No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES AND SUPPORTING MEMORANDUM

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CITATIONS

561-963—74——1

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EXCEPTIONS OF THE UNITED STATES

The United States takes exception to three determinations by the Special Master as to the location of the coastline of the State of Louisiana:

1. The United States excepts to the Special Master's finding (Report, pp. 32–35) that there have been, for any period relevant to this litigation, subsidiary bays within East Bay, the closing lines of which affect the seaward limit of Louisiana's Submerged Lands Act grant.

2. The United States next excepts to the Special Master's finding (Report, p. 47) that particular low-water elevations near Pass du Bois existed as part of the baseline until December 6, 1969.

3. The United States further excepts to the Special Master's finding (Report, pp. 45–46) that Ascension Bay is an overlarge bay within the meaning of the Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 7(5).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

November 1974.

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MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF ITS EXCEPTIONS

STATEMENT AND INTRODUCTION

Since 1948 the United States and the State of Louisiana have been engaged in litigation over the right to exploit the valuable mineral resources of the seabed off the coast of that State. See *United States* v. *Louisiana,* 339 U.S. 699. The case has been before this Court, on the merits or on procedural issues, on a score of previous occasions. It now returns, hopefully for the last time,[1] on the Report of the Special Master appointed five Terms ago.

[1] To be sure, after disposing of the Exceptions to the Report filed by each of the parties, the Court will ultimately be asked to enter a formal decree precisely delimiting the boundary be-

1. We need not, however, rehearse the entire past history. The present controversy begins with a new suit filed by the United States in 1955, two years after the enactment of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301, *et seq.* See 350 U.S. 990. The Court ultimately held, in 1960, that Congress had quitclaimed to Louisiana the lands underlying the Gulf of Mexico within 3 geographical miles of the "coastline." *United States* v. *Louisiana,* 363 U.S. 1. In the same decision, the United States was declared entitled to the natural resources of the seabed further seaward. However, neither the 3-mile boundary, nor the baseline from which it must be measured, was located. The decree subsequently entered simply defined the coastline in the language of the Submerged Lands Act, 43 U.S.C. 1301(c): "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," 364 U.S. 502, 503. And, recognizing

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tween State and Federal submerged lands and requiring the parties to account for revenues derived from disputed areas. We anticipate, however, that such a decree can be formulated by agreement once the Court has rendered its decision. Otherwise, a reference to the Special Master for that limited purpose may be appropriate. See Report, p. 53.

It is also true that, because of the ambulatory character of the coast, further proceedings at some future time may become necessary. See Report, pp. 53–54. But, on the side of the United States at least, it is hoped that the parties will take up the Court's suggestion that the line now fixed will be "frozen" for a substantial period by agreement. See 394 U.S. 11, 34. To that end, we invite the Court to make clear, once again, that such a binding agreement is appropriate and, so far as the Federal Constitution is concerned, requires no legislative approval.

that the parties might disagree on the application of that definition to the Louisiana coast, the Court reserved jurisdiction "to entertain such further proceedings, enter such orders and issue such writs as may * * * be deemed necessary or advisable to give proper force and effect to this decree." 364 U.S. at 504.

As it turned out, no agreement was reached and, by cross-motions filed in 1968, both parties requested a supplemental decree specifically designating the seaward limit of the lands under the Gulf of Mexico owned by Louisiana. After oral argument, the Court rendered an opinion resolving many of the issues involved. *United States* v. *Louisiana,* 394 U.S. 11. Most importantly, the principles of the intervening decision in *United States* v. *California,* 381 U.S. 139, were held applicable to the present controversy, so that the delimitation of "inland water" here, as there, is controlled by the rules announced in the international Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606. Applying those rules, the Court itself rejected Louisiana's claim based on the so-called "Coast Guard line" and effectively settled the boundary between State and federal submerged lands along much of the coast. This made possible the subsequent entry of decrees removing large areas from dispute. See 404 U.S. 388; 409 U.S. 17.

There remained, however, several issues with respect to which an evidentiary hearing was deemed appropriate. Most of these concerned water areas which

Louisiana claimed as "inland," either because they were said to qualify as "juridical bays" under the international Convention,[2] or on the ground that they were "historic bays" exempted from the strict criteria of the Convention.[3] To resolve those questions, as well as other relatively minor factual disputes,[4] the Court appointed a Special Master. 395 U.S. 901.

In a joint Pretrial Statement dated December 5, 1969 (Report, pp. 55–62),[5] counsel for both parties set out the issues which they believed to be before the Special Master in this case.[6] Thereafter, the Special

[2] For the Court's convenience, we have printed, as Appendix A to this memorandum (pp. 33–34, *infra*), the full text of Article 7 of the Convention which governs juridical bays.

[3] In either case, the 3-mile belt granted to the State by the Submerged Lands Act would be measured from the closing line of the "bay," which represents the "seaward limit of inland waters." In some areas (as with respect to East Bay), the parties disagree as to whether *any* bay affecting the Submerged Lands Act grant exists. More often, the dispute involves the location of the bay closing line.

[4] Primarily, these factual issues concern the existence or non-existence of certain mudlumps, low-tide elevations, or spoil banks, during relevant periods. See 394 U.S. at 40–41 n. 48.

[5] As the introduction to the Pretrial Statement recited (Report, p. 55), it consisted of three parts, designated "A", "B" and "C". The Master's Report reprints only Part A. Because we shall have occasion to refer to it here and in our Reply Brief, we have printed Part B of the Pretrial Statement as Appendix B (pp. 35–36, *infra*) to this memorandum. Part C has no continuing relevance and is omitted.

[6] By a subsequent Stipulation (Report, p. 62), the Statement was amended. As the hearings progressed, a few additional or subsidiary issues emerged. Except insofar as the Pretrial Statement expressly foreclosed the matter, the parties and the Special Master agreed that these, too, should be resolved in order to avoid a wasteful remand of the case.

Master held a number of hearings. The United States and the State of Louisiana submitted numerous exhibits and examined many witnesses who testified on legal and factual matters relevant to the ultimate location of Louisiana's coast. At the invitation of the Master, both parties submitted exhaustive briefs and presented oral argument on several occasions. The Master has now filed his Report and the Court, on October 15, 1974, directed the filing of any exceptions thereto by November 29.

2. The United States accepts all of the Special Master's conclusions with only the three exceptions already noted. We here address ourselves entirely to those exceptions, deferring argument in support of the balance of the Master's Report until our response to Louisiana's exceptions.[7]

We stress that our exceptions do not challenge factual determinations based on the sifting of massive documentary evidence or the appraisal of witnesses.[8] On the contrary, our principal argument under Points I and III requires no more than the application of

[7] Whether or not the State excepts to all of the Master's conclusions which the United States accepts, we shall address each of those conclusions in our response—if only by adopting the appropriate passage of the Report. On some issues, we shall buttress the Master's conclusions with additional arguments. And, in rare instances, we may support the result on independent grounds, without endorsing all the Master's subsidiary findings or his reasoning. The present exceptions are directed only to *results* we challenge and our failure to except to any finding or statement in the Report should not be understood to imply that we accept it as correct.

[8] Compare, *e.g.*, the Special Master's resolution of the "historic inland water" claim, which accounts for the bulk of the record.

legal principles already settled by the Court to a physical situation fully revealed on stipulated maps. Except for the maps, no reference to the record is necessary or appropriate to resolve those questions. Nor is the operation one that requires special expertise. The answer turns essentially on visual impression, informed by strict observance of legal criteria.[9]

To be sure, the situation is somewhat different when we challenge the Special Master's finding that certain low-tide elevations existed at relevant times (Point I(B) and Point II). As it happens, however, our quarrel is with the Master's automatic acceptance of the Coast and Geodetic Survey's 1200 series charts for these areas. There is no dispute about what those maps show: our submission is simply that, in the circumstances, they should not be deemed controlling. If we are correct, it is true that reference to the record may become necessary.[10] But we have no reason to believe that there is any disagreement as to what the evidence shows, once it is ruled that the Master's reliance on the 1200 series charts was improper.

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[9] So saying, we do not underrate the useful function served by the Special Master. His findings have eliminated many subsidiary issues and have narrowed others. Thus, in East Bay, the Master's determination as to the correct application of the semicircle test reduces the dispute (at least so far as we are concerned) to the propriety of two proposed bay closing lines.

[10] Even here, reference to the record is unnecessary if the Court accepts our submission that, in the circumstances, the special set of 54 maps should have been deemed controlling. See pp. 17–20, *infra*.

ARGUMENT

I

THERE ARE NO LESSER BAYS WITHIN EAST BAY WHICH AFFECT THE EXTENT OF LOUISIANA'S SUBMERGED LANDS ACT RIGHTS

The United States and Louisiana have continually disagreed on the location of the coastline within East Bay. Prior to the Court's 1969 decision, 394 U.S. 11, the State argued that the whole of East Bay was a juridical bay, from the tip of the jetties at South Pass to the tip of the jetties at Southwest Pass. This Court held otherwise, pointing out that the water area "enclosed" by a line connecting the jetties was not sufficiently large to meet the so-called "semicircle test" established by Article 7(2) of the Convention on the Territorial Sea. 394 U.S. at 53–54. In the Special Master proceedings, Louisiana proposed a number of alternative closing lines within East Bay, labelled from A (the most seaward) through D (the most inland). Two of the closing lines, C and D, admittedly enclose enough water to satisfy the semicircle test.[11]

The Special Master found: (1) that prior to December 6, 1969, the area enclosed by Line C constituted a

[11] We fully accept the Special Master's application of the semicircle test. See Report, pp. 29–31. When we speak of "enclosing enough *water* to satisfy the semicircle test," we treat as "water" any islands or low-tide elevations within the indentation, as required by Article 7(3) of the Convention (Appendix A, *infra*, p. 33) and the Master's ruling.

juridical bay; and (2) that, thereafter, Line D represented the seaward limit of inland waters in East Bay. Report, pp. 34–35. December 6, 1969, is the date after which the land formation referred to as "Cow Horn Island"—the eastern terminus of Closing Line C—no longer appeared on large-scale nautical charts of East Bay issued by the federal government (the Coast and Geodetic Survey's 1200 series charts).

In order to reach the conclusion that Lines C and D enclosed juridical bays for periods relevant to this litigation the Special Master found that those areas, besides satisfying the semicircle test, met the other requirements of Article 7 of the Convention and that Cow Horn Island actually existed above mean low water. We challenge both propositions.

A. LOUISIANA'S PROPOSED CLOSING LINES C AND D DO NOT ENCLOSE JURIDICAL BAYS

As we have noted, this Court expressly held in 1969 that the entirety of East Bay is not a juridical bay under the Convention on the Territorial Sea and the Contiguous Zone because it does not contain enough water area to meet the semicircle test requirement of Article 7(2). 394 U.S. at 53. But that was not the only ruling relevant to East Bay. Responding to the State's proffer of another closing line which met that test, the Court said: "We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention." *Id.* at 54. Without foreclosing the possibility that a lesser bay existed, the Court stressed that no such finding would be justified unless all the other

criteria of Article 7 were met: " 'a well-marked indentation' with identifiable headlands which enclose 'land-locked waters.' "[12] *Ibid.* We submit that injunction has not been followed.

The Special Master, we believe, reached his conclusion by a path which begins at the wrong place. Although not expressly articulated, we think it fair to say that implicit in the Master's treatment of East Bay are three assumptions: (1) that there is, almost certainly, a true bay *somewhere* within East Bay which affects the Submerged Lands Act grant, the task being to define it; (2) that the natural entrance points of that bay need not be apparent when one looks at the map; and (3) that any body of water that satisfies the semicircle test is presumptively a juridical bay. We challenge each of these premises, and suggest that the Master's determination cannot survive when those false supports are removed.

1. The reality is that, unless East Bay as a whole qualifies (which it does not, as the Court has already held), there is *no* smaller juridical bay within the

[12] To be sure, the Court also noted that East Bay (like all other areas claimed as historic inland waters) is an "indentation sufficiently resembling [a] bay" that it would "clearly qualify under Article 7(6) if historic title can be proved." 394 U.S. at 75 n. 100. But, the Master to the contrary notwithstanding (see Report, p. 28), that has no bearing here. Indeed, Article 7(6) (Appendix A, *infra*, p. 34) expressly exempts "historic bays" from the criteria established in that Article for juridical bays, as the Court repeatedly noted. See 394 U.S. at 53 n. 72, 74, 75 n. 100. Accordingly, the finding that East Bay is sufficiently bay-like to qualify as an "historic bay" says nothing whatever on the issue whether any of the tests announced in Article 7(2) are satisfied.

area (except only minor "pocket" bays which are so situated that they do not affect the boundary of the 3-mile grant).[13] That is, after all, what one would expect. East Bay is essentially a triangle whose "height" (or "depth") is barely more than half the length of its wide base opening to the sea. No body of water so shaped can ever qualify as a bay, if only because it cannot meet the semicircle test. Nor can *any more "inland" part* of such a triangle satisfy the semicircle test.[14] It is therefore *surprising* to find that any line can be drawn in East Bay so as to "enclose" enough water to meet the test. Such a closing line is immediately suspect.[15]

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[13] The most important of these "pocket bays"—numbered from 1 through 5—are indicated on Drawing 1, following p. 14, *infra.* They do not affect the 3-mile grant because arcs swung from points on the shore, or the territorial sea of islands or low-tide elevations seaward of the "pocket bays," produce a more seaward 3-mile line than would be the case if the closing lines of these bays were used as a baseline. There is no dispute between the parties on this point.

[14] The area of a triangle will not equal that of a semicircle drawn on the same "base" (or diameter) unless the "height" or "altitude" of the triangle is well over three-quarters the length of the "base." The "base" of the East Bay triangle is approximately 16 nautical miles; its "height" is just over 8 nautical miles. Nor will a triangle satisfy the semicircle test if the angle opposite the baseline exceeds 65°. Accordingly, since the northern angle of the East Bay triangle is substantially more obtuse, no smaller "interior" triangle will satisfy the formula.

[15] We note that the argument presented here is *not* the same as that rejected by the Master at pages 27 and 28 of his Report. The proposition there discussed was that an indentation which is shaped like an inverted V does not qualify as a bay, *even if it meets the semicircle test*, because it cannot be deemed "land-locked." We adhere to that view, but it should not be confused with the narrower point urged here which depends on the un-

When we examine the lines in question, we see how artificially contrived they are. They are in fact nothing more than impermissible fallback lines that work mathematically under the semicircle test only because they capture discrete little pocket bays that are *seaward* of the line—a very odd basis for defining a bay. But, as we have seen, that is not enough. To qualify as a true bay, the body of water behind the closing line also must be "a well-marked indentation, with identifiable headlands which enclose landlocked waters." Those criteria are not met here.

2. The arbitrariness of Closing Lines C and D is starkly revealed if one begins with an unmarked map of East Bay and asks oneself "where does the bay begin?" See Drawing 1, following p. 14, *infra.* If there is a bay at all, it ought to be visually obvious. One would look for the natural entrance points which help to "enclose" the "landlocked" waters of the bay and separate it from the open sea. We search the map in vain: No such "headlands" appear because, on both sides of the triangle, the coast is essentially straight.[16] Conceivably, some might be tempted to choose

controvertible premise that *some* triangular bodies of water—those which are very much wider than high—cannot satisfy the semicircle test.

[16] Dr. Robert Hodgson, Geographer of the Department of State, made the point forcibly (Tr. p. 5373):

> The shape of the feature [East Bay] which is contained within these two passes is essentially that of a triangle in which the base, that portion toward the sea, is exceedingly wide, it is very open.
>
> There is no significant geographical feature existent up to the point where I have drawn the line to separate the waters of this feature from the main waters of the Gulf.

The "line" Dr. Hodgson marked merely defines what we have

the tips of the jetties as the natural entrance points of the bay, albeit their direction, at least on the west side, does not help "enclose" any body of water. But, at all events, once that selection is rejected, it is impossible to define visually the true entrances of a bay. Certainly, no non-mathematician would see that the points on which Closing Lines C and D are anchored define the beginning of a bay, nor conclude that the waters inland of those lines are any more "landlocked" than the waters immediately seaward. See Drawing 2, following p. 16, *infra*.

What we have sought to demonstrate is that Closing Lines C and D are not—as they should be—lines which *apparently* separate an inland bay from the open sea and which survive when tested mathematically. On the contrary, the operation was done in reverse: these lines were chosen because, by virtue of a geographical "fluke", they meet the semicircle test; and, afterwards, they were sought to be justified as marking the limits of a natural bay. That procedure is inadmissible. One ought to be able to see the bay on the map at first glance, as the Convention itself makes clear.

Indeed, the *first* condition that must be satisfied under Article 7(2) before a body of water can be deemed a putative bay is that it be "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked

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labelled Pocket Bay 2, at the very north end of East Bay. See Drawing 1, opposite. As already noted (n. 13, *supra*), it does not affect the 3-mile limit.

DRAWING 1
(EAST BAY)

waters * * *."[17] The semicircle test is an *additional* criterion, imposed as a second check. Until and unless one has isolated a landlocked body of water on the chart, there is no occasion to resort to the planimeter to apply the semicircle test.

3. If we are correct that no true bay less than the whole of East Bay (except minor pocket bays that have no practical effect) is visible to the eye, that is an amply sufficient ground for rejecting Closing Lines C and D—or any other bay closing line inside East Bay. But we reach the same result even if we follow the kind of *ex post facto* analysis suggested by the Special Master's Report and focus only on the lines actually proposed.

The most obvious objection is that the anchor points for Closing Lines C and D do not qualify as "headlands" of a bay. They are nothing more than slight protuberances on an otherwise straight coast. They do not substantially depart from the general contour of the shore.[18] To be sure, the points selected may be headlands of small pocket bays along the levee of

[17] Indeed, the history of the Convention clearly indicates rejection of the semicircle test as the primary definition of a juridical bay. See 1 *Yearbook of the International Law Commission* (1955), pp. 206–207, 210–211.

[18] See I Shalowitz, *Shore and Sea Boundaries* (1962), p. 57 n. 57, an authority quoted extensively by Louisiana before the Special Master (La. Opening Brief, Vol. IV, p. 110). Commenting on the *California* case, Mr. Shalowitz wrote: "we can define a headland generally as 'the apex of a salient of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast,'" adding, "[t]o consider these protuberances as headlands of a bay, they must bear a definite relationship to the curvature whose status is being determined." See, also, *id.* at 64 n. 77.

South and Southwest Passes.[19] But they contribute nothing to "enclosing" the main body of water to the north, to help make it "landlocked." Not surprisingly, when we look at the area landward of those lines, we cannot see what divides those waters from the open sea beyond, except the artificial line drawn on the map. We must conclude that the Special Master has too quickly accepted closing lines which were selected only because they satisfy the semicircle test, without properly examining whether their termini qualified as the natural entrance points of a true inland bay.

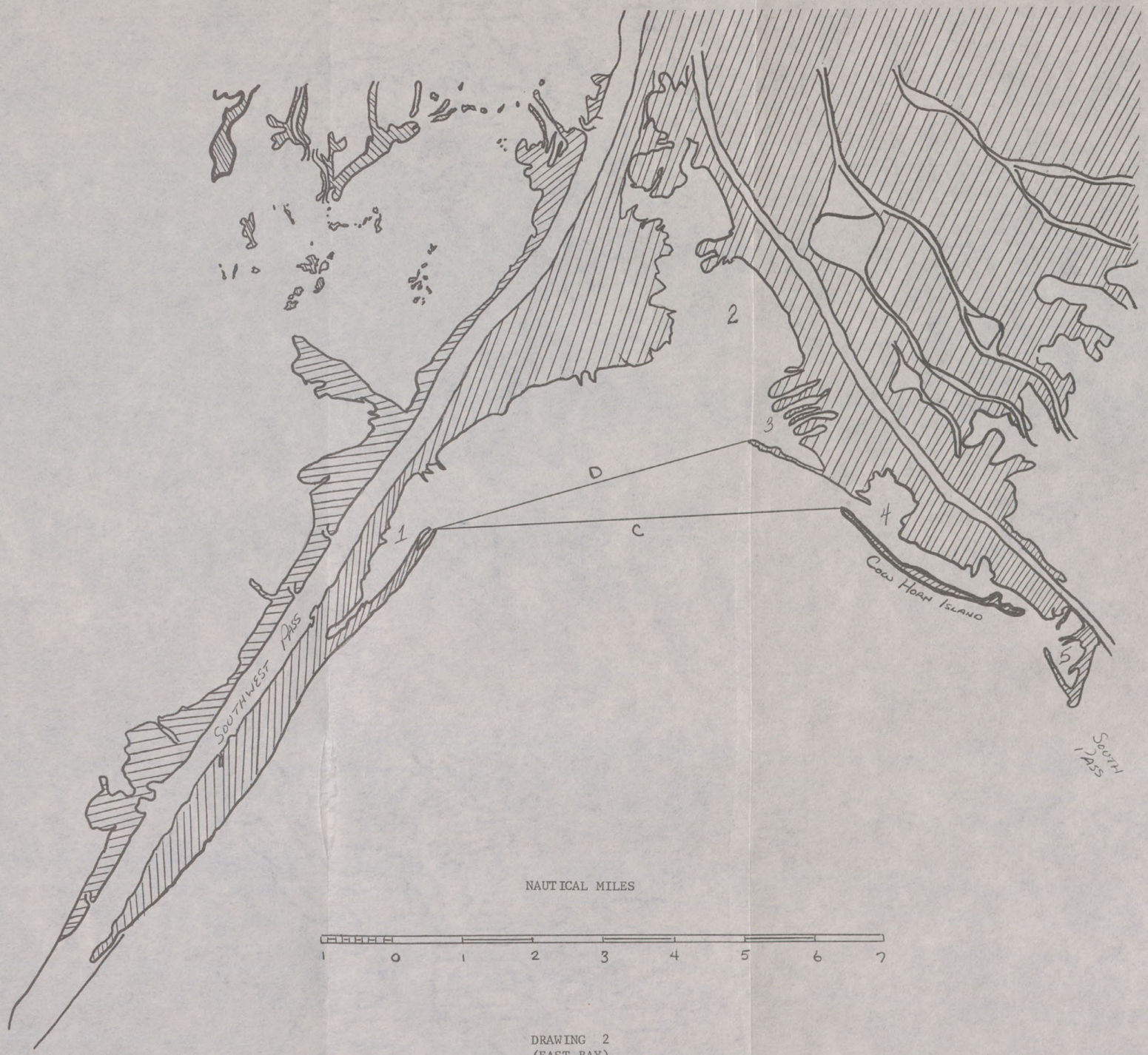
The argument just concluded, if correct, requires the rejection of both Closing Lines C and D, and, *a fortiori,* of Closing Lines B^1 and C^1 disallowed by the Master himself. See Report, p. 32.[20] Our submission has been that there is no true bay within the area of East Bay which affects the outcome. We now turn to an independent objection, applicable to Closing Line C only: the non-existence of "Cow Horn Island" on which that line is anchored.

B. COW HORN ISLAND DID NOT EXIST AT ANY TIME RELEVANT TO THIS LITIGATION

The eastern terminus of Louisiana's proposed Closing Line C is located on a low-water elevation shown

[19] Thus, the point selected as the western terminus of both Lines C and D is a headland for Pocket Bay 1; the eastern terminus of Line C is a headland for Pocket Bay 4; and the eastern terminus of Line D is a headland for Pocket Bay 3. See Drawing 2, opposite.

[20] These are the only lines proposed that satisfy the semicircle test. See Report, pp. 29–31. We would, however, interpose the same objection to Closing Line A, its variants, and Closing Line B, if they met the semicircle test.



DRAWING 2
(EAST BAY)

near the eastern shore of East Bay on a number of large-scale charts and labelled "Cow Horn Island" by counsel for the State. If that formation did not exist after June 1950,[21] the line has no basis. We submit the Special Master erred in finding that "Cow Horn Island" subsisted beyond 1949.

1. We begin with the omission of "Cow Horn Island" on the set of 54 large-scale maps of the Mississippi River delta prepared for the State of Louisiana and the United States in 1959 for use in this litigation. See Report, p. 32. These maps, constructed at four times the scale of the standard large-scale nautical charts of the Louisiana coast, have been stipulated as accurately depicting most of the coast by both parties.[22] To be sure, for some areas—including this one—the State declined to be bound by these maps and

[21] The critical date for the accounting ultimately required between the parties is June 5, 1950, when the first decision was entered in this litigation. See 340 U.S. 899, 900. While the Submerged Lands Act, 43 U.S.C. 1311(b)(1), forgave any violation of the 1950 decree with respect to the 3-mile belt quitclaimed to the State in 1953, it had no effect on any accounting due for exploitation by State lessees beyond that boundary.

[22] These maps, commonly referred to as the "set of 54 maps" or the "special maps," were before this Court in 1969, were filed with the Special Master at the outset of the present proceedings (see Pretrial Statement, Part B, Appendix B, *infra*, p. 35), and are now part of the record filed with the Court. Although bound in a single volume, the maps are in three groups of 41, 8 and 5 maps respectively, and are accordingly referred to as, *e.g.*, "Map 6 of 41," or "Map 6 of 8", etc. There are three exemplars of the volume in the record, one unmarked, a second showing the submission of the United States as to the correct location of the coastline (U.S. Ex. 389), and a third showing Louisiana's maximum submission (La. Ex. 353).

"reserve[d] the right to show" that the physical situation was different. Pretrial Statement, Part B, ¶(d), Appendix B, *infra,* p. 35. But that does not render the maps valueless; they remain *prima facie* correct, although impeachable by better evidence.

What, then, was the evidence that persuaded the Special Master to depart from the special maps on the issue of the existence of "Cow Horn Island"? It was nothing more than the appearance of "Cow Horn Island" on the less detailed Coast and Geodetic Survey's 1200 series of charts until December 1969. Report, p. 33. This automatic deference to the "official" chart, the Master apparently believed, was compelled by the Convention itself. See Report, p. 24. In our view, that was a wholly unwarranted progression.

Article III of the Convention (Report, p. 24), it is true, specifies that the low-water line, where relevant, shall be that "marked on large-scale charts officially recognized by the coastal State." But that provision is not dispositive here. First, it was always recognized that, in proper cases, such charts could be impeached. See, *e.g.,* 1 *Yearbook of the International Law Commission* (1954), p. 65. Second, it would be a very narrow reading of the Convention to suppose that its drafters meant to prefer the "official" charts when more detailed, more careful, and more current maps were available. And, finally, only the most literal-minded can interpret the Court's ruling that the Convention governs this case to mean that the parties to this domestic controversy are bound by charts published for a wholly different purpose, at

least when better evidence, specifically addressed to the issues in the case, is available. Compare the Court's treatment of "historic inland water," 394 U.S. at 77–78.

The Special Master's approach ignores the reason behind the laborious undertaking that resulted in the special set of 54 maps. Obviously, no such effort was necessary if the parties were content to accept the official 1200 series charts as accurately depicting the Louisiana coast. There were at least three objections to the 1200 series charts: (1) they were not sufficiently large-scale to reflect all necessary detail; (2) in the absence of a re-survey, the new issues of those charts merely reproduced earlier editions (in this case based on information gathered in 1939, Tr. p. 5097); and (3) these charts, in the interest of navigational safety, tended to resolve all close questions by exaggerating the extent of low-water lines, Tr. p. 4951. It was therefore entirely inappropriate to resort to these rejected charts merely because Louisiana declined to stipulate the correctness of the more careful set of 54 maps in the area.

Nor did the stipulation entered into by the parties justify the Special Master's solution. The Pretrial Statement recites that, in certain areas, Plaintiff or Defendant reserves the right to challenge the accuracy of the set of 54 maps, otherwise accepted as final for the purpose of this litigation. The United States always assumed that, to prevail, it must demonstrate the error on the special map by *better* evidence. See Pretrial Statement, Part B, ¶¶ (a) and (b), Appendix B, *infra,* p. 35. To be sure, Louisiana,

in two instances (*id.* at ¶¶ (c) and (d), Appendix B, *infra,* p. 35), reserved the point that the official 1200 series charts "must be given effect." But that was never *agreed.* On the contrary, then as now, the United States maintained that the special maps could not be successfully attacked simply by showing that the 1200 series charts depicted a different coastline. Indeed, it has always seemed to us plain that the Court intended the resolution of geographical disputes by resort to the *best* evidence—not an arbitrary reference to official charts. See 394 U.S. at 40–41 n. 48. And see Report, pp. 24–25.

2. We have said enough to invalidate the Special Master's reliance on the 1200 series charts as establishing the existence of "Cow Horn Island" until December 1969. The question remains, however, whether there was any independent basis for that conclusion. There was none. One witness for the State, it is true, testified that, while flying over East Bay in the 1950s, he saw birds standing on "Cow Horn Island." But that evidence, wholly unrelated to tidal datum and presumably reciting an observation during abnormally low water, is wholly unsatisfactory, as the Special Master concluded. See Report, p. 33. It follows, we submit, that the existence of "Cow Horn Island" for any relevant period was never proved. Nor is that all. In the event, there was persuasive factual evidence corroborating the indication of the set of 54 maps.

Mr. Bennett G. Jones testified at great length about how the 1959 maps were constructed.[23] He fully de-

scribed the procedures involved in the aerial survey, which produced the photography used for the mapping, and the subsequent field survey which was conducted to verify the aerial work. Mr. Jones explained that the survey party, which he led, knew the purpose of the project and was aware of the importance of accurately locating the low-water line. He noted that the party was familiar with Coast and Geodetic Survey's chart 1272, indeed used it for navigation while in the area, and as a result paid particular attention to differences between the low-water line as shown on chart 1272 and the actual line as it existed in 1959. In this regard, Mr. Jones testified that "a long narrow low water spit" [Cow Horn Island], appearing on chart 1272, did not appear in the 1959 aerial photos. Tr. p. 4430.

Mr. Jones also reviewed numerous aerial photographs of East Bay which had been taken between 1949 and 1959. United States Exhibits 213–226. He testified that he considered these to be good photographs for his purposes and, after taking known tidal data into account, was able to give his opinion that the low-tide elevation near the western levee of South Pass [Cow Horn Island] did not exist between 1949 and 1959. Tr. p. 4447.

This evidence, we believe, is dispositive. The fact is that "Cow Horn Island" has not existed above mean

[23] Mr. Jones was employed by the United States Coast and Geodetic Survey from 1925 until 1969. During most of that time he was engaged in photo interpretation work for the production of nautical charts. Tr. pp. 4353–4364.

low water since 1949. Accordingly, there is no basis for Closing Line C.

II

THE EXTENSIVE LOW-TIDE ELEVATIONS BETWEEN PASS DU BOIS AND PASS TANTE PHINE DID NOT EXIST AT ANY TIME RELEVANT TO THIS LITIGATION

Our second exception relates to the location of the low-water line between Pass du Bois and Pass Tante Phine on the western side of the Mississippi River Delta. The difference between the parties is illustrated on Drawing 3, opposite. It will be seen that the State extends the coastline seaward by virtue of extensive low-tide elevations (dark areas), the existence of which is disputed by the United States.

Here, as in the case of Cow Horn Island, Louisiana did not accept the low-water line as shown on the special set of 54 maps. See Pretrial Statement, Part B, ¶ (c), Appendix B, *infra,* p. 35. Accordingly, the State was free to show that, contrary to the indication of those maps, substantial low-tide elevations extending outward from the coast existed for relevant periods. But, in the event, the State produced no evidence whatever; it merely pointed out that the Coast and Geodetic Survey 1200 series chart for the area indicated such low-tide elevations until the December 1969 edition. On that basis alone, the Special Master accepted Louisiana's proposed baseline. See Report, p. 47, ¶ (c).[24] We submit this was plain error.

[24] The Master's summary conclusion does not reveal his reasoning. But the sequence of events indicates that he followed the same course as with respect to Cow Horn Island. When, in

DRAWING 3

We have already suggested why, in our view, the Master could not properly resolve any dispute as to physical facts by simply resorting to the 1200 series charts. In summary, that short-cut procedure is inappropriate because it makes nonsense of the expensive and careful undertaking involved in producing the more detailed set of 54 maps, and is, moreover, at odds with the Court's 1969 opinion which required the parties to produce factual evidence in such cases. Our submission is that a party challenging any geographic fact depicted on the special set of 54 maps must prove the true situation by *better* evidence—not a mere reference to the 1200 series charts which were early rejected as not sufficiently exact. It follows that, in the circumstances—Louisiana having offered no contradictory evidence whatever—the set of 54 maps ought to control.

As it happens, however, the United States introduced further evidence. Indeed, uncontradicted testimony showed: (1) that the disputed low-tide elevations were carried on successive editions of Chart 1272 until the end of 1969 solely on the basis of a 1936 survey (Tr. p. 4670); (2) that aerial photographs, analyzed by an expert in connection with weather,

---

the last weeks of the proceedings, the Master indicated that he would make no determination with respect to this area, the United States proposed a finding based on the set of 54 maps, and, thereafter, Louisiana proposed the finding based on the 1200 series chart. It is not clear whether, at that last moment, the Master focused on the independent evidence submitted by the United States and the State's failure to produce any evidence. Following his own guidelines, it would seem the Master should have gone behind the 1200 series chart for this area. See Report, pp. 24–25.

tide and river information, negated the existence of these low-tide elevations between 1949 and 1959 (Tr. pp. 4446–4448); and (3) that the disputed formations still had not reappeared above mean low water in 1970 (U.S. Ex. 200, Vol. 2; Tr. pp. 4510, 4673). Accordingly, the Master's rejection of the low-water line shown on Map 7 of 8 of the set of 54 maps was not only without basis; it was contrary to the only evidence in the record.

III

ASCENSION BAY IS NOT AN OVERLARGE BAY

Throughout this litigation Louisiana has contended that the vast water area which washes the Mississippi Delta on the west—labelled by the State "Ascension Bay"—qualifies as an overlarge bay.[25] See Drawing 4, following p. 26, *infra*. The Court considered this area in its 1969 decision, concluding that it meets the semicircle test (394 U.S. at 51–53), but leaving it to the Special Master to determine in the first instance whether the area satisfies the other requirements of a juridical bay: that it be a well marked indentation with headlands, and that the indentation enclose landlocked waters (394 U.S. at 48 n. 64). We submit the

[25] As the Court has had occasion to explain (394 U.S. at 48–49 n. 64), the Convention recognizes that a body of water which satisfies all the criteria of Article 7 may be a bay even though the width of its mouth exceeds 24 miles. In that event, however, the seaward limit of inland water is not a line across the mouth, but a "fallback line" of 24 miles inside the bay, so located as to enclose the maximum area of water. Article 7(5), Appendix A, *infra*, p. 34. We do not quarrel with the Master's location of this fallback line here *if* "Ascension Bay" is indeed a true bay.

Master erred in resolving that issue in the affirmative. See Report, pp. 45–46.

1. Because no obviously "landlocked" waters are revealed on the map, it is important to identify the area which is said to constitute "Ascension Bay." The Special Master was somewhat reluctant to commit himself on this score,[26] presumably because several alternative closing lines would satisfy the semicircle test[27] and the exact boundaries of the bay would not affect the location of the fallback line—the only line that ultimately controls the result. But those are not valid excuses. As this Court expressly held in rejecting Louisiana's alternative closing line for East Bay in 1969, the fallback principle applies *only with respect to a true bay* (394 U.S. at 53–54), and a body of water that satisfies the semicircle test does not, on that ground alone, qualify as a bay (394 U.S. at 54). It was, therefore, essential, here as elsewhere, first to establish that there exists a "well-marked indentation" with identifiable headlands which enclose "land-

[26] The Master initially made no determination whatever as to the entrance points of "Ascension Bay" and the finding in the final Report was included only after the United States suggested the necessity of fixing the boundaries of "Ascension Bay". See *Memorandum of the United States Commenting on the Special Master's Draft Report*, pp. 13–14. The Master now defines "Ascension Bay" as the area enclosed by a line running from the tip of a jetty at Belle Pass to the tip of the jetty at Southwest Pass, but adds that other unspecified closing lines "could also be drawn" or "could also be selected." Report, pp. 45, 46.

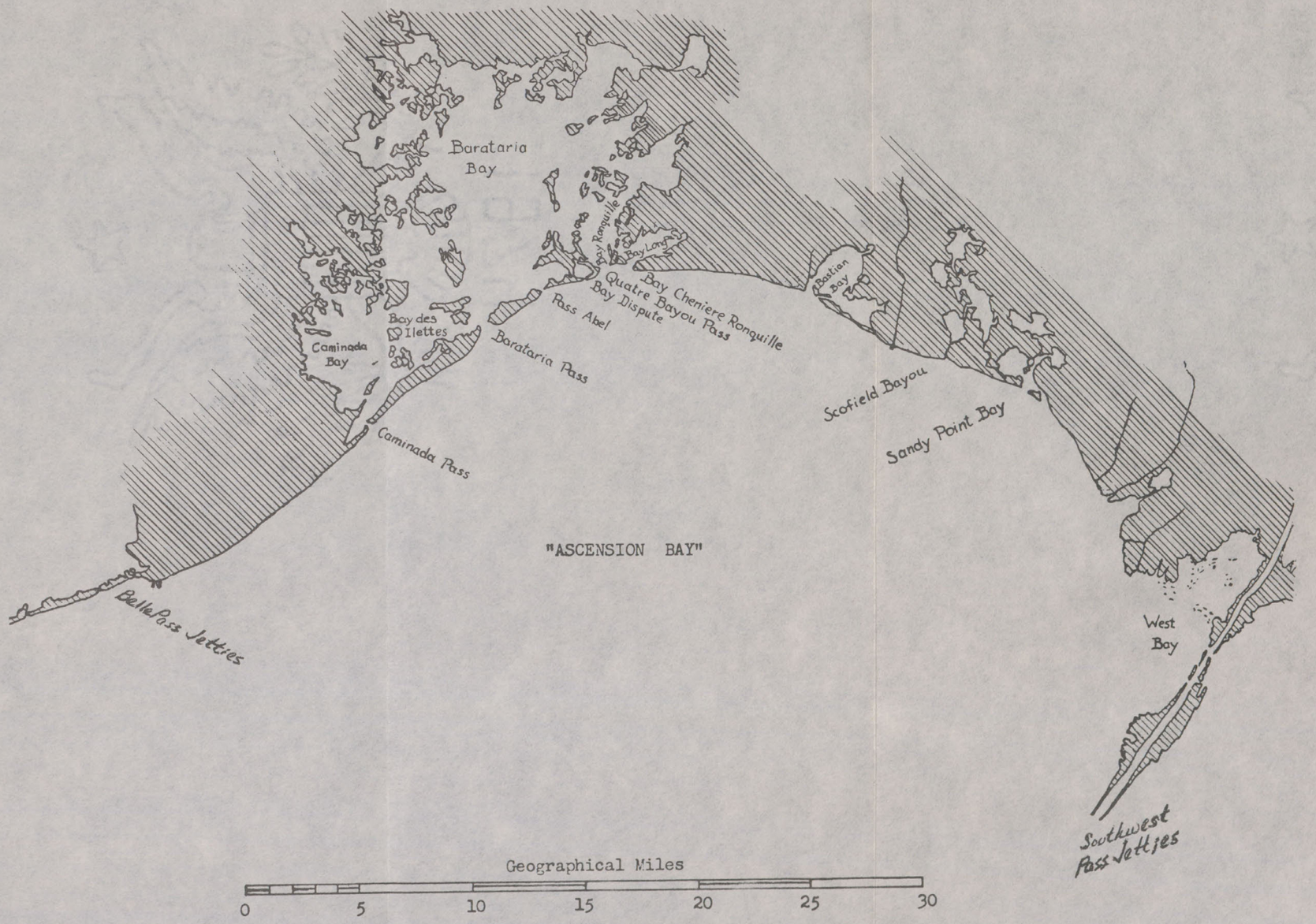
[27] This is only by virtue of the Court's ruling that the Caminada-Barataria Bay complex, as well as the islands screening those bays, must be included as part of "Ascension Bay" for the purpose of applying the semicircle test. 394 U.S. at 52–53.

locked waters." Yet, no such conclusion has meaning except as related to a defined area: how can one say that an indentation is "well-marked," that it has "identifiable" headlands, and that the included waters are "landlocked," without knowing the boundaries of the alleged bay?

So saying, we do not mean to suggest that the Special Master should have approached the issue by confining his attention to any closing line or lines proposed by the State. On the contrary, as with East Bay (*supra,* pp. 13–15), we believe the best procedure for judging whether any bay exists is first to study an unmarked map of the area. Indeed, we invite the Court to perform that operation for itself by referring to Drawing 4, opposite. If the Court agrees with us that no identifiable bay is revealed by such an examination (except, of course, the Caminada Bay-Barataria Bay complex and West Bay),[28] that should be an end of the matter. On the other hand, however, it is clearly improper to decide the issue in favor of Louisiana on the ground that there is a true bay *somewhere* in the general area—never mind precisely where it begins.[29]

[28] Although disagreeing with the State as to the proper closing lines for those bays, the United States has always acknowledged that the named bays qualify. The Court's ruling that the waters of the Caminada-Barataria Bay complex may be deemed part of "Ascension Bay", and the screening islands treated as water, of course applies only if "Ascension Bay" is a true bay. See 394 U.S. at 48–50 n. 64, 58–59 n. 79.

[29] To be sure, because the fall-back line ultimately controls, it is not necessary, in the case of an overlarge bay, to be *quite* as precise. Thus, quibbles about the exact location of the terminus of the closing line on a particular headland need not be resolved. But the headland itself must be identified.


Barataria Bay
Bay Ronquille
Bay Land
Bastian Bay
Bay Cheniere Ronquille
Quatre Bayou Pass
Bay Dispute
Pass Abel
Bay des Ilettes
Caminada Bay
Barataria Pass
Caminada Pass
Scofield Bayou
Sandy Point Bay
"ASCENSION BAY"
West Bay
Belle Pass Jetties
Southwest Pass Jetties
Geographical Miles
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DRAWING 4

Accordingly, we look to see what might be deemed arguable entrance points for "Ascension Bay." Our own inspection of the map suggests only two remotely bay-like areas, one defined by a closing line beginning (on the west) at the Belle Pass Jetty and ending at the tip of the northwestern jetty of Southwest Pass, the other defined by a line between the western headland of Caminada Pass and the same Southwest Pass jetty. See Drawing 5, following p. 28 (first map), *infra.* Although the Special Master expressly mentioned only the first of those alternatives,[30] we assume he may have accepted the second closing line as one that "could also be drawn," and we therefore consider both.

2. The Special Master's conclusion that "Ascension Bay" qualifies as a true bay—the semicircle test aside—is explained in the Report by the following three sentences only (p. 45):

> Certainly its waters are landlocked, or, as sometimes described, *Inter Fauces Terrai,* within well marked natural entrance points. This is supported by the ratio of its depth of penetration to the width of its mouth, for it is almost perfectly semicircular in shape, the classic form of a bay. In this respect, it bears a startling resemblance to Monterey Bay, which was held to be a true bay in the California case.

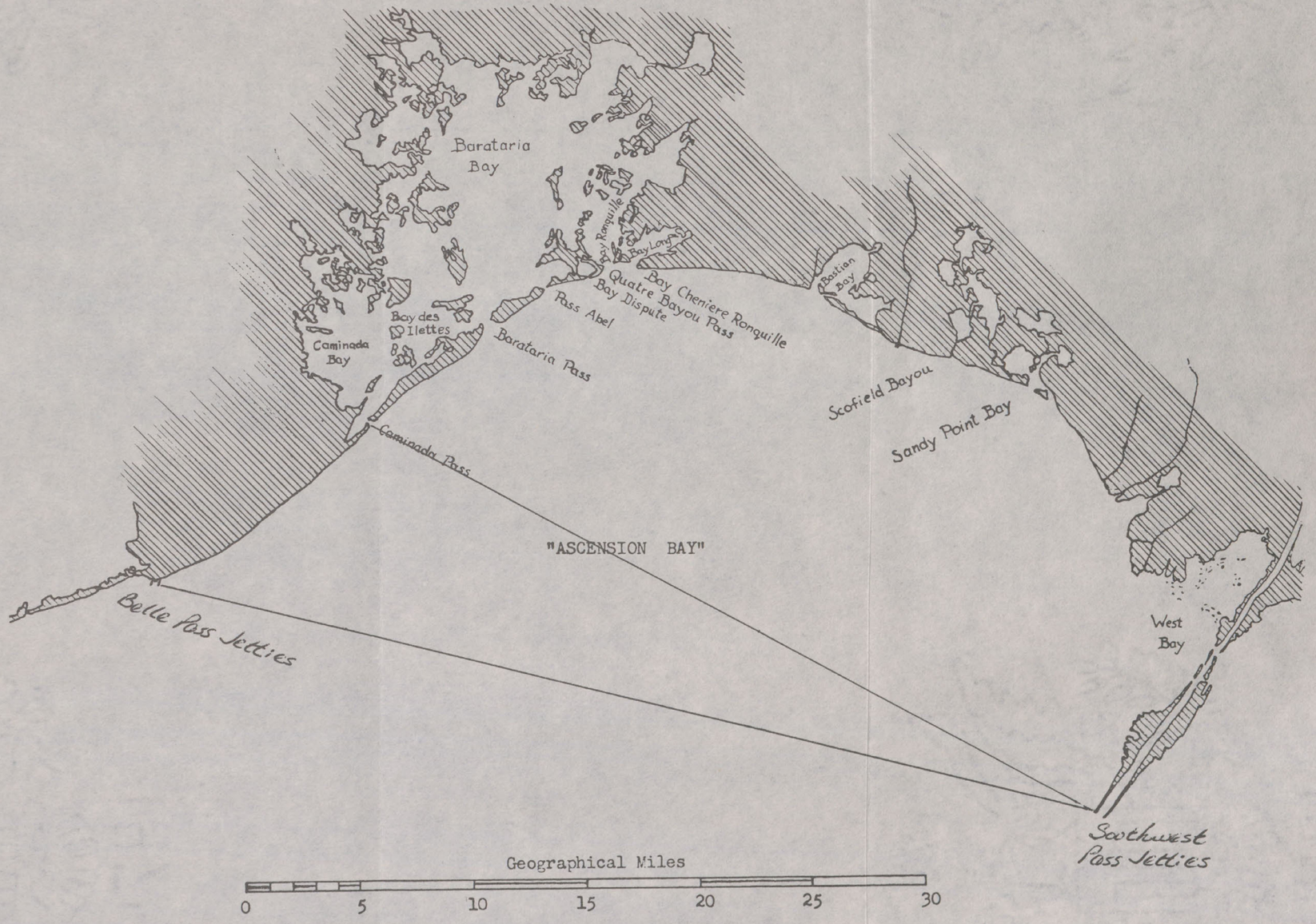
[30] The Special Master twice refers to the "tip of the *east* jetty at Southwest Pass" as the eastern headland of "Ascension Bay". Report, pp. 45, 46. We assume this was a slip of the pen and that he meant the "*west*" or "northwest" jetty of Southwest Pass.

We challenge both the first and last sentences, and suggest that the intervening statement, if true, does not support the result.

a. We begin with the assertion that "Ascension Bay" is "almost perfectly semicircular in shape." That is something of an exaggeration. Indeed, no matter what closing line one uses, a semicircle drawn on that base very substantially invades the mainland, as Drawing 6, opposite (second map), demonstrates. The basic shape of the claimed bay is an appreciably shallower curve. It satisfies the *semicircle test* only because, in addition to the pocket of West Bay, the Court has held that waters of the Caminada-Barataria Bay complex, as well as the islands screening those bays, may be included. But, even if "Ascension Bay" were truly an "almost perfect semicircle", that would lend little weight to the claim.

The truth is that a perfect semicircle is *not* "the classic form of a bay." On the contrary, the classic bay is shaped more like a C, with an interior width greater than the length of its mouth, or like a U, with a depth greater than the width of the mouth. The C-shape is the characteristic of Monterey Bay,[31] relied on by the Master, and of Hawke Bay. New Zealand,

[31] Monterey Bay is well illustrated in an appendix to the opinion of Mr. Justice Black, dissenting, in *United States* v. *California*, *supra*, 381 U.S. following p. 213. As indicated there, the mouth of Monterey Bay is only some 19 miles (as compared to 42 miles for "Ascension Bay"), while its maximum interior width, behind the headlands, is substantially greater. The only feature it shares with "Ascension Bay" is a general circular contour with a depth of penetration slightly less than half the length of the mouth.


Barataria Bay
Bay Ronquille
Bay Long
Bay Cheniere Ronquille
Quatre Bayou Pass
Bay Dispute
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Bastian Bay
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Caminada Bay
Barataria Pass
Scofield Bayou
Sandy Point Bay
Caminada Pass
"ASCENSION BAY"
Belle Pass Jetties
West Bay
Southwest Pass Jetties
Geographical Miles
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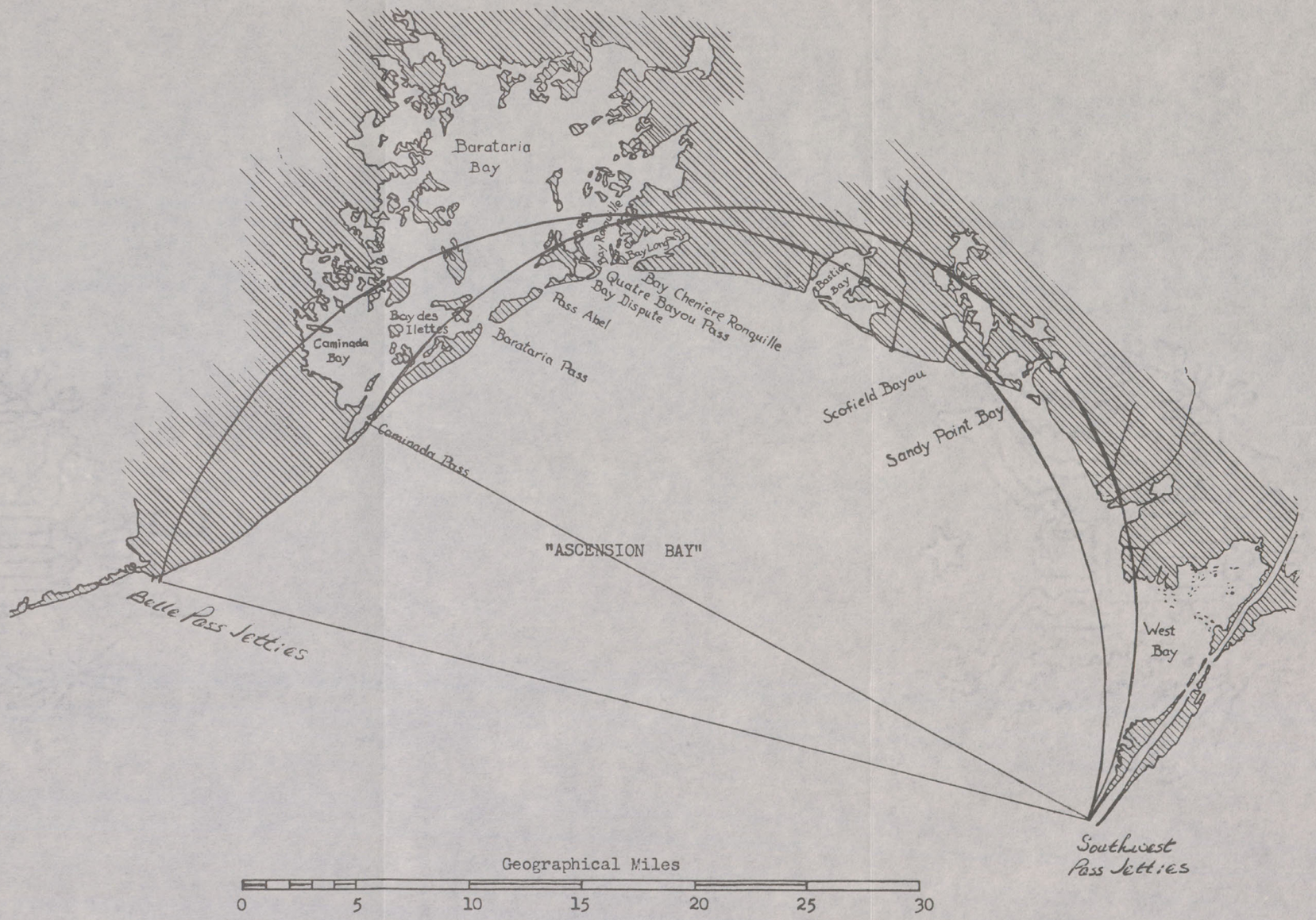
DRAWING 5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"ASCENSION BAY"
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Southwest Pass Jetties
Geographical Miles
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DRAWING 6

invoked by Louisiana; the U-shaped bay is typified by Mobile Bay, Alabama and Cape Cod Bay, Massachusetts. Such formations are more bay-like because they are more evidently "landlocked" than a mere semicircle. Indeed, it is doubtful if any perfectly semicircular area would qualify as a "well-marked indentation" enclosing "landlocked waters" without some additional feature, such as pinched headlands. See Tr. p. 5380.

b. At all events, "Ascension Bay"—the Master to the contrary notwithstanding—has no "well-marked entrance point" on the west.[32] Unlike even a perfect semicircle which would begin with a definite departure from the general direction of the coast, the suggested western termini for the "Ascension Bay" closing line offer no forewarning that we are entering a bay. To be sure, the Belle Pass jetties protrude slightly from the shore, but, once we have passed them, the coast curves outward, not inward as one would expect. Nor does the western headland of Caminada Pass give the slightest clue that a large bay to the *south* is ahead. That promontory does not deviate from the general contour of the shore; it merely announces the entrance of a bay to the *north* (Caminada Bay). The plain fact is that these landmarks were chosen to define the western boundary of "Ascension Bay" for want of anything better. Neither qualifies as a "headland" or "natural entrance point."

c. In this respect, the situation here is so obviously different from the very pronounced "pinched" head-

[32] We accept that, on the east, the Southwest Pass jetty more nearly qualifies as a "natural entrance point," albeit we believe it marks only the beginning of West Bay, not of "Ascension Bay."

lands defining Monterey Bay that we cannot understand the Master's statement that "the resemblance is startling." There, the entrances to the bay were as clear as one could wish, pointing toward each other like pincers. Here, fixing the western boundary of the bay is such an arbitrary task that everyone is hesitant to risk a selection. The answer is that "Ascension Bay" is an artificial construction; in nature, it does not exist.

3. In conclusion, we stress a further objection to "Ascension Bay", related to its abnormal size. As we have noted, we do not believe "Ascension Bay" would satisfy the criteria of Article 7 even if, with the same configuration, it comprised a very much smaller area. But, that is all the more difficult, we submit, when it is remembered that we are considering a body of water with a mouth some 42 miles wide—in contrast to Monterey Bay with only a 19-mile mouth.

The Convention, it is true, recognizes overlarge bays without expressly imposing additional tests. But that is not dispositive. Presumably, everyone would agree that, at some point, the rules of Article 7 cease to apply because the water body considered has *too large* an opening to be considered a "bay," regardless of its "bay-like" configuration. That would include areas which geographers term "gulfs"—such as the Gulf of California and the Gulf of Campeche off the Mexican coast, and, indeed, the Gulf of Mexico itself. Also beyond the reach of Article 7 are bodies of water conventionally labeled "bays" on maps but far too large

to be so treated—for instance, the Bay of Biscay or the Bay of Bengal, both of which would easily satisfy the semicircle test.[33] We do not suggest that "Ascension Bay" is in this category. Yet, in our view, it is significant that we are dealing with an area which has an opening to the sea so much greater than the normal 24-mile maximum.

What we suggest is that, in such a case, the criteria of Article 7 should be more clearly satisfied. After all, the underlying principle is that a bay should be recognizable to the mariner as *inland* water. The wider its mouth, therefore, the more important other features that identify the area as a bay. At least once we pass the 24-mile limit, it is reasonable to expect plainly identifiable headlands and other indications that confirm the "landlocked" character of the area. See the testimony of Dr. Robert Hodgson, the Geographer of the State Department, Tr. pp. 5318, 5379–5384. Thus, one may concede that Hawke Bay in New Zealand, despite the comparable size of its mouth, is a true bay because of its very pronounced pinched headlands. But it would be impossible to make the same claim for "Ascension Bay."

[33] We recognize that Article 7, by its own terms (Art. 7(1)), "relates only to bays the coasts of which belong to a single [national] State." But the fact that some of the water bodies listed wash the shores of several nations does not detract from our point. Thus, the Gulf of Mexico—although literally satisfying all the tests of Article 7—would not qualify as an overlarge bay even if all the countries bordering it were united into a single nation.

CONCLUSION

For the foregoing reasons, the Special Master's determinations with respect to East Bay, the specified low-tide elevations near Pass du Bois, and "Ascension Bay" should be rejected in favor of the submission of the United States for these areas, and, in all other respects, his Report should be confirmed.

Respectfully submitted.

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WALLACE H. JOHNSON,
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MICHAEL W. REED,
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November 1974.

APPENDIX A

Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606 (1958), provides:

> 1. This article relates only to bays the coasts of which belong to a single State.
>
> 2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.
>
> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

APPENDIX B

Part B of the Joint Pretrial Statement filed with the Special Master on December 5, 1969, provides:

> For the purposes of the present cross motions for entry of a second supplemental decree as to the State of Louisiana, the parties agree to accept the set of 54 maps filed with the Special Master as correct representations of the present high- and low-water lines, with the following exceptions:
>
> (a) The United States reserves the right to show that the spoil bank shown on Map 8 of 8 as extending westward from the northern headland of Pass Tante Phine has ceased to be above the level of mean low water;
>
> (b) The United States reserves the right to show that the mean low-water line west of Sandy Point Bay between 89°30′ W. and 89° 32′ W. differs from that shown on May 8 of 41;
>
> (c) Louisiana reserves the right to show that in the area from Pass Tante Phine running southerly to the vicinity of the mouth of Pass du Bois, in addition to the low-water lines reflected on Map 8 of 8, there are more seaward mean low-water lines marked on large scale charts officially recognized by the coastal state, which must be given effect in delimiting Louisiana's coast line;
>
> (d) Louisiana reserves the right to show that in the area of East Bay, seaward of the mean low-water line reflected on Map 4 of 8, in addition to said mean low-water line there is an additional mean low-water line configuration which is marked on official large scale charts officially recognized by the United States, and which should be given full effect by the Master;

(e) Louisiana reserves the right to show that islands or low-tide elevations exist south of the mouth of South Pass that were not reflected on Map 4 of 8;

(f) It is agreed that the y coordinate of the mudlump east of Pass a Loutre, shown on Map 2 of 8, La. Ex. 119 p. 9, as x=2,754,100, y=189,915, should be y=186,915.

This agreement to accept as correct the water lines shown on the set of 54 maps does not preclude the parties from introducing evidence, not inconsistent with those maps, of geological, physical, or other facts, including but not limited to water depths, inland portions of water lines left incomplete on the set of 54 maps, particularly inclusion of tributary waters in measurements for the semicircle test, and conditions that existed prior to the surveys on which the 54 maps were based. Also, the parties may show the history and usage of these areas. Neither will acceptance of the 54 maps for the purpose stated preclude the parties hereafter, on future motions for entry of further supplemental decrees to have only prospective effect, from showing changes from the conditions on the 54 maps. Neither does this agreement imply that the parties accept as correct the methods used in making the 54 maps.

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