends oceanward to a line drawn between the headlands thereof; and if it shall further be found that said entire area of said bay of Monterey is to be held included within the territorial boundaries of the state of California, it would follow irresistably that the ship 'Peralta' at its designated place of anchorage is within said state and is subject to its laws.

(1) Upon the solution of the problem thus presented this court is entitled to bring to bear, in so far as it may be aided thereby, its judicial notice of the political history of the world (Code Civ. Proc., sec. 1875, subd. 8) . . . [W]hen

in the early years of the sixteenth century of our era Spain through her voyagers had discovered and through her conquistadores established her dominion over that region in the southwestern portion of North America which became known as 'New Spain' she began through her viceroys to send forth navigators to the northward along the western coast of the continent, with the twofold object of adding further territory to her domain and of discovering the fabled northwest passage. The first of these navigators to thus extend his voyages beyond what is now known as Lower California was Juan Cabrillo. This bold navigator after a stormy voyage up an unknown coast sighted the wooded headland to which he gave the name of Point Pinos and sailed into the body of water behind it, to which, as recorded in his log, he also gave the name 'Bahia de Los Pinos,' the Bay of Pines. He was followed in 1602 by another navigator, Sebastian Vizcaino, who also found and entered the same incurved body of water upon the inner shores of which he landed, taking formal possession of its coasts in the name of his sovereign and rechristening it 'Bahia de Monterey,' in honor of his patron the Count de Monterey, then viceroy of New Spain, which name it has ever since borne in the official records of Spain, of Mexico, the United States, and state of California.

(2) The bay of Monterey, thus designated from its first discovery as a 'bay,' is a body of water having headlands approximately eighteen miles apart, with receding shores, giving a total width of twenty-two miles inside the headlands, with a total depth of approximately nine miles. It thus satisfies the definition of a 'bay' given by the lexicographers as a body of water around which the land forms a curve; or a recess or inlet between capes or headlands. (Webster, Title 'Bay.') It is needless to detail the history of the increasingly troubled effort of Spain and later of Mexico to assert and maintain the sovereignty of each in turn over the indefinite region known as California and its adjacent islands, inlets, and seas; but the interesting fact

may be noted as having its bearing upon whatever question of international law is involved herein that the dispute between Spain and England in the year 1790 growing out of the northwest coast fur trade was for the time being settled by the so-called Nootka Convention wherein as between these two powers, which were then the greatest maritime powers of the known world, it was agreed that the exclusive sovereignty of Spain should be recognized and respected over all parts of the northwest coast already occupied by subjects of Spain and for a distance of ten leagues into the ocean. The agreements of this convention were ratified by the contracting powers and the claims of Spain to exclusive sovereignty and jurisdiction over the coasts of what is now California and Oregon as far north as the mouth of the Columbia River on land and to a distance of ten leagues into the ocean were conceded and confirmed. This jurisdiction over these coasts and seas and adjacent islands Spain and her successor Mexico thereafter asserted and insisted upon through rigid maritime regulations over the increasing coastal traffic during the half century or so following the date of said treaty and down to the time of the occurrence of the war between the United States and Mexico and consequent seizure of California by the former, manifested by the raising of the American flag at Monterey on July 7, 1846, and by the subsequent events which marked the passing of the old dominion.

(3) By the terms of the treaty of Guadalupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1848, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. By virtue of this treaty the United States assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of California and for a considerable though perhaps

indefinite distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast.

(4) When in the course of events the duly constituted framers of the constitution of California assembled at Monterey in the autumn of 1849 and proceeded to frame the first constitution of California they inserted in article XII thereof a description of the boundaries of the state, which, in so far as the southerly and westerly lines thereof were concerned, read as follows: 'Thence running west and along said boundary line (the Mexican boundary) to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also all the islands, harbors and bays along and adjacent to the coast.' This language in our first constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all those several bays and harbors which indent its coast.

* * * * *

(8) The petitioner . . . . insists that by the rules of international law the territorial jurisdiction of a maritime state does not extend beyond three miles from the shore line and follows the indentations of the coast into all bays or gulfs, the headlands of which are more than six miles apart, and cites certain text-writers upon international law in support of that contention. These text-writers give as the reason for this rule the somewhat fantastic one that while our modern international law was in the process of forming, the range of coast planted cannon did not exceed three miles. These text-writers, however, while suggesting such a rule based upon such a long-lost reason admit

that as to the stronger maritime powers of modern Europe the rule was more honored in the breach than in the observance. Britain, which has depended more upon its 'Wooden Walls' than upon its coast ordnance, has always asserted its sovereignty not only over the entire area of the bays, ports, harbors, firths, and other inlets along its much indented coast line, but also over the bays, gulfs, and inlets of its dependencies; such, for example, as the bay of Conception in Newfoundland, which has a breadth of fifteen miles. These text-writers also point out that France has always asserted sovereignty over the bay of Cancale, which is seventeen miles wide at its headlands, and that the United States asserts and has maintained its jurisdiction over the bays of Delaware and Chesapeake, although the former has a headland width of fifteen and the latter of twelve miles. In Moore's Digest of International Law the basis of our assertion of jurisdiction over the entire area of Chesapeake Bay is set forth in its reference to the decision of the Commissioners of Alabama Claims, wherein the extent of that jurisdiction was directly involved. The decision of the commission is illuminating in its bearing upon the instant proceeding. It reads: 'Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English Courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig "Grange" and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and

authority of the Government of the United States.' While it is true that by treaties and conventions between the powers chiefly in arbitration cases the fixation of a six-mile distance between headlands of certain bays and inlets have at times been agreed upon in the settlement of international disputes, it cannot be said that there is any rule of international law upon the subject, the whole matter resting in the undisputed assertion of jurisdiction by the power of possessing the inclosing shore line of the bay or inlet in question.

(9) This being so, we arrive at the conclusion that the bay of Monterey between its headlands and the ocean adjacent to a line drawn between these headlands for a distance of three nautical miles is within the boundaries of the state of California and of the counties respectively of Santa Cruz and Monterey. The particular location of the ship 'Peralta' as given in the petitioner's application herein places it within the county of Santa Cruz and hence within the jurisdiction of the Superior Court in and for said County of Santa Cruz. It is not seriously contended by the petitioner that the acts which it proposes to do upon and by the use of said vessel and its equipment at said point would not, if permitted, constitute a violation of the laws of the state of California regulating the taking and reduction of that species of marine fish known as 'sardines.'

(10) It follows that the Superior Court in and for the County of Santa Cruz has jurisdiction over offenses against these laws; and hence that the alternative writ issued herein should be discharged and the application of the petitioner for a permanent writ of prohibition denied."

Shenk, J., Curtis, J., Seawell, J., Waste, C. J., Langdon, J., and Preston, J., concurred.

People v. Stralla, 14 Cal. 2d 617, 96 Pac. 2d 941.

SHENK, J.—The grand jury of the county of Los Angeles returned an indictment against the defendant Adams and others, charging the violation of subdivision 2, section 337a, of the Penal Code. The specific accusation was the keeping and operating of the gambling ship "Rex" anchored in the waters of what is known as Santa Monica Bay, at a point four miles oceanward from the end of the municipal pier of the city of Santa Monica and approximately six miles landward from a line drawn between the headlands, Point Vicente on the south and Point Dume on the north. The defendant Adams appealed from the judgment of conviction and from the order denying his motion for a new trial.

There is no dispute as to the sufficiency of the evidence to support the jury's verdict if the offense was committed within the jurisdiction of the state. The appeal presents the single question whether the territorial jurisdiction of the State of California extends over the area of the waters known as Santa Monica Bay. If it does, an affirmance of the judgment will be required.

The territorial boundaries of the state were defined in the Constitution of California of 1849, article XII, section 1, which fixed the ocean boundary of the state as: "thence running west . . . to the Pacific Ocean and extending therein three English miles; thence running in a Northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, including all the islands, harbors, and bays along and adjacent to the coast." That language was readopted in the Constitution of 1879, section 1, article XXI, without substantial change. Section 33 of the Political Code enacted in 1872 provides that the sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the Constitution, subject to qualification in cases where jurisdic-

tion has been ceded to or acquired by the United States Government.

[1] The immediate problem for solution is whether the waters commonly known as Santa Monica Bay were intended to be included within the designated territorial boundary. The answer comprehends not one, but several factors, namely: Is this body of water a bay geographically? Is it a bay historically? Is it a bay legally?

For the purpose of considering those factors this court may examine historical data and maps, public papers and records, and may take judicial notice of such geographical, historical and political data even though the same have not been introduced in evidence in the trial court. (Code Civ. Proc., sec. 1875; *Rogers* v. *Cady,* 104 Cal. 288 (38 Pac. 81, 43 Am. St. Rep. 100); *Varcoe* v. *Lee,* 180 Cal. 338, 343 (181 Pac. 223).)

[2] The waters known as Santa Monica Bay lie in an indentation of the California coast between Point Vicente and Point Dume. The points are distant from each other about 25 nautical miles or about 29 statute miles. The line of the coast forms a curve inward to a distance of about ten miles from a line drawn between the headlands. The line of the shore recedes slightly from Rocky Point, which is to the north of Point Vicente, making the distance between shores landward from Point Dume and Rocky Point greater than the distance between those two points. Otherwise the bay is widest between Point Vicente and Point Dume.

The foregoing geographical description appears to conform to the definition of a bay. Funk & Wagnalls New Standard Dictionary defines "bay" as "an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean." We find in Webster's International Dictionary: "An inlet of the sea, usually smaller than a gulf, but of the same general character. The name is used, often for large tracts of water, around which the

land forms a curve, or for any recess or inlet between capes or headlands; as the Bay of Biscay; Hudson Bay." The Oxford English Dictionary (1933) gives: "An indentation of the sea into the land with a wide opening." The Encyclopedia Brittanica, eleventh edition: "A wide opening or indentation in a coast line. This may be of the same origin as 'bay', in the architectural sense, or from a Latin word which is seen in the place named Baiae." "A bay is a bending or curving of the shore of a sea or of a lake, and is derived from an Anglo-Saxon word signifying to bow or bend. For a similar reason the word bay is in Latin termed sinus, which expresses a curvature or recess in the coast." (*State* v. *Town of Gilmanton,* 14 N. H. 467, 477.) * * * * *

Historically it appears that both Cabrillo (in 1542) and Viscaino (1603) noted this body of water as "Gran Ensenada" or "Grand Bay" (Bancroft's Works, vol. 18, History of California, vol. 1, 1541-1800, p. 71; Paulen's Atlas of Historical Geography of the United States, plate No. 17). Both Spain and Mexico claimed and exercised exclusive jurisdiction over the waters of this coast as far as the mouth of the Columbia River, for a distance of ten leagues into the ocean, and such claim was confirmed by treaty with Great Britain in 1790. (See *Ocean Industries, Inc.,* v. *Superior Court,* 200 Cal. 235, 242 (252 Pac. 722).)

Historians refer to the waters as Santa Monica Bay (Ingersoll's Century History of Santa Monica Bay Cities, p. 121; Charles Sumner Warren, History of Southern California; California Blue Book, 1932, p. 520). They indicate that the bay received its present name probably earlier than 1827, and that the city of Santa Monica was named later. Rand-McNally & Co.'s Atlas of the World (United States, 1908, p. 277), contains the following statement: "The seacoast of California extends the entire length of the State and is indented by many bays and harbors, that of San Francisco being the finest on the Western coast, nearly fifty miles long and about nine miles wide. Other

bays or harbors of importance are San Diego, San Pedro, Santa Monica, Santa Barbara, San Luis Obispo, Monterey, Tomales, Bodega, and Humboldt."

Before 1872 "Shoo Fly Landing" on Santa Monica Bay afforded shipping facilities for the La Brea rancho. (Ingersoll, Century History of Santa Monica Bay Cities, p. 141.) The same writer, states (pp. 144, 145) that in 1875, in conjunction with the construction of a railroad, a new wharf, 1700 feet in length, reaching a depth of 30 feet at low tide, was completed and the first ship landed at this wharf in June of that year. Collis P. Huntington, about 1892-1893, was instrumental in building the "Long Wharf", 4600 feet, at a cost of about $1,000,000. (Newmark, Sixty Years in Southern California, 1853-1913.) Guinn's Historical and Biographical Record of Southern California (printed 1902, p. 139 et seq.), states facts showing the importance of Santa Monica as a shipping point.

The long struggle to obtain funds to establish a breakwater in either of Santa Monica or San Pedro Bays as a port for Los Angeles, which ended in the selection and establishment of the port in San Pedro Bay, has become part of historical California. (Article "The Battle for Southern Pacific Ports", by Lanier Bartlett, in "Westways", August, 1935, pp. 26-29.)

The defendant quotes the following from the United States Coast Pilot, issued by the United States Department of Commerce under the supervision of the Coast and Geodetic Survey, page 57: "From Point Vicente to Point Dume, about 25 miles, the coast forms a broad open bight about ten miles wide known as Santa Monica Bay". He thus argues that an open bight is not a bay within the accepted terminology of what constitutes a bay. But we are also referred to the statement in the same survey that "Monterey Bay . . . is a broad, open bight, twenty miles long, between Point Pinos and Point Santa Cruz, and nine miles wide . . ." Monterey Bay was determined to be territorial waters in the case of *Ocean Industries, Inc.*, v. *Superior Court,* 200 Cal. 235 (252 Pac. 722).

[3] The defendant contends that a body of water which may answer the definition of a bay, does not constitute a bay unless it also affords protection and safe anchorage to vessels engaged in shipping, and that Santa Monica Bay does not offer the advantages of a harbor. The evidence and the historical facts do not support the statement. The defendant refers to the discussion before the 54th Congress, 1896, as indicating a lack of secure refuge in Santa Monica Bay. But the evidence there produced does not necessarily negative the characteristics of Santa Monica as a bay or a harbor. The controversy centered on the problem of which bay, Santa Monica or San Pedro, was the better site for the project of establishing a port for Los Angeles.

In a history of the Los Angeles Harbor district, compiled by Ella A. Ludwig and published by the Historical Record Company, Inc. (California), referring to the report of the board of engineers appointed to investigate the question of which bay was the more eligible location for such a harbor, it is stated: "There was a lengthy and full comparison of the two places, Santa Monica and San Pedro. On the comparative advantages for arrival and departure, the board held that there was no essential difference between the sites of San Pedro and Santa Monica. The question of distance from Los Angeles was declared to be unimportant . . . On the question of construction, after going into all details, it was declared in substance that the cost of San Pedro would be much less than at either of the locations suggested at Santa Monica". The fact that San Pedro Bay was finally selected does not refute the evidence of use of Santa Monica Bay as a harbor. Nor is the fact that Santa Monica Bay affords less protection from northwesterly winds a controlling consideration. San Pedro Bay, situate on the southerly curve of the peninsula or projection of land formed by Point Vicente and Point Fermin, is open to southeasterly gales, as to which Santa Monica Bay, along the northerly curve of that peninsula,

affords protection. Leading into the latter curve in Santa Monica Bay, a deep canyon, known as Redondo Canyon, provides passage for ships almost to the breakwater line along Redondo beach. Also, oceanward and to the northwest of Santa Monica Bay lie the islands of Santa Cruz and Santa Rosa; and to the southwest, Catalina and San Clemente Islands. The position of the islands undoubtedly affords some protection against gales coming from their direction. In his Century History of Santa Monica Bay Cities, chapter 1, page 11, Ingersoll notes that "the waters of this bay are ordinarily quiet since the force of the waves is broken by the seaward islands and the deep, recessed position of the shoreline". Moreover, the "Rex", which has no motive power of its own, has been anchored at the same point in Santa Monica Bay for the past five or six years. If the question whether Santa Monica Bay is a harbor were important in the solution of the problem presented, the foregoing fact would tend strongly to refute the contentions of the defendant that Santa Monica Bay, as a harbor, is not within the territorial waters of the state.

In discussing the legal sources on the question of what constitutes a bay, the defendant places reliance upon the case of *United States* v. *Morel,* 26 Fed. Cas. 1310, No. 15,807, wherein a distinction was made between high seas, and roads, harbors and ports. After noting the distinctions made by Lord Hale in the fourth chapter De Jure Maris, the Court said: "We see here a clear and reasonable distinction taken between the main sea or ocean, and such parts of its waters as may flow into places so situate and secured by the circumjacent land as to afford a harbor or protection for vessels from the winds, which make the sea dangerous. The open sea, the high sea, the ocean, is that which is the common highway of nations, the common domain, within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right". And, quoting from Lord Hale, the court continued "The

expression (high seas) describes the open ocean where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge in which protection and shelter are sought, within the enclosures and projections of land." It is obvious that the extent of the harborage offered by the places so described will vary; but mere variations which become apparent in making comparisons with other harbors may not preclude judicial recognition of Santa Monica Bay as a harbor, in view of its geographic conformation and the history of its uses as such.

[4] Furthermore it does not appear that the law of nations defines, circumscribes or restricts the character of a body of water which may be included within the territorial boundaries of a country in accordance with the defendant's contentions. * * * * *

In line with the foregoing considerations the Bay of San Pedro (*United States* v. *Carrillo,* 13 Fed. Supp. 121), and Monterey Bay (*Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235 (252 Pac. 722)), have been judicially recognized as territorial waters of the state. There is not such a difference between the configuration and expanse of those bays and of Santa Monica Bay as would compel the invocation of the "rule of reason" referred to in the Carrillo case, for the purpose of rejecting the contention that Santa Monica Bay is within the territorial boundaries of California. That rule of reason does not persuade us to conclude that the waters of Santa Monica Bay, per se, beyond three miles from the shore, constitute a part of the open or high seas. We are not here concerned with a body of water comparable to the Behring Sea, or to the Gulf of Mexico mentioned as an example in the Carrillo case.

We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed juris-

diction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the state by the Constitution. It follows that the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vicente and Point Dume, and at least for a distance of three miles oceanward from that line, and that such jurisdiction may be exercised by the state for all proper purposes including the prosecution of violators of the penal laws of the state.

The Judgment and the order are and each is affirmed.

Curtis, J., Waste, C. J., Gibson, J., and Carter, J., concurred.

Houser, J., did not participate in the foregoing decision.

United States v. Carrillo, 13 F. 2d 121 (S. D. Cal., 1935).

STEPHENS, District Judge.

"The defendants were on trial under indictment alleging in four separate counts that they conspired to commit acts of piracy and to rob and plunder, and that they did commit acts of piracy and did rob and plunder a gambling vessel, the Monte Carlo, anchored off the shore of California.

"This is a motion to dismiss all counts of the indictment upon the ground that the court should take judicial knowledge that the vessel allegedly robbed was within the territory of the state of California at the time of the alleged robbery.

"(1, 2) The state of California was admitted into the nation of the United States shortly after the territory within its limits had become unquestionably American through the Treaty of Guadalupe Hidalgo as it was proclaimed July 4, 1848, by the President of the United States. It may be claimed that California was an independent nation for a short time from the raising of the Bear Flag at Monterey to the admission into the Union, but as a functioning gov-

ernment it never was recognized by other nations. No territorial government was ever established by the United States for California. It may be said, therefore, that the government under the California Constitution of 1849 succeeded the Mexican sovereignty with all of its rights, and, of course, the Mexican sovereignty succeeded the Spanish sovereignty.

"There is, strictly speaking, no law between nations, except that which is agreed upon between them through treaties, and sovereignty with its geographical limits is, in the main, a question of dominion. From a very early date nations have generally acquiesced in the proposition that a nation's territory over which its sovereignty extends ends 3 miles from and into the bordering ocean. *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 P. 722. Such three miles was not a line following the exact contour of the coast, which would seem impracticable, but was three miles from the line joining headlands or points between which the indentations or bays. But a moment's thought upon the subject is sufficient to cause appreciation of the fact that the rule of reason must be read into this formula. As, for instance, if the whole of the land bordering the Gulf of Mexico were under one sovereignty the whole of such vast sea could not well be considered as within such country's sovereignty. The practice of governments, explorers, geographers, etc., has generally confined such formula to bays which are not in fact open sea, and so the coasts of the continents have been mapped, the points between which the sea curves inward have been designated, and the waters between such points have been designated as bays. A consultation of the old discovery and navigation maps of the Spaniards, and as well the English, will show this to have been the practice on the Pacific Coast of North America, and it does not appear to have been disturbed by the Mexican sovereignty. See citation to maps herein. The Constitution of California (Const. Cal. 1849, art. 12) in its boundary description provides that the 3-mile

limit shall be followed, and that the bays and harbors along the coast are included. It would seem to follow logically that United States national and California state sovereignty have always been in accord with this rule. See *Ocean Industries, Inc.* v. *Superior Court, supra,* wherein the question is treated and authorities cited. Ancient and more modern maps, as well as maritime publications of the United States government, have referred to the Bay of San Pedro as being that portion of the Pacific Ocean lying between the bluffs, now the site of the city of Huntington Beach, and until lately called Point Lasuen, on the east and Point Firmin on the west. The Pacific Coast Pilot, 1889, official government publication; Map of coast 'San Diego to Santa Rosa Island,' U. S. C. & G. S. No. 5101; 'Pacific Coast, San Diego to Santa Monica, including Gulf of Santa Catalina, Cal.,' U. S. C. & G. S.; the following maps at University of California; Spanish N. A. drawn for Thompson's New General Atlas of 1814; Map marked 'Carte de La de L'Amerique'; Map Vancouver Chart Coast of N. W. America; Rand-McNally's Atlas 1878 and 1899. Between these points the coast curves inward, and between them (except for detached hills) are lowlands, inlets and lagoons into which several torrential streams flow from the mountains some 20 or 30 miles inland.

"It seems, therefore, and I so decide, that the Bay of San Pedro is that body of water lying landward from a line drawn from Point Lasuen to Point Firmin, and that the sovereignty of the United States and the territory of the state of California extends three miles to seaward from such line. The same conclusion was reached by the Appellate Department of the Los Angeles County California Superior Court in Criminal Appeals No. 734, *People* v. *Haskel.*"

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