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

REPLY MEMORANDUM FOR THE UNITED STATES

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STATEMENT AND INTRODUCTION

The present memorandum is entirely devoted to answering the points raised by Louisiana's Brief in Support of its Exceptions. We do not repeat the arguments advanced in our own initial Memorandum, although some portions of that earlier submission are incorporated by reference. For the Court's convenience, we have here followed the State's sequence and, so far as possible, have avoided burdening the Court with additional illustrative materials, citing instead to

Appendix I of Louisiana's Brief which reproduces most of the essential maps.[1]

One preliminary comment is appropriate. Throughout its present submission, Louisiana suggests that all close questions ought to be decided in its favor, wherever necessary by bending the rules of the Convention on the Territorial Sea and the Contiguous Zone. It is said that the Special Master construed the Court's most recent opinion "too narrowly" (La. Brief, p. 7), that his application of the semicircle test was "erroneously conservative" (*id.* at p. 77), that "practical handling" and "the interest of justice to the state" suggest deviation from strict criteria (*id.* at pp. 80–81, 150, 153–154), that the United States will at all events receive the "lion's share" of the revenues (*id.* at pp. 151–154), and that Congress did not intend to be "miserly about minutiae" (*id.* at pp. 87, 154). All this, we submit, is improper argument, especially at the present stage of the proceedings.

It is worth noting that this plea for resolving the dispute in a "practical" way, under the influence of the relatively greater importance of the revenues to the State, was put forward when the case was last here and was expressly rejected by the Court—over the vigorous dissent of Mr. Justice Black, joined by Mr. Justice Douglas. 394 U.S. at 32–35, and see *id.*

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[1] We remind the Court that a useful overall map of the Louisiana coast—helpful for picturing the larger areas in dispute and for locating the smaller indentations discussed—is reproduced at the end of the Court's previous opinion in the case, 394 U.S. 11, opposite p. 78.

at 78 n. 2, 88. The argument is now foreclosed. It is, moreover, quite impossible to justify breaking the rules for the special benefit of Louisiana. Having determined that the Convention on the Territorial Sea governs the delimitation of inland waters for the purpose of the Submerged Lands Act, the Court cannot invent novel rules for a single State. Nor would it be right to interpret the Convention one way for international relations and differently here. As it happens, Louisiana has already benefited from unique federal concessions. See 394 U.S. at 66–67 n. 87. There is no occasion for the Court to reward the State's unusually litigious history with further special generosity.

I

LOUISIANA'S FIRST EXCEPTION: EAST BAY AS HISTORIC INLAND WATER

The State, in its initial brief on the Report of the Special Master, devoted some 131 pages to the contention that East Bay (defined at its maximum size) is historic inland water.[2] The sheer bulk of this submission, and the number of the exhibits which are said to support it, might suggest that there is at least a colorable claim. We submit, however, that, properly analyzed, Louisiana's evidence does not come close to making out historic inland title to East Bay and that the Master was entirely correct in concluding (Report,

[2] See Louisiana's Brief in Support of Exceptions, pp. 8–59, and Appendix I thereto, pp. 5–35, 45–48, 129–172.

p. 21) that "there is no basis for Louisiana's claim of historic inland waters extending beyond the limits of its coastline as determined [under the normal juridical rules for bays]."

We reproduce as Appendix A (*infra,* pp. 55–73) the full submission we made to the Special Master on the State's historic inland claims. It deals, point by point, with each of Louisiana's assertions. Beyond that, we rely on the Special Master's treatment of the matter in his Report (pp. 13–22; see, also, pp. 5–13).[3] It may be helpful, however, to recapitulate briefly, with special emphasis on the State's new arguments.

In light of what the Court has already said in this case, there can be little dispute as to the legal criteria for establishing ripened title to a bay as historic inland water. It is common ground that three primary factors are relevant: "(1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States" (394 U.S. at 23–24 n.

[3] The Special Master dealt with some of the matters advanced by the State as relevant to a contention that the United States, at some earlier time, "had actually drawn its international boundaries in accordance with the [straight baseline] principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone." See 394 U.S. at 74 n. 97. The Master rejected that proposition and Louisiana has taken no exception to his ruling. In the circumstances, we are content to rely, for this point, on the Report (pp. 5–13). It may be, however, that the State continues to invoke the straight baseline evidence in support of its historic inland water claim and we accordingly deal with it under that heading. See particularly, Appendix A, *infra*, pp. 62–64, paras. 17–22.

27).[4] In this domestic litigation, however, there are also additional ingredients: (4) the effect of state actions which the national government has not invoked vis-a-vis other nations; and (5) the effect of a disclaimer of historic title by the federal government. We consider each of these factors in turn.

1. EXERCISE OF AUTHORITY

It would seem self-evident that, to establish historic title to an area as *"inland"* or *"internal"* waters,[5] the claimant must show exercise of that sort of authority which clearly indicates such a full title. Otherwise, all that is suggested is jurisdiction over the area as *"territorial"* waters—whether by historic title or otherwise. Indeed, this Court made that plain in its most recent opinion. 394 U.S. at 24 n. 28, 26 n. 30. And it is common sense: how can other nations be on notice that the coastal State is claiming an area as part of its internal waters when the acts performed are entirely consistent with the assertion that the area is part of

[4] The Court was quoting from a United Nations publication, "Juridical Regime of Historic Waters, Including Historic Bays," U.N. Doc. A/CN.4/143, 2 *Yearbook of the International Law Commission* (1962), p. 13. A typed copy of that publication, which collates and summarizes the views of leading writers on the subject and has been much cited by the Court and by both parties, is part of the record here as U.S. Exhibit 99.

[5] The terms "inland" and "internal" are synonymous. The first is used in the Submerged Lands Act, the second in the Convention on the Territorial Sea and the Contiguous Zone, to denote waters landward of the territorial sea. See 394 U.S. at 22–23.

the territorial sea? Yet, Louisiana now apparently challenges this settled proposition.

What the State asserts is that the rule just stated applies to *open* waters claimed as historic, but not to *bay-like* indentations. La. Brief, pp. 22–43. There is no warrant for any such distinction, in this Court's opinion or any of the authorities cited. All Louisiana has shown is that the term "historic bay" is commonly understood to connote inland waters—not that a bay-like area cannot assume the lesser status of historic territorial water. See "Juridical Regime of Historic Waters," U.S. Exh. 99, p. 66. It may be unusual to claim historic title to a bay-like area as only territorial waters, but that is only because most of such areas—as in the case of East Bay—will qualify as part of the territorial sea under normal juridical rules. The fact remains, however, that historic *inland* water title cannot be established with respect to an indentation without some exercise of authority beyond what is permitted in the territorial sea. Else, every indentation that is not a true bay but is part of the territorial sea *ipso facto* would become historic inland water.

At all events, Louisiana misstates the Special Master's reasoning when it suggests that he concluded that East Bay is an "historic territorial bay" (La. Brief, pp. 22–23, 27, 37 n. 28). There is no such finding. In most of his references to the territorial sea, the Master was simply pointing out that the evidence merely disclosed regulatory activities permitted within the 3-mile belt off the shores of East Bay—the conventional territorial sea established by international

law regardless of any historic claim. To be sure, the Report also notes that activities beyond that belt might be advanced in support of the wider territorial sea which the State was then claiming (Report, pp. 21–22). But there is nothing approaching a conclusion that Louisiana had proved a ripened historic title to the whole of East Bay as territorial waters. On the contrary, the Master explicitly ruled in the negative on this issue—one that Louisiana itself had suggested. See the Statement of Issue 1(e) at Report, p. 56, and the finding thereon at Report, p. 22.

Strictly speaking, the only clear indication that a coastal state is claiming waters as internal (or inland), rather than as part of its territorial sea, is the denial of the right of innocent passage. It would be dispositive *against* a claim of historic inland waters that innocent passage by foreign vessels regularly occurred without let or hindrance. 394 U.S. at 26 n. 30. But it does not follow—as Louisiana appears to suggest (La. Brief, pp. 31, 36, 38)—that the burden is on the party challenging a claim to historic inland water to show that foreign ships entered the area freely. On the contrary, historic title is an exception to the normal rule and the burden of proof is always on the claimant. See "Juridical Regime" p. 153; U.S. Exh. 99, p. 62. It may be, as some of the authorities suggest, that evidence of acts effective against foreign nationals other than denial of innocent passage is relevant to a claim of historic inland waters. But, obviously, the more ambiguous the character of those acts, the more numerous and long continued they must be. Certainly, equivocal legislative declarations are

insufficient. See *United States* v. *California,* 381 U.S. 139, 174. Nor can occasional deeds which would be permissible in the territorial sea establish historic title to waters as inland.

When we test the State's evidence under these principles, there is very little indeed that even arguably qualifies as an assertion that East Bay is historic inland water. Plainly, no action taken by the federal government remotely amounts to a claim that East Bay is an historic bay. See Appendix A, *infra,* pp. 62–65, paras. 17–22; Report, pp. 7–13. We turn immediately to Louisiana's own declarations and activities. These relate exclusively to fishing (including oystering and shrimping) or to mineral exploration. Here we caution that the Master's summary findings appended to his Report (pp. 67–69) must be read as qualified by the discussion in the main body of the Report (pp. 19–22).[6] Only as so construed, is it fair to say that the

[6] Thus, Finding 15 (Report, p. 69) alone might be read to suggest that a State mineral lease covering the entirety of East Bay has been in effect since 1928. Yet, the Master expressly concluded (Report, p. 19) that "there is no evidence that any of these leases extended more than three miles from the low-water line of the shore," and, indeed, a plat related to the East Bay lease (La. Exh. 90) identifies a 3-mile belt only.

On the other hand, it should be noted how carefully some of the findings are worded to avoid any misstatement. While all of the Master's findings are obviously borrowed from the State's Motion to Clarify (Proposed Findings 5A–5X) and 6, reproduced in La. Brief, Appendix I, 155–163), it is significant how some are changed. For instance, in Finding 6 (Report, p. 68), "from time to time" has been substituted for "continuously" (La. Brief, App. I, p. 158, para. P), and in Findings 9, 10 and 11 (Report, pp. 68–69) the ambiguous term "Louisiana waters" has been substituted for "East Bay" (La. Brief, App. I, p. 159, paras. R, S and T).

facts are "not disputed by the United States" (Report, p. 15).[7]

With respect to oystering, shrimping and fishing, the State produced a number of regulatory statutes. But they reveal no consistent pattern. Many simply ambiguously embrace "Louisiana waters" or "bays" without specification, or name some bays but not East Bay (*e.g.*, La. Act 245 of 1910; La. Act 103 of 1926); others expressly limit jurisdiction to the 3-fathom line—always less than 3 miles from shore (*e.g.*, La. Act 143 of 1942; La. Act 51 of 1958); and there are more equivocal descriptions (*e.g.*, La. Act 452 of 1962). Obviously, no historic inland title can be founded on such weak footings.

Nor is the evidence of the administration of these laws any clearer. Oyster leases, concededly, were never granted more than 3 miles from shore. There was testimony that foreign fishermen were required to, and did, obtain licenses to fish in "Louisiana waters" (see findings 9 and 10 appended to the Master's Report, p. 68), and that state patrols, "from time to time," followed the shortest route between the two passes (see Finding 6, Report, p. 68)—which may show no more than a convenient method of guarding the 3-mile belt. But, even assuming Louisiana's enforcement officials applied that requirement to all of East Bay, it may well be that the fishermen acquiesced

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[7] As Louisiana points out (Brief, p. 16 n. 10), Appendix B to the Report was added at a late stage. The United States had no opportunity to suggest changes, although, as just noted (n. 6, *supra*), the Master himself significantly altered some of the Proposed Findings submitted by the State.

because they wished to enter what were admittedly inland waters. At all events, the only actual arrest adduced—without any documentation—was a single incident in 1946 involving three Mexican fishing vessels (see Findings 6, 11 and 12 at Report, pp. 68–69, and Report, p. 20).[8]

The upshot is an equivocal history of some regulation of fisheries, mostly within a 3-mile territorial belt which, of course, indicates no inland water claim. See authorities cited in Appendix A, *infra,* pp. 66–67, paras. 24–25, and Pub. L. 88–308, 78 Stat. 194, 16 U.S.C. 1081, *et seq.* Nor, indeed, does regulation beyond that limit necessarily imply more than a wider territorial sea (which Louisiana in fact claimed until 1960) or a special fishing zone. See Pub. L. 89–658, 80 Stat. 908, 16 U.S.C. 1091–1094; and see Convention on Fishing and Conservation of the Living Resources of the High Seas, T.I.A.S. No. 5969 17 U.S.T. 139, Art. 7

The evidence relating to mineral exploration is even less persuasive We have already noted (*supra,* p. 8 n. 6) that the record suggests no leasing by the State—and certainly no exploitation by its lessees—more than 3 miles from shore until well after the United

[8] Again, we stress the importance of a careful reading of the Findings appended to the Report together with the main text. Thus, read quickly and alone, Findings 6 through 12 (Report, pp. 68–69) might well convey a picture of rigorous enforcement, accompanied by many arrests, for the whole of East Bay, whereas the Master's discussion in the main body of the Report (pp. 20–21) makes it clear that there is, in fact, only one isolated incident, and his cautious rewording of the State's proposed findings indicates doubt concerning any effective fishing regulation beyond 3 miles from shore. See note 6, *supra.*

States (initially by Presidential Proclamation in 1945, later by statute and international convention) claimed the exclusive right to the resources of the seabed underlying the entire continental shelf. Indeed, when the case was last here, Louisiana expressly dated the first leasing beyond 3 miles at 1947. See Brief of the State of Louisiana in Support of its Motion, etc., No. 9, Original, October Term 1968, pp. 247–248. Any subsequent leasing could not be understood by foreign nations as based on an historic claim to inland water in light of the national (and later international) position that such exploitation was *beyond* even territorial waters. See Appendix A, *infra,* pp. 70–71, para. 29.[9]

Finally, Louisiana refers to pollution control within East Bay. But, so far as the evidence discloses, that was entirely related to post-1947 mineral operations. Moreover, it imports no claim to the waters as inland. See *Askew* v. *American Waterways Operators, Inc.,* 411 U.S. 325. And see Convention on the High Seas, T.I.A.S. No. 5200, 14 U.S.T. 2313, Art 24; Convention on the Continental Shelf, *supra,* Art 5(7).

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[9] Thus, Proclamation No. 2667, 10 Fed. Reg. 12303, issued by President Truman on September 28, 1945, while claiming for the United States the resources of the seabed and subsoil of the American continental shelf, expressly notes that "[t]he 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." Similar disclaimers are included in the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. 1331, *et seq.*, 1332(b); and the Convention on the Continental Shelf, T.I.A.S. No. 5578, 16 U.S.T. 472, Art. 3.

2. CONTINUITY OF THE EXERCISE

It is well settled that historic title to inland waters does not ripen quickly. In the words of the United Nations Publication "Juridical Regime of Historic Waters," quoted by this Court (394 U.S. at 23–24 n. 27), the "exercise of authority must have continued for a considerable time; indeed it must have developed into a usage." Isolated or occasional assertions of jurisdiction, even if importing a claim to full sovereignty, simply will not do. See *United States* v. *California, supra,* 381 U.S. at 174–175. Nor will a short-lived declaration or course of conduct, however consistent for the time.

Apparently recognizing the weakness of its case on this score,[10] Louisiana would "tack on" to a more recent period of "adverse possession" an earlier, and longer, span during which the area now claimed as historic inland waters was a juridical bay. We submit that is an impermissible procedure. The dispositive reason is that such a doctrine would defeat the principle of ambulatory coastlines, which is a fundamental aspect of the law of the sea.

Indeed, the normal rule is that an area which ceases to qualify as a bay because of a change in geography thereupon ceases to be inland waters. Of course, the coastal state may take steps to assert continuing jurisdiction and, provided appropriate exercise of authority

[10] We note that the only unambiguous findings by the Master of state activities more than 3 miles from shore are with respect to the Mexican vessel incident of 1946 (Findings 7 and 12, Report, pp. 68, 69) and the line followed by boat and aircraft patrols "from time to time" (Finding 6, Report, p. 68).

is continued long enough and wins the acquiescence of other nations, a new historic title to the area eventually will ripen. But such historic title does not inure simply because the waters were once a juridical bay. Nor can the new title—which is essentially adverse to the rights of foreign nations—begin to mature until the juridical basis for treating the waters as inland is terminated. Any different rule would prejudice the principle that other nations must have ample notice and opportunity to prevent the encroachment on the freedom of the seas that historic title represents.

It need hardly be added that the argument for "tacking" a period of "legal" title to make up the long usage required for ripened historic title is all the weaker when the claimant shows no active assertion of sovereignty during the period when the area was juridically part of its territory. So, also, no such contention is even arguable if the claimant allowed a substantial hiatus to occur after legal title was lost and before dominion was reasserted by positive acts. As we shall see, that is the history of East Bay.

Louisiana makes too much of our concession that East Bay appears to have satisfied the then criteria for a juridical bay until perhaps as late as 1918. See La. Brief, pp. 8, 11, 12 n. 8, 16 n. 10, 18, 19, 20, 21, 22, 23, 35, 67, 114.[11] Except for very weak and equivo-

[11] The evidence shows that East Bay ceased to qualify as a juridical bay some time between 1900 and 1918—the chart issued in the latter year indicating a mouth well in excess of 10 miles. See La. Exh. 23; Appendix A, *infra*, pp. 59–60, paras. 8–11. Thus, at best, East Bay was a juridical bay at least until 1900—not "until at least 1918" as Louisiana repeatedly asserts.

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cal evidence of patrols crossing the wide mouth, there is absolutely nothing to show any exercise of sovereignty more than 3 miles from shore during the Nineteenth Century or the first two decades of the Twentieth. Nor, indeed, is there more for the period from 1918 through 1946—when the State was apparently confining its oyster and mineral leases to a belt 3 miles from shore. The only conclusion is that Louisiana's claim to East Bay as a whole really dates from about 1947 and was then promptly contested by the United States. In these circumstances, there can be no legitimate argument that an unbroken pattern has "developed into a usage."

3. ATTITUDE OF FOREIGN STATES

In our view, the question whether the emergence of an historic title to inland waters requires the "acquiescence" of foreign states, or merely the absence of their protests, presents a largely false issue in this case. For our part, we do not assert that explicit recognition of an existing inland water claim is always, or even usually, necessary. We do suggest that, since the attitude of foreign nations is an essential ingredient of establishing historic title, it is necessary, at a minimum, that the claimant have, over a considerable time, conducted such activities within the area as unambiguously as to put other nations on notice that historic inland water title was being asserted. Only then can the failure of affected nations to protest realis-

tically be viewed as tacit acquiescence. See the testimony of Dr. Bouchez at Tr. 1079–1080.

We insist only that "toleration" or "acquiescence" cannot be presumed without some indication that foreign *governments*—not merely some of their citizens—were made aware of an inland water claim and no such inference is justified unless the claimant consistently and notoriously took action unequivocally announcing its treatment of the area as part of its "inland" territory. See "Juridical Regime," ¶96; U.S. Exh. 99, p. 43.

What, then, is the evidence on this question with respect to East Bay? We have already noted that the declarations and deeds alleged by the State would not have alerted other nations that an historic claim to inland waters was being asserted—because they were neither consistent nor unequivocally "inland" in character. It was never shown that any other nation had notice of an inland water claim for East Bay. Accordingly, it would be very unreal to construe absence of protest as tacit acquiescence.

4. EFFECT OF STATE ACTIONS

In light of the Court's prior opinion (394 U.S. at 76–78), we of course concede the relevance of some State actions, even though the United States has not chosen to invoke them against foreign nations. But there are two important caveats, which the Court itself noted. The first is that State activities may be asserted to support Louisiana's historic inland water claim only

"[t]o the extent [that] the United States could [—albeit it does not—] rely on [them] in advancing such a claim." 394 U.S. at 77–78. The other is that the State cannot predicate its case on actions which were, at the time, "repudiated by or inimical to the interests of the national sovereign * * *." 394 U.S. at 76 n. 103.

The initial qualification has this consequence: that actions which, if taken by the national government, would not imply a claim to the area as inland water, cannot have greater significance because performed under state authority. The reason is, of course, that foreign governments cannot be expected to know—nor indeed care—about the division of jurisdiction between federal and state governments. Thus, if other nations are excluded from certain activities near the American coast on grounds that do not, as a matter of international law, depend upon the character of the area as inland, it is irrelevant that the regulation is imposed by Louisiana which asserts power—and perhaps, as a matter of domestic law, can only act—on the basis that the area is inland. This principle alone disposes of most of Louisiana's "historic" evidence.

With respect to the second point, it is perhaps only necessary to say that Louisiana cannot rely on any exploration or exploitation of the seabed of East Bay after 1948 when the United States expressly challenged Louisiana's claim in the area. Any such action by the State, or under its authority, plainly would have been "inimical to the interests of the national sovereign."

5. EFFECT OF FEDERAL DISCLAIMER

We fully accept that a disclaimer of historic inland waters by the United States is not "decisive in all circumstances" (*United States* v. *California, supra,* 381 U.S. at 175) because the federal government does not enjoy "complete discretion to block" such a claim (394 U.S. at 77). What is more, we recognize that a federal disclaimer, so far as this domestic litigation is concerned, may be ineffective with respect to historic title which had already ripened. 394 U.S. at 77 n. 104. Nor need we insist in this case that, in the face of such a disclaimer, the State's case for historic title must be "clear beyond doubt." See *United States* v. *California, supra,* 381 U.S. at 175; 394 U.S. at 77. But we do submit that a disclaimer by the United States is strong evidence against a claim to historic inland waters, and that the claiming State has a heavy burden to show that the disclaimer purports to nullify vested historic title.

Louisiana's effort to deny the existence of any disclaimer cannot avail. Whether or not any particular document is technically flawed, nothing is clearer than that, since 1948, the United States has consistently asserted that East Bay is not inland water. See Appendix A, *infra,* pp. 58–59, para. 6, pp. 71–72, para. 30. Nor is there the slightest basis for any suggestion that the government has adopted one position for the purpose of this litigation and a different one in its foreign relations. On the contrary, at all stages, the Department of Justice has consulted the Department of State and made certain that a single federal submission was

advanced. This is fully disclosed by the correspondence of record in the case (see U.S. Exhs. 108–114) and by the testimony of the Geographer of the State Department before the Special Master.

Our submission is that the evidence supporting a claim to East Bay as historic inland water would be wholly insufficient as a matter of international law even if now endorsed by the United States. Certainly, it cannot overcome what is, in fact, a disclaimer repeatedly asserted over a quarter of a century.

II

LOUISIANA'S SECOND EXCEPTION: OTHER HISTORIC BAY CLAIMS

Louisiana apparently asserts historic inland title to Blind Bay, Garden Island Bay, West Bay, an area which it labels "Isle au Breton Bay," and Caillou Bay. Brief, pp. 60–66. With respect to all of these claims, it is fair to say that the evidence is even weaker than for East Bay. See La. Brief, Appendix I, pp. 172–210. At all events, there is no basis for extending the juridical boundaries of the first three bays, nor any arguable ground for defining "Isle au Breton Bay" (which does not qualify juridically) as an "historic bay." It may be appropriate, however, to deal briefly with the special case of Caillou Bay.

Louisiana has advanced no significant historic evidence with respect to Caillou Bay. It is a special case only because, until 1968, the United States did not challenge the State's assertion that the "bay" was inland—for *juridical,* not historical reasons. That fact,

however, cannot establish historic title. Nor can Louisiana's mineral operations between 1948 and 1968, since during that period the American claim to exclude foreigners from exploitation of the continental shelf—not based on any inland water theory—was fully in force.

In truth, the State's argument has nothing to do with the criteria for establishing historic title: it is simply an assertion of estoppel against the federal government. See La. Brief, p. 63 n. 39, 146–150. We defer discussion of that contention to our treatment of Louisiana's Sixth Exception, *infra,* pp. 47–52.

III

LOUISIANA'S THIRD EXCEPTION: EAST BAY AS A JURIDICAL BAY

In our initial Memorandum (pp. 10–16), we fully articulated—and illustrated—our submission that *no part* of East Bay (except minor pocket bays that do not affect the Submerged Lands Act grant) qualifies as a juridical bay. The question of the existence of "Cow Horn Island" aside, the reasons we gave there for opposing Closing Lines C and D—which did *not* rest on failure to meet the semicircle test—are fully applicable to Closing Line A, its earlier variants, and Closing Lines B, B^1, and C^1 discussed in the State's opening Brief (pp. 67–115). We do not repeat those arguments here; if they are accepted the matter is at an end. But, if the Court is not persuaded by our earlier submission, it will be necessary to con-

sider independent objections to closing lines more seaward than those approved by the Master, and we accordingly turn to these issues.

Proposed Closing Lines A and B (illustrated at Figure 4 of Louisiana's Brief, p. 73) are impermissible, among other reasons, because they fail to satisfy the semicircle test stipulated by Article 7 of the Convention on the Territorial Sea and the Contiguous Zone (reproduced, in relevant part, at Report, pp. 22–23, and in full in our initial Memorandum, pp. 33–34). To overcome that impediment, Louisiana advances two propositions which we shall discuss: (1) that the Master misapplied the semicircle test, and (2) that he wrongly ignored evidence of erosion of land within East Bay (primarily at Joseph Bayou) which, if taken into account, would have sufficiently increased the water area behind the closing lines as to satisfy the semicircle test even as "conservatively" applied by the Master. After disposing of those points, we shall very briefly note other objections to each of the proposed closing lines (other than C and D treated in our initial Memorandum), irrespective of the semicircle test.[12]

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[12] We do not deem it necessary to address Louisiana's argument that, because East Bay as a whole, or some large part of it, once satisfied the semicircle test (long before it was developed), that should somehow influence the Court to waive the strict rules of the Convention (see La. Brief, pp. 67–69, 114–115). Whatever the relevance of that fact to the "historic bay" submission, it obviously can have none here. As the Master rightly concluded (Report, pp. 34–35), the principle of ambulatory coastlines cannot tolerate an exception which would ordain "once a bay, always a bay."

At the outset, however, it is right to point out that Louisiana's present arguments are an afterthought devised for this final stage of the proceedings. When the case was last before the Court, there was no dispute about the correctness of the East Bay maps or concerning the application of the semicircle test to the area. Not only did the State freely concede that East Bay as a whole did not satisfy the test, but (historical claims aside) it asserted as the most seaward line that would meet the semicircle test a closing line well landward of Closing Line A and one that enclosed less water than Closing Line B. Indeed, that line, closely approximating the presently proposed Line C[1], was obviously based on semicircle measurement principles corresponding to those accepted by the United States and now characterized by the State as "Method 1." [13]

We do not, of course, criticize Louisiana for withdrawing the closing line it suggested in 1968. It was no more than an arbitrary fallback line which the Court held improper unless it independently satisfied all criteria besides the semicircle test. See 394 U.S. at 53–54. But, on the other hand, the State's present submission—entirely inconsistent with its 1968 position—must be recognized for what it is: a last-ditch salvage attempt, which the Court may well view with suspicion. See Report, pp. 29–30.

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[13] See 1968 La. Brief in Support of its Motion, etc., p. 263. Compare the coordinates for the line there described and the claimed water acreage behind it with the relevant data for Closing Lines A and B. Report, pp. 29, 31, and La. Exh. 197.

1. APPLICATION OF THE SEMICIRCLE TEST

Article 7(3) of the Convention on the Territorial Sea and the Contiguous Zone tells us only that, in applying the semicircle test, we must measure the area "lying between the low-water marks around the shore of the indentation and a line joining [14] the low-water marks of its natural entrance points," counting islands wholly [15] within the indentation "as if they were part of the water areas of the indentation." Both parts of this rule have given rise to disagreement between the parties. But the difference is not as straightforward as the State would have it.

(a) *Following the low-water line of the shore.*— Read literally, Article 7(3) would seem to forbid using any water crossings other than the main bay-closing line in applying the semicircle test. But that is obviously impossible. As the Special Master commented (Report, p. 29), "[i]f this were accepted, the entire lower portion of the State of Louisiana would have to be treated as one gigantic over-large bay." [16] Indeed, the State itself recognizes that it is necessary to abandon the shoreline and make water crossings *at*

[14] We note that the Master's Report (p. 23) inadvertently substitutes "adjoining" for "joining."

[15] The Court itself has already ruled that "within" means "wholly within." 394 U.S. at 59–60.

[16] In truth, if the State's Method 3 were consistently applied with all connected waterways included as bay waters and all intervening "islands" treated as water, the entire Mississippi River Delta and much else must be deemed part of the Gulf of Mexico—depriving Louisiana of all of the areas now in dispute. See note 27, *infra*, p. 29.

some point, notably when one reaches the mainstreams of the Mississippi River flowing down Southwest and South Passes. La. Brief, pp. 89–90, 91 n. 54. And so did Mr. Justice O'Connor in the so-called *Thames Estuary* case by suggesting that river waters above the tide-line ought to be excluded. *Post Office* v. *Estuary Radio, Ltd.* [1967] 1 W.L.R. 847, 862–864; [1967] 3 All E.R. 663, 673–674.[17] Thus, *everyone* agrees that in defining the limits of a putative bay one cannot include *all* waters physically connected to it.

On the other hand, it is *not* our position that *no* subsidiary waters should be included. The Court itself has correctly summed up the federal submission (394 U.S. at 51):

> The United States does not reject the notion that some indentations which would qualify independently as bays may nonetheless be considered as part of larger indentations for purposes of the semicircle test; but it denies the existence of any rule that *all* tributary waters are so includible. Article 7(2), it emphasizes, refers to "that indentation." The inner bays can be included, therefore, only if they can reasonably be considered part of the single, outer indentation. And that cannot be said of inland waters which * * * are wholly separated from the outer body of water and linked only by narrow passages or channels.

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[17] We discuss this case in a moment. It is well to note immediately, however, that the passage invoked by Louisiana is at best an alternative holding by a single judge of an English court of first instance, and that his conclusion on this point was *not* endorsed by the Court of Appeals. See *infra*, p. 25.

What is more, as the Court noted (394 U.S. at 53 n. 70, referring to *id.* at 51 n. 67), we have not endorsed an alternative suggestion advanced by Shalowitz that self-qualifying inner bays must be excluded on that ground alone. The issue, then, is *which* "tributary" waters ought to be counted.

We submit the Master correctly resolved the question. Report, pp. 29–31. In adopting Louisiana's so-called "Method 1"—which, so far as relevant here, is the federal position—he included tributary bays, coves and inlets, regardless of whether they independently qualify as bays, but not the waters of "rivers and streams flowing into a bay." See Report, p. 31. This is entirely consistent with the views of Dr. Pearcy and Mr. Shalowitz quoted by the Court (394 U.S. at 51 n. 66) and again invoked by Louisiana (La. Brief, pp. 78, 91–92 and n. 56). Nor is it in any way at odds with the Court's rulings with respect to Ascension Bay and West Bay, which merely included subsidiary *bays.*[18] There is, indeed, *no* authority to the contrary except the alternative holding, at the trial level, of a single English judge, which we now consider.

The issue in the *Estuary Radio* case, *supra,* was whether the operation of an unlicensed radio station located at Red Sands Tower, more than three miles from the English shore, could be enjoined because its situs was within British internal or territorial waters. That, in turn, depended upon whether the Thames estuary, properly defined, qualified as an overlarge

[18] See discussion, *infra*, pp. 28–29.

bay; if there was a juridical bay—however delimited—the parties agreed that Red Sands Tower was well inside the fall-back line and therefore in internal waters. The trial judge fully resolved the dispute by fixing the "natural entrance points" of the estuary at places (the Naze in Essex and Foreness Point in Kent) that, concededly, created a true bay, satisfying the semicircle test *without including any river waters.* [1967] 1 W.L.R. at 853–862; [1967] 3 All E.R. at 666–673. Only then, for the eventuality that his basic holding should be reversed on appeal,[19] did the judge go on to discuss the propriety of including river water up to the tideline. [1967] 1 W.L.R. at 862–864; [1967] 3 All E.R. at 673–674.[20]

It is noteworthy that, in reaching his conclusion, the judge did not rely solely on the convention, or even the Order in Council which gave it effect, but invoked special statutes pertaining to the Thames River. What is more, his result depended on the *tidal* character of the rivers, which more obviously identified their waters with those of the bay. But, at all events, when the case went up to the Court of Appeal, this alternative holding was not endorsed. On the contrary, Lord Justice Diplock (now Lord Diplock), speaking for a unani-

[19] Had the northern terminus of the bay been fixed at Orford Ness instead of the Naze, the enclosed area would not have satisfied the semicircle test unless upriver water was added in.

[20] The Judge went on to make a further alternative holding: that if the area considered did not qualify as a bay, nevertheless Red Sands Tower was within the British *territorial* sea because it was sufficiently near one or more low-tide elevations. [1967] 1 W.L.R. at 864–868; [1967] 3 All E.R. at 674–677. This aspect of the decision is, of course, irrelevant to our problem.

mous Court of Appeal, expressly declined the invitation of both parties to decide the issue whether upstream river waters should be included in semicircle measurement. [1968] 2 Q.B. 740, 760–761; [1967] 1 W.L.R. 1396, 1407; [1967] 3 All E.R. 679, 684. It is fair to infer that the appellate court thought Judge O'Connor's rule less than self-evident. There is thus no authoritative English ruling. We submit this Court ought not be guided by the alternative holding of a single trial judge whose opinion, in any case, partly depends upon facts and law peculiar to the Thames situation.

We turn, then, to the common sense of the issue. As we have seen, there must be a stopping place in tracing the waters appurtenant to a bay. The first question in every case must be whether the connected body of water realistically can be viewed as part of the primary indentation. That judgment, it seems to us, must depend on the width and length of the connecting channel and the shape of the subsidiary water body. Obviously, subsidiary bays or coves which have a wide opening to the main indentation ought to be included (whether or not they would independently qualify), and that has been freely done in East Bay.[21] So, also, a bay-like area immediately adjacent to the main indentation, connected by a narrow but very short channel, is a better candidate for inclusion than

[21] The Master, using Louisiana's Method 1, has included, among others, all the "pocket bays" we referred to in our initial Memorandum, p. 12 n. 13, and Drawing 1, opposite p. 14. The parties are agreed that this was entirely proper.

a long stream or canal of the same width that does not widen out or lead to any distinct bay or pond or lake. This no doubt partly explains the Court's ruling that Bob Taylor's Pond, Zinzin Bay and Riverside Bay should be treated as part of West Bay. 394 U.S. at 50 n. 65, 53 n. 71. See La. Brief, p. 81, Figure 8.[22] What is more, unless the subsidiary body of water is to be included as a whole. it is very difficult to justify following it only to an arbitrary distance.

Applying these guidelines to East Bay, we submit it is clear that the additional water areas Louisiana would include under its "Method 2" and "Method 3" [23] are not properly part of the main indentation. They consist principally of very small streams or canals in the area of Joseph Bayou at the northern end of Southwest Pass and similar streams and channels in a landform off South Pass adjacent to Oysterville, both shown on Figure 22 of Louisiana's Brief, Appendix I, p. 230.[24] These waterways, very narrow and relatively long, lead to no wider body of water, except the main channels of the Mississippi River—which even the State does not claim as "tributary waters" of East

[22] But see n. 25, *infra*, p. 28.

[23] Methods 2 and 3 include the same waterways. The difference is that Method 3 also counts all intervening lands as water (on the theory that they are islands), while Method 2 does not. See discussion, *infra*, pp. 28–29.

[24] We note that the reduced reproduction of Chart 1272 in Louisiana's Appendix I does not fully show the *low*-water lines and thus tends to exaggerate the relative width of the waterways near Oysterville. For a more accurate picture of that area, we refer the Court to Map 5 of 8 of the set of 54 maps or La. Exh. 353. We deal later (*infra* pp. 30–33) with the claim that these areas have suffered erosion.

Bay. There is, we suggest, no pretext whatever for treating those mere streams as "pockets" of East Bay.

(b) *Treating islands as water.*—We have already noted that Article 7(3) treats "islands" wholly "within an indentation" as part of the water area "of the indentation." When the case was last here we argued that when islands largely block the mouth of an indentation (as in the case of the Barataria Bay-Caminada Bay complex), the question whether it should be viewed as part of another connected indentation must be judged by treating the islands as such, not as water. The Court held otherwise (394 U.S. at 52–53 and n. 71),[25] and we do not re-argue the point.[26] But it is important to stress that the Court was dealing with what were unquestionably

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[25] The result of treating the islands at the mouth of the Barataria Bay-Caminada Bay complex as water was to so widen the connection between that indentation and Ascension Bay that the two bodies could "reasonably be deemed a single large indentation even under the United States' approach." 394 U.S. at 53. The same situation obtained with respect to the bays which the Court held part of West Bay. See 394 U.S. at 53 n. 71. Accordingly, those rulings do *not* necessarily indicate that two water bodies connected only by a very narrow passage should be treated as one for semicircle test measurement. But, at all events, no such issue exists with respect to East Bay.

[26] Thus, while the absence of any scale makes the judgment more difficult, we would probably accept the illustration in Louisiana's present Brief, p. 70, Figure 1. But, of course, the "tributary" there shown, relatively wide and short and with a generous opening to the main indentation (once the island is removed), bears no resemblance to the narrow streams and channels which the State claims as tributary waters of East Bay.

true *islands,* not formations so closely related to the mainland as to be properly assimilated to it.

That distinction is critical when we consider Louisiana's Method 3. The State would treat as islands—and therefore as water—land formations of significant size which are separated from the mainland only by very narrow streams or canals. This is, of course, wholly inconsistent with the State's submission for other areas that small islands relatively distant from shore should be deemed a part of the mainland. See Point IV, *infra,* pp. 37–45. But, more important, the claim of island status for the accretions around Joseph Bayou and Oysterville is absurd by any test. It would be more plausible to view all of the Mississippi River Delta as a series of islands, separated by the major passes—with the consequence that all the bays claimed by Louisiana would cease to qualify.[27]

We conclude, in harmony with the Special Master's ruling, that the correct way to apply the semicircle test is by using what Louisiana terms Method 1 and that, accordingly, the small streams and channels in the vicinity of Joseph Bayou and Oysterville cannot be included in the calculation.

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[27] Thus, the area between Grand Pass and Southwest Pass might be deemed an island, thereby robbing West Bay—and Ascension Bay—of any southern headland; the area between Southwest Pass and South Pass would be one or more islands, thereby eliminating East Bay; and the same procedure could be followed to the east, viewing Southeast Pass, Northeast Pass, Pass a Loutre, North Pass and Main Pass as separating islands and therefore denying juridical bay status to Garden Island Bay, Redfish Bay, Blind Bay and Bucket Bend Bay.

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2. LAND DETERIORATION OR EROSION IN EAST BAY

Assuming Method 1 must be used, the State alternatively contends that additional water areas must be included in applying the semicircle test to East Bay because neither the set of 54 maps nor the series 1200 charts accurately show the deterioration of certain land masses, especially around Joseph Bayou off Southwest Pass.[28] La. Brief, pp. 80–89. There are several objections to this claim.

(a) We have already noted that Louisiana advanced no such argument when the case was last before the Court. Nor is that all. When the issues were framed for the Special Master in December, 1969, the State did not identify any question with respect to land deterioration not shown on the maps or charts. See Report, p. 58.[29] On the contrary, the State expressly stipulated the correctness of the set of 54 maps with respect to East Bay with the single exception of the right to rely on the 1200 series chart to prove the existence of "Cow Horn Island." See Appendix B of our initial Memorandum, p. 35, para. (d). That would seem to foreclose the claim now advanced.

The State nevertheless embarks on its argument without apology. Presumably it invokes the final paragraph of Part B of the Joint Pretrial Statement,

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[28] But see Figure 7, La. Brief, p. 78, which may be intended to show a like deterioration of land masses off South Pass. This photograph, apparently not taken at mean low tide, is equally objectionable as those purporting to depict the Joseph Bayou area.

[29] Nor did the subsequent Stipulations add this issue. See Report, pp. 62, 63–66.

reprinted at p. 36 of our initial Memorandum. See La. Brief, p. 80 n. 49. To be sure, the parties there reserve the right to introduce evidence showing, among other things, "inland portions of water lines left incomplete on the set of 54 maps, particularly inclusion of tributary waters in measurements for the semicircle test." But that right is expressly qualified: no such evidence shall be "inconsistent" with the set of 54 maps. Thus, to the extent that those maps show water lines in the vicinity of Joseph Bayou, Louisiana is bound by them. And, as it happens, the highwater lines *are* shown. See Map 5 of 8. Accordingly, while the State was free to supply the missing low-water lines, to be consistent with what is already on the map, they must of course be located seaward, not inland—with the result that the water area would be *decreased,* not increased.

(b) We note, moreover, the State here makes an argument inconsistent with its usual insistence that, where a variance from the set of 54 maps is claimed, one must look to the official series 1200 charts. Louisiana cannot have it both ways: the existence of "Cow Horn Island" cannot be deemed proved simply because it was shown on Chart 1272 (until December 1969), despite evidence to the contrary, while the existence of the Joseph Bayou land form is discounted although it appears on the very same chart.

(c) At all events, the evidence submitted is far too equivocal to justify any conclusion that the Joseph Bayou land form has so deteriorated that it should be treated as water. It is not even clear what Louisiana is asserting. Apparently, the allegation is that the land

in the area, which had been gradually growing in size until at least 1956 (La. Brief, pp. 85–86), is now in the process of deteriorating due to canalization. When the erosion is claimed to have begun is none too clear, but most of it is alleged to have happened since the 1959 survey (see La. Brief, pp. 88–89). Yet, as we have seen, it is elsewhere suggested that the 1959 survey was erroneous. Moreover, if the erosion only *began* after 1959, it is difficult to appreciate how Line A can be claimed for the entire period 1956 to the present (see La. Brief, p. 86).

But, whatever the exact nature of the claim, the State's evidence is entirely inadequate to the purpose. It is true that some photographs were submitted early in the hearing.[30] Others [31] were presented far too late, as the Master noted (Report, p. 34). All are objectionable, however, because they are not properly correlated with tidal datum. One cannot know whether the scene depicted truly represents the situation at mean low-tide—the only relevant time.

(d) Finally, as the Master concluded (Report, p. 34), it is impossible to judge whether the additional water claimed would so change the total that Closing A would satisfy the semi-circle test under Method 1—remembering that it fails the test by the wide margin of some 4,700 acres (see La. Brief, p. 75, Figure 6). The State's belated attempt to prove the point (La. Brief, p. 86) is unpersuasive. If one compares the charts for 1944 and 1955 (La. Brief, pp. 71–72, Fig-

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[30] See the photographs reproduced at La. Brief, pp. 82–83.

[31] This includes those reproduced at La. Brief, pp. 84–85.

ures 2 and 3) with the chart for 1969 (La. Brief, p. 73, Figure 4), it is obvious that accretions at places other than Joseph Bayou may well explain why the same closing line no longer satisfies the semicircle test.

The upshot is that, even if properly received, Louisiana's "deterioration" evidence cannot overcome the bald fact that closing Lines A and B do not meet the semicircle test, properly applied, at least since 1956.

3. OTHER OBJECTIONS

What we have said thus far disposes of Louisiana's proposed Closing Lines A and B for East Bay, at least for the last two decades. There remain for consideration several other lines which apparently satisfy the semicircle test: (1) the variants of Closing Line A up to 1956 (La. Brief, pp. 71–72, Figures 2 and 3, 77, 92–93); (2) Closing Line B^1 (La. Brief, p. 74, Figure 5, 94–102); (3) Closing Line C^1 (La. Brief, p. 96, Figure 12, 101–102); (4) Closing Line C (La. Brief, pp. 102–113); and (5) Closing Line D (La. Brief, p. 114). But—in addition to special defects—all of these lines (including Closing Lines A and B) suffer from the same basic infirmity we discussed in our initial Memorandum (pp. 10–16) with respect to Closing Lines C and D: they are arbitrarily drawn closures devised to avoid certain objections but in no case anchored on proper headlands or realistically "enclosing" inland waters. We do not repeat that submission here, noting only *additional* objections to each of the lines other than Closing Lines C and D.

(a) *Closing Line A.*—We do not share the Master's view that, if they satisfied the semicircle test, Closing Lines A and B "might be accepted, as the area which each of them encloses has all of the other characteristics of a true juridical bay" (Report, p. 31). On the contrary, it seems to us obvious, looking at a chart of the general East Bay area (see La. Brief, p. 73), that the western terminus of Closing Line A is in no sense the "natural entrance point" of the indentation. It will not do to magnify the shoreline at that place and show that some very minor salient is revealed. The line *as a whole* must be seen to divide inland waters from the open sea and that simply cannot be claimed for Closing Line A.

The eastern terminus of Closing Line A is also objectionable—albeit for a different reason. The claimed headland is a detached mudlump, plainly an island, and therefore not allowable (see 394 U.S. at 60–66). It may be that, but for Hurricane Camille, Mudlump 93 would have become incorporated onto the sand spit at the end of South Pass (see La. Brief, Appendix I, at pp. 231–234), but there is no evidence that this has occurred or that, under applicable principles (see Point IV, *infra,* pp. 37–45), the mudlump should be viewed as an extension of the mainland.[32]

[32] We note that the State's choice of the mudlump instead of the sand spit itself was necessary to produce a closing line that would satisfy the semicircle test under Method 3. A line to the spit itself would be both longer (thereby increasing the required semicircle area) and more inland (thereby reducing the available water area behind the line).

(b) *Earlier variants of Closing Line A.*—It is not clear whether the eastern terminus of the pre-1956 lines claimed (see La. Brief, pp. 71–72, Figures 2 and 3) is likewise fixed on a detached mudlump. It is, however, perfectly plain that the western terminus of these lines is very arbitrarily chosen. No one, we submit, would select the point actually chosen as the "natural entrance" of East Bay—unless he had already worked out the semicircle test measurements.

(c) *Closing Line B.*—Besides failing to satisfy the semicircle test, Closing Line B (see La. Brief, p. 73, Figure 4) has two impermissible headlands. The western terminus of the line is the same as that selected for Closing Lines C and D, already discussed in our initial Memorandum (pp. 15–16). In short, the objection is that the salient feature chosen, while a true headland of the pocket bay to the west, is not a natural entrance point for the larger East Bay indentation claimed.

The eastern terminus of Closing Line B suffers the same defect. Moreover, the line cannot be accepted if (as Louisiana insists) "Cow Horn Island" exists *as an extension of the mainland.* A closing line may cross *islands* (and be adjusted accordingly), but it cannot cross a *mainland* formation. See La. Brief, pp. 98–100 n. 58.

(d) *Closing Line B'.*—The Special Master rejected Closing Line B^1 (La. Brief, p. 74, Figure 5, p. 96, Figure 12) on the double ground that its western terminus did not qualify "as a pronounced headland

helping to enclose landlocked waters" and that its eastern terminus "is located at approximately the center of Cow Horn Island by applying the so-called 'bisector of the angle' method, a technique entirely inappropriate in the physical situation, as there are pronounced headlands in the vicinity" (Report, p. 32). Even assuming we inadvertently misled the Master as to the western terminus (see La. Brief, pp. 95–96), we submit that it can no more qualify than that used for Closing Line B. At all events, however, the eastern terminus is objectionable for the reason given by the Master and, in our view, for the additional reason that Cow Horn Island has not existed above mean low water at any time relevant to this litigation. See our initial Memorandum, pp. 16–22.

(e) *Closing Line C¹*.—Finally, we consider Closing Line C¹ (La. Brief, p. 96, Figure 12), also rejected by the Special Master (Report, p. 32). Again, whether or not the Master was misled, we deem it plain that the point chosen for a western terminus is no more than the headland of a small pocket cover. And, of course (like Closing Lines B¹ and C), the line depends on the challenged finding that Cow Horn Island exists (or existed for some relevant period).

4. SUMMARY

We repeat that the basic defect of *all* the State's proposed East Bay closing lines is that they are wholly artificial contrivances for defining a juridical bay which simply does not exist. In all cases, one or both claimed headlands plainly do not qualify as the

"natural entrance" of the identation claimed. Beyond that, Closing Lines A and B must be rejected as failing the semicircle test and Closing Lines B^1, C^1, and C are each objectionable as depending on the unsupported finding that "Cow Horn Island" existed for some relevant period. This leaves only the variants of Closing Line A until 1956—which have perhaps the most obviously arbitrary western terminus—and Closing Line D. This last is no doubt the least objectionable, but, even here, as we fully argued in our initial Memorandum, we are confronted with an *ex post facto* rationalization, not a line that naturally defines the limits of an inland bay. The obvious truth is that East Bay—albeit it is so labelled on charts—is no more a juridical bay than San Luis Obispo Bay or Santa Monica Bay. See *United States* v. *California,* 381 U.S. 139, 143–145, nn. 3 and 6, 169–170.

IV

LOUISIANA'S FOURTH EXCEPTION: ISLANDS AS PART OF THE MAINLAND

The State devotes considerable space to the question whether islands near the shore ought to be treated as extensions of the mainland (La. Brief, pp. 116–143). Most of the argument, however, consists of generalities; there is very little discussion of concrete situations. The reason for this approach is obvious when we consult the maps and note how far one must strain natural meaning to view any of the islands or mudlumps claimed by the State as "so closely linked to

the mainland as realistically to be assimilated to it" (394 U.S. at 66). The truth is that, in each case, as the Master correctly found, the islands are in no sense extensions of the mainland unless one invents very novel rules for the Louisiana coast. Accordingly, we follow the State's sequence and first discuss the governing principles.

1. GENERAL PRINCIPLES

The issue whether any particular island, or group of islands, should be treated as part of the mainland arises because, at several places, the State attempts to draw a more seaward bay closing line by anchoring it at one end or both on an island or low-tide elevation—which is permissible only if the formation can be deemed an extension of the mainland. See 394 U.S. at 60–66. We must, therefore, consider the test which governs whether a land form surrounded by water—technically an "island"—ought to be considered a part of the mainland.

The Court itself has given us the basic guidelines: relevant factors include the island's "size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." 394 U.S. at 66. These are clear enough criteria. The best candidate for mainland assimilation is a large land form, separated from the shore only by a narrow, shallow, impassable ribbon of water, and so shaped and located that it appears to be a mere continuation of the coast. The worst candidate is a

small island, detached from the mainland by a relatively wide channel, and so situated that it contributes nothing to the general direction of the coastline. And, of course, there are closer cases in which the island enjoys some, but not all, of the mainland extension characteristics.

To be sure, the application of these guidelines is not always easy. But the Court has not left us altogether at sea. It is, for instance, settled that the St. Bernard Marshes and the like formation just north of Caillou Boca should be treated as mainland despite the many waterways that divide those areas into technical islands. 394 U.S. at 63, 65–66. On the other hand, the Court has ruled that the Isles Dernieres and the string of islands shielding the entrances of Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay, must be viewed as true islands—although some of these "fringing islands", which are quite large and separated from the mainland by relatively narrow and shallow water passages, can be viewed as continuing the general coastline. 394 U.S. at 52, 53 n. 71, 55, 58–59 n. 79, 66–67 n. 87, 67 n. 88.[33] These examples, we submit, were properly followed by the Master in rejecting the State's mainland assimilation claims. Indeed, the case for treating the island immediately to the east of Caminada Pass, southeast of Caminada Bay (see

[33] We take it for granted that the Court would not have discussed the problems of how to draw a closing line when "islands" are situated at the mouth of an indentation with particular reference to these areas if it deemed them true extensions of the mainland. Nor do we suppose the Court would treat as water for semicircle measurement purposes islands which should be deemed part of the mainland.

Drawing 4, opposite page 26 of our initial Memorandum) as an extension of the mainland is so much stronger than any of the present claims that it is difficult to view the matter as still open.

What, then, is Louisiana's response? It is largely confined to stressing the *fluvial origin* of the islands and mudlumps it would treat as portions of the mainland. The Court, it is true, expressly noted that this is "one consideration relevant to the determination of whether [islands] are so closely tied to the mainland as realistically to be considered part of it." 394 U.S. at 65 n. 84. But, at the same time, the Court was careful to caution that by citing *The "Anna"* and other early authorities it was not "suggesting that, under the now controlling Convention on the Territorial Sea and the Contiguous Zone, every Mississippi River Delta mudlump or other insular formation is a part of the coast." *Ibid.* Plainly, an island is not to be deemed part of the mainland today simply because it once was—or because it may be at some time in the future. The upshot, we submit, is that every island or low-tide elevation claimed as an extension of the mainland must satisfy the normal criteria, albeit those tests will be somewhat more leniently applied in the case of a formation of fluvial origin.

With these principles in mind, we turn briefly to the particular areas where the State seeks to anchor a bay closing line on an island or low-tide elevation on the premise that it is realistically part of the mainland. We follow Louisiana in proceeding from west to east.

2. ATCHAFALAYA BAY

In this area, Louisiana claims islands or low-tide elevations as headlands of the bay both on the west and the east. We shall consider these separately. At the outset, however, it may be well to point out that the difference between the parties, while important in principle, has only a small practical effect. This is because the State's closing line exceeds the maximum 24 miles and a fallback line must accordingly be substituted, which is very near the United States line. See La. Brief, Appendix I, p. 309, Figure 44.[34]

(a) *The Shell Keys.*—On the west, the State would anchor the closing line of Atchafalaya Bay south of Marsh Island in a group of shell reefs associated with the Shell Keys. See La. Brief, Appendix I, p. 217, Figure 17.[35] That is objectionable in our view, both because (1) these reefs cannot be deemed part of the mainland (or part of Marsh Island),[36] and (2) the reefs do not qualify as the natural entrance of the bay, which is more appropriately located at South Point on Marsh Island. See Report, pp. 52–53.

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[34] The United States line, on the west, ends at the prominent point (South Point) just to the north of the State's fallback line.

[35] Properly speaking, the Shell Keys are those few true islands at the southwest of the complex. But there are, as Louisiana points out, more extensive low-tide elevations nearer Marsh Island.

[36] It does not matter whether Marsh Island itself is viewed as an extension of the mainland or an island intersected by a closing line drawn to the eastern headland of Southwest Pass to the west of Marsh Island. In either case, the line must be adjusted to meet the natural headland of Marsh Island on the east. See 394 U.S. at 55–60.

Both points, we suggest, are quickly resolved by inspecting the map. The claim that the shell reefs are part of the mainland is rebutted when we note the relatively great water crossings between the reefs and compare the total land and water areas within the complex. See La. Brief, Appendix I, p. 217, Figure 17. Nor is it irrelevant that most of the reefs are mere low-tide elevations. For, while ruling that a low-tide elevation, like an island, may be deemed an extension of the mainland, the Court noted that "[l]ow-tide elevations obviously do not so closely tie the enclosed waters to the land * * *." 394 U.S. at 60 n. 80. It would be extravagant indeed to view this sparse complex of mere reefs as a part of the mainland.

An independent objection, as we have noted, is that normal headland principles forbid fixing the western headland of Atchafalaya Bay at some point within the Shell Key reefs. As the Master concluded, the natural closure for the bay on the west is at South Point on Marsh Island, a pronounced headland which is the obvious complement of Point au Fer on the east. See La. Brief, Appendix I, p. 309, Figure 44, or the map attached to the Court's opinion, 394 U.S. opposite p. 78.

(b) *Low-tide elevations off Point au Fer.*—Instead of closing Atchafalaya Bay at the east by a line proceeding directly to Point au Fer, the State would move the line seaward to include a small cluster of low-tide elevations to the west. See La. Brief, p. 140; Appendix I, pp. 308–310. Presumably acknowledging that low-tide elevations—as contrasted with islands—

can in no event affect a bay-closing line *unless they are properly viewed as part of the mainland,* Louisiana asserts that the elevations in question are an extension of the Point au Fer mainland. The Master, rightly in our view, rejected this contention. Report, pp. 52–53.

There is no need to elaborate. At low tide the total exposed surface of the group of elevations on which Louisiana relies cannot exceed a quarter of an acre and yet the nearest is some 2500 feet from the mainland. Nor do the elevations in any sense continue the arm of Point au Fer: they stand very much on their own in the sea. See Map 1 of 5. In these circumstances, it requires more than submerged oyster beds to so closely tie the formations to the mainland as to justify deeming them a part of it. See La. Brief, p. 140.

3. GARDEN ISLAND BAY/REDFISH BAY

Louisiana would place the northern terminus of this bay complex on a minute islet, even at low tide only 300 feet long, but approximately 5,000 feet from the mainland. See La. Brief, Appendix I, p. 268, Figure 34.[37] In our view, those facts alone required the ruling that the mudlump—whatever its origin—can no longer be viewed as part of the mainland. See Report, pp. 40–42.

[37] The Louisiana line is anchored on the southernmost of the islands depicted on this map, while the terminus of the United States line is the much larger island at the north which is detached from the mainland only by a mere 30-foot channel.

Louisiana seeks to avoid that obvious conclusion, first, by indulging in a kind of leapfrog exercise from islets nearer shore, and, second, by claiming that the group of islands forms a "portico" to the mainland. Neither theory can avail in this situation. The initial hurdle is that the nearest islet (other than the one we concede as an extension of the mainland) is some 1600 feet from the mainland. Moreover, the group is separated by water crossings which, in all but one case, far exceed the width of the islets, even at low tide. See La. Brief, Appendix I, p. 268, Figure 34.

As for the "portico" claim, it is simply preposterous when one considers the entire bay complex. Even ignoring the large water gaps between the islets, the alleged "screen" covers less than one mile of a bay closing line of more than six miles. Nor does it follow the same direction. See Report, p. 42.

4. BLIND BAY

To enlarge Blind Bay in such a way that a closing line across it affects the three-mile grant, the State claims that mudlumps off Pass a Loutre at the north and off Southeast Pass at the south should be deemed extensions of the mainland. See La. Exh. 353; Map 2 of 8. In both cases, the mudlumps are so small in relation to their distance from the shore that Louisiana wisely refrains from any assertion that one would view them as part of the mainland simply by looking at the map. Instead, what is stressed is the fluvial origin of the islets and the prospect that, one day, they will be reunited to the shore. See La. Brief,

Appendix I, pp. 260–262. But neither the past nor the uncertain future can govern this litigation. We submit that the Master was right in concluding that, *for the present,* these mudlumps are no part of the mainland. Report, p. 40.

There is, moreover, an independent objection to the proposed closing line of Blind Bay. As the Master noted (Report, p. 38), a large part of the water area Louisiana would include is obviously open sea, south of what is labelled "Blind Bay" on all charts. Even if the mudlumps off Pass a Loutre were deemed an extension of the mainland, the southern natural entrance point for the only indentation in the vicinity—Blind Bay—would be at Northeast Pass, not Southeast Pass. The waters to the south are not arguably "landlocked."

5. BUCKET BEND BAY

Finally, Louisiana would place the southeastern terminus of Bucket Bend Bay on a mudlump some 1900 feet from the nearest mainland, or, alternatively, one 600 feet away. See La. Brief, Appendix I, p. 259, Figure 29. Again, the elevations are far too distant from the mainland—considering their size and position—to be deemed a part of the mainland. This is made particularly clear when one considers the ratio of water to "land." At best, the intervening water area is more than 15 times the area of the elevations at low tide. See U.S. Exh. 349, sheet 3. We submit the Master was plainly right in rejecting this claim. Report, pp. 35–38.

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V

LOUISIANA'S FIFTH EXCEPTION: CARTOGRAPHIC AND SURVEY QUESTIONS

As the State itself notes, many of the so-called "cartographic or surveying oversights or errors" collected in this short section of its Brief (pp. 144–145) have already been discussed elsewhere. Thus, issues relating to "Cow Horn Island" and the low-water areas claimed near Pass du Bois are fully treated in our initial Memorandum (pp. 16–22, 22–24). So, also, we have discussed the alleged erosion near Joseph Bayou and accretions of Caillou Bay in other parts of the present Memorandum (pp. 30–33, *supra,* and pp. 47–52, *infra*). The only matters remaining concern (1) the spoil bank off Pass Tante Phine and (2) mudlumps off South Pass.

These are relatively minor issues. The formations claimed do not affect any bay closing lines. They would merely "bulge out" the 3-mile line at the named places. Moreover, the question is not *whether* the formations ever existed, but for precisely *what periods.* At Pass Tante Phine, the Master accepted our submission as to the dates of appearance and disappearance of the spoil bank (Report, p. 47), paras. (d) and (e). For the South Pass mudlumps, the Master made a ruling substantially more favorable to the State (Report, pp. 43–44). On our side, we are content to accept the Master's conclusions. Nor has the State lodged more than a *pro forma* protest. These are peculiarly factual issues which do not lend themselves to argument here.

Of course, the Court cannot abdicate its responsibilities in an original case, but, on these two very minor points, we suggest the Master's findings may safely be endorsed without further debate.

VI

LOUISIANA'S SIXTH EXCEPTION: CAILLOU BAY

If we correctly construe its present submission, the State now concedes that Caillou Bay qualifies as a juridical bay only if the western Isles Denieres properly can be deemed an extension of the mainland. That is indeed the single theory that could support the result sought, for this Court has already settled that true islands cannot form a bay (394 U.S. at 66–71) and, when the Isles Dernieres are discounted, there is obviously no indentation of the coast sufficient to constitute a bay. See Drawing 1, *infra,* following p. 48, and Report, p. 51. Yet, unless a bay exists, there can be no question of using "intersected islands" or "fringing islands" to extend the bay seaward.

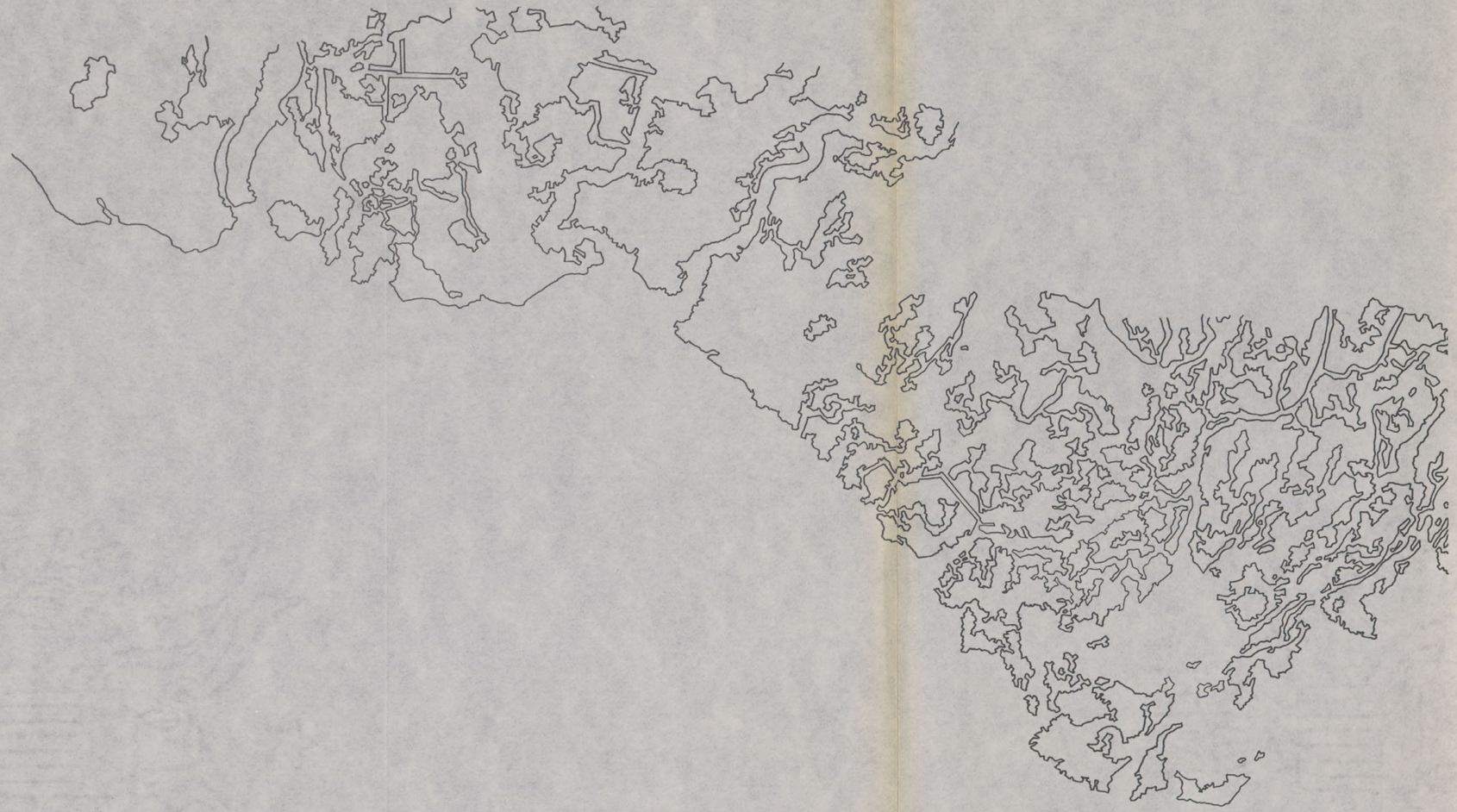
The sole issue, then, is whether the western part of the Isles Dernieres chain should be treated as part of the mainland. The short answer to that question is that the Court has already decided it. See 394 U.S. 66–67 nn. 87–88; Report, pp. 49–50. While acknowledging this, Louisiana pleads for reargument, essentially advancing three considerations: (1) the Court overlooked the State's submission in 1968; (2) the late change of position by the United States placed Louisiana at an unfair disadvantage; and (3) at all events,

the issue ought to be reconsidered in light of the Master's indication that he disagrees with the Court's ruling. We briefly address each of these points.

1. Louisiana is not without courage in taxing the Court with misunderstanding its 1968 submission that the western Isles Dernieres should be considered a part of the mainland. At the time, the State burdened the Court with 625 pages, in 4 volumes, plus 13 volumes of maps, in which every point was argued and illustrated at length. Out of all that material, Louisiana now points to an ambiguous half-sentence, buried in the wholly different argument of its Reply Brief [38] to the effect that the United States ought to be held bound by the Chapman Line at Caillou Bay "irrespective of whether it is a true bay." La. Brief, pp. 147–148. One might well take the view that the State has rightly paid the price of undue prolixity. Moreover, it is not even clear that the reference to the Isles Dernieres chain as a "natural extension of the mainland" in the 1968 brief was anything more than an alternative formulation of the rejected "portico" theory.[39] See 394 U.S. at 66–71. Certainly, the only permissible

[38] There was no suggestion in the State's original brief that the western Isles Dernieres constituted a mainland peninsula, rather than a chain of islands. See La. Brief in Support of Motion, etc., October Term, 1968, pp. 295–303.

[39] Indeed, in the italicized language now reproduced (La. Brief, p. 148), the State seems to be arguing that the islands are so closely connected to *each other*—not to the mainland—that they "form a portico to the mainland" and are, for that reason, to be treated as "an extension of the mainland."



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Nautical Miles

DRAWING 1

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proposition cannot be said to have been "argued". At all events, the Court did not rest its conclusion on Louisiana's submission: the opinion expressly states, "we agree that none of the islands would fit that description." 394 U.S. at 67 n. 88.

2. The State's estoppel point, once again, is no more than re-argument of a matter already adjudicated, with full awareness of the government's change of position. 394 U.S. at 73–74 n. 97, and 66–67 n. 87. Presumably, the State quarrels with the Court's statement that "Louisiana has not relied to its detriment on the [earlier] concession [that Caillou Bay is inland water]." 394 U.S. at 73 n. 97. Let us examine that claim.

First, the State points out that, until 1968, it was permitted to grant mineral leases and receive the revenues from the area, without any warning that it might later have to account (La. Brief, p. 63 n. 39). Needless to say, it is no disadvantage to have the use of monies to which one is not entitled. Nor should the ultimate accounting create any undue embarrassment. The State has now been on notice for 7 years that it may be required to repay royalties received from Caillou Bay before 1968. In the interim, there have been disbursements to Louisiana exceeding any amount which probably is due on this score, which the State should have set aside against the eventuality of losing its Caillou Bay claim. And, at the end of the day, Louisiana may be entitled to disbursements from

the escrow fund sufficient to offset its Caillou Bay debt.[40]

Second, Louisiana asserts that the federal change of position has worked a "surveying prejudice," in that no special attention was given to low-water lines on the landward side of the Isles Dernieres in the 1950's. See La. Brief, pp. 148–150. This is a most extraordinary claim in light of the 6 years that elapsed between notice of the new federal position and the closing of the record before the Master, Louisiana's voluntary acceptance of the set of 54 maps for the area in December 1969, and the fact that the State was permitted, and did, present evidence of additional land behind the islands, which was not opposed by the United States and was accepted by the Master. See Report, p. 51.[41] It is too late in the day to com-

[40] While we do not believe the justice of the case requires it, the State's argument would, at best, suggest a waiver of accounting for monies received from Caillou Bay (defined by the Chapman Line) until 1968, when it was first put on notice of the federal claim. There is plainly no basis for a contention that Louisiana has suffered any prejudice since that time.

[41] Part B of the Joint Pretrial Statement filed with the Special Master in December 1969 (reproduced as Appendix B of our initial Memorandum, pp. 35–36) stipulated that, with certain exceptions, the parties accepted as correct the high and low-water lines shown on the set of 54 maps, but allowed further evidence "not inconsistent with those maps" to show, among other things, "inland portions of water lines left incomplete on the set of 54 maps." Because the low-water lines on the landward side of the western Isles Dernieres were not indicated on the stipulated maps, Louisiana was free to supply them and did so. What was objected to and disallowed was evidence of islands wholly missing from the set of 54 maps or inconsistent water lines—because the State, although free to do so in December 1969, did not reserve that right.

plain: the State might easily have fully reserved its right to present new evidence and developed it (as both parties did for other areas) in the generous time allowed.

What is more, it appears that Louisiana did make some form of re-survey on its own. And, while its failure to specify an exception for Caillou Bay rendered some of its evidence inadmissible, the new map does not affect the result as the Master found (Report, p. 51). As our illustrations show, the western Isles Dernieres are no more closely tied to the mainland when we add the new land areas claimed by Louisiana (Drawing 3, following p. 52, second map) then they are as depicted on the set of 54 maps (Drawing 2, following p. 52, first map). Although the islands may be more closely tied to one another, the critical separation of the entire chain from the mainland by the relatively deep channel of Caillou Boca remains unchanged. That is presumably what led the Court to conclude that the Isles Dernieres could not be deemed an extension of the mainland and there is no occasion to re-open that ruling.

3. Louisiana nevertheless asks the Court to reconsider its holding. As we have just seen, this cannot be on the ground of fresh evidence, which, as the Master found, is in part inadmissible and at all events irrelevant. It must be on the sole basis that the Master gratuitously expressed his disagreement with the Court's ruling. See Report, pp. 50–51.

For our part, we submit the Court ought not accept the invitation. The case presents sufficient issues without undertaking reconsideration of these already de-

cided. But, if the Court determines to look at the matter anew, we must repeat what we have just said: however closely the several islands of the Isles Dernieres may be connected to one another, the chain is clearly separated from the mainland. The smallest gap is at Caillou Boca, a very plainly defined channel, marked by buoys, some 14 or 15 feet deep and almost ⅓ mile wide—which is in no way narrowed even if one accepts Louisiana's new evidence. See Drawings 2 and 3, following p. 52.

In those circumstances, we simply fail to understand how the Master could suggest that the Isles Dernieres should be assimilated to the mainland, except by succumbing to the State's repeated appeal to find a juridical bay "somehow" (La. 1968 Reply Brief, p. 122, reproduced in the present La. Brief, p. 148) or "by some means" (La. Memorandum Presenting Additional Data to the Special Master, p. 61). Unless novel rules are to be invented for this area,[42] the Court's conclusion that the Isles Dernieres chain is not part of the mainland must stand, with the consequence that the waters labelled Caillou Bay do not constitute a true bay.

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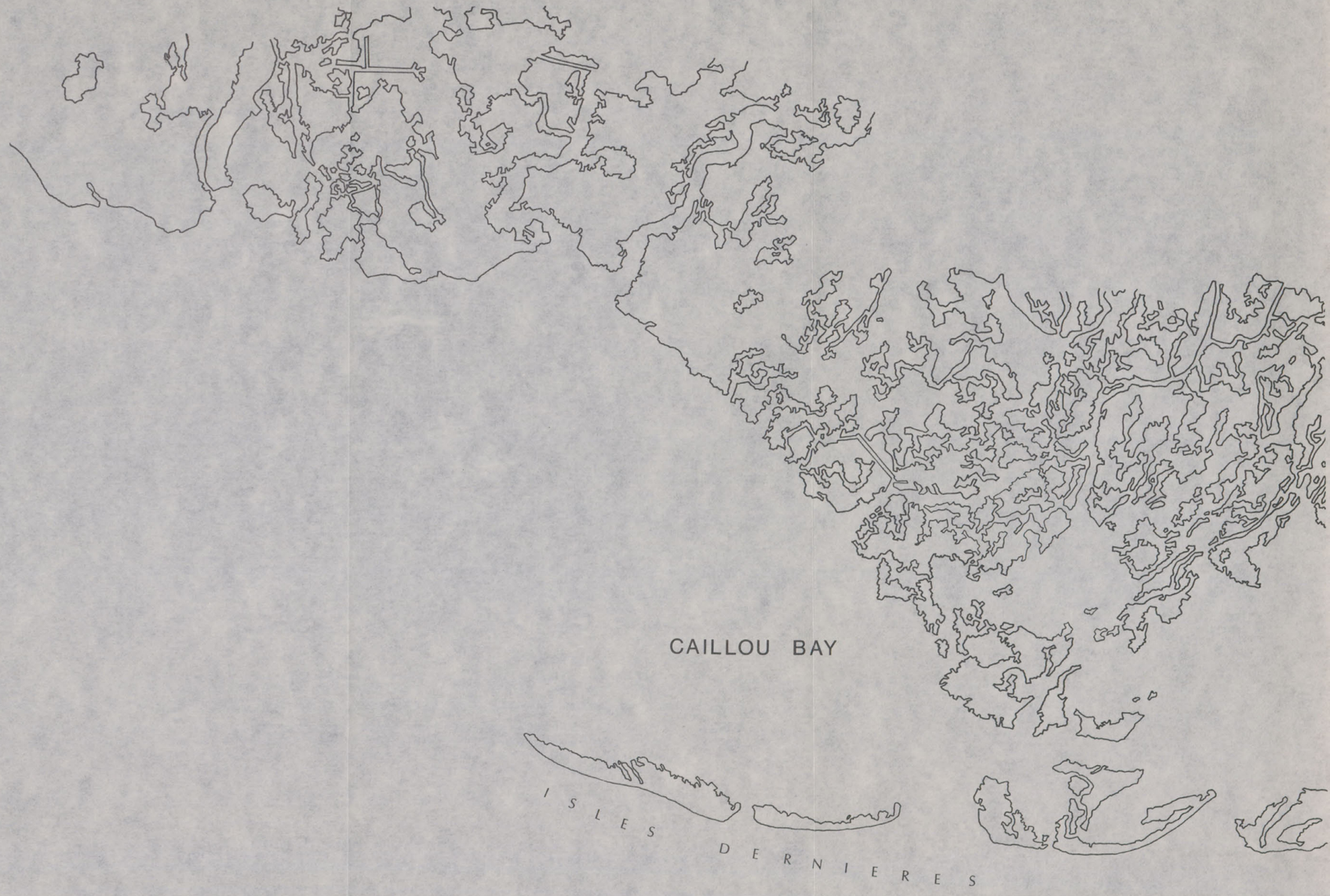
[42] In this one area, the Master, we submit, has grossly departed from the sound island-assimilation principles followed elsewhere—notably at Bucket Bend Bay (Report, pp. 35–38), at Blind Bay (Report, pp. 38–40), at the Garden Island Bay/Redfish Bay complex (Report, pp. 40–42), and at Atchafalaya Bay (Report, pp. 52–53). See Point IV, *supra*, pp. 37–45.



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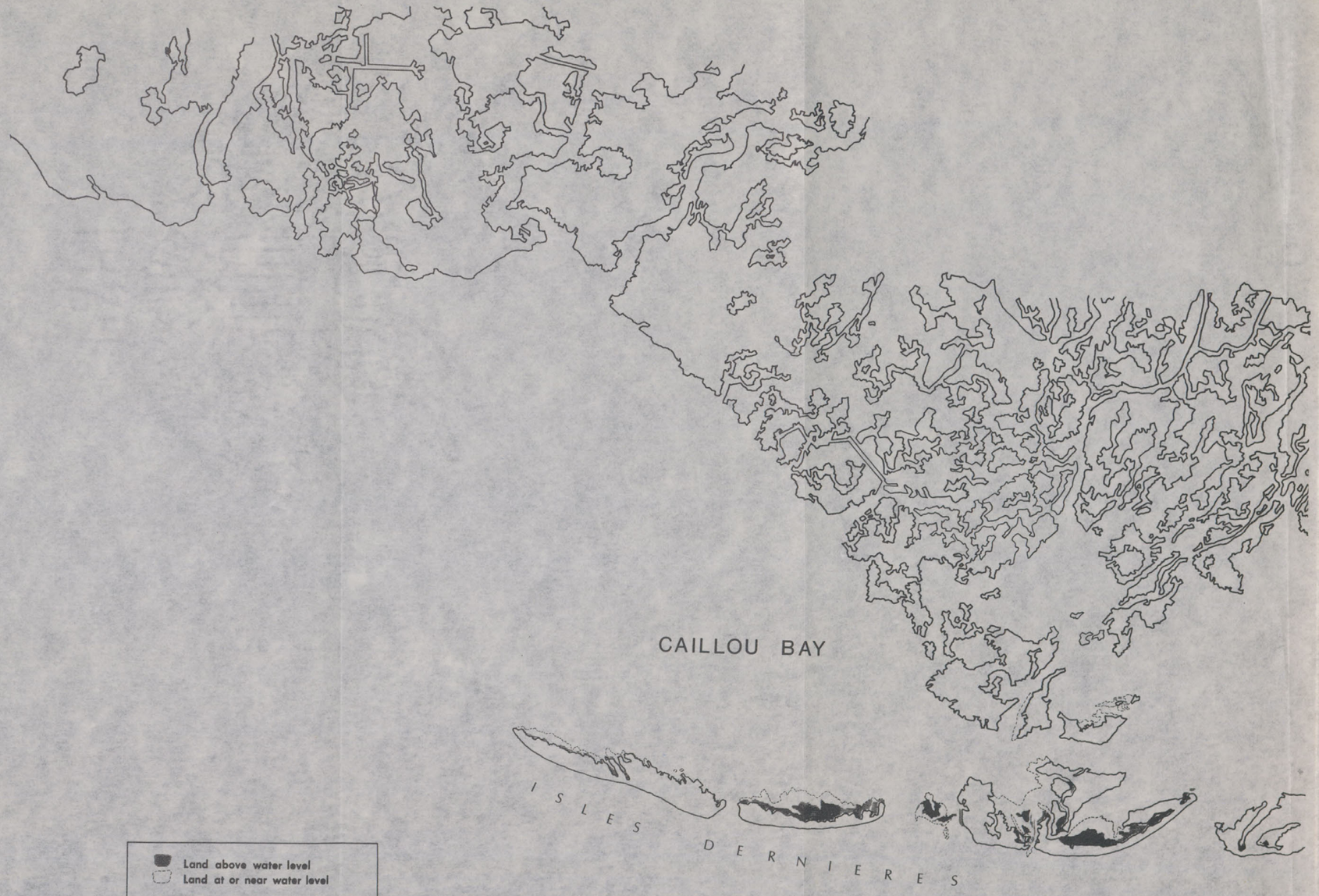

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CONCLUSION

For the foregoing reasons and those stated in our initial Memorandum, the Special Master's determinations should be confirmed, with only the following three exceptions:

(1) Contrary to the Master's determination, no subsidiary bay whose closing line affects the Submerged Lands Act grant has existed for any period relevant to this litigation;

(2) Contrary to the Master's determination, the low-water elevations near Pass du Bois did not exist until December 6, 1969; and,

(3) Contrary to the Master's determination, "Ascension Bay" is not an overlarge juridical bay.

Respectfully submitted.

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JANUARY 1975.

APPENDIX A

Appendix A being a document submitted by the United States in these proceeding at the invitation of the special master

No. 9, Original

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

BEFORE THE SPECIAL MASTER

SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE UNITED STATES WITH RESPECT TO LOUISIANA'S HISTORIC INLAND WATERS CLAIMS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

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SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE UNITED STATES WITH RESPECT TO LOUISIANA'S HISTORIC INLAND WATERS CLAIMS

I

HISTORIC INLAND WATER CLAIMS

A. INTRODUCTORY

1. (La. C. 11–12, 15–25; see also La. F. 14, 19–20, 44–52, 53–61).[1] In order to prevail with respect to any claim of historic inland water, Louisiana must show:

[1] For the convenience of the Special Master, we have noted parenthetically (where possible) the finding or conclusion proposed by Louisiana which corresponds to each of our own proposed findings and conclusions. "La. F." refers to one or more of Louisiana's "Findings of Fact" (pp. 3–28 of the State's submission of October 29, 1973); "La. C." refers to one or more of the separately numbered "Conclusions of Law" proposed by Louisiana (pp. 29–42 of the same submission). For our part, we have not distinguished between "findings of fact" and "conclusions of law," believing that, in the particular context of the historic inland water claims, factual and legal questions are so intertwined as to make the attempt to separate them somewhat artificial.

a. That there has been governmental exercise of authority of such a character that foreign nations were put on notice that the area was claimed as inland waters of the United States, not merely as part of the American territorial sea or part of a contiguous zone or the high seas beyond with respect to which more limited rights might be asserted. See 394 U.S. 11 at 23–32, esp. nn. 28–30 and 76, n. 103.

b. That such exercise of authority has been notorious and continued over a long period. See 394 U.S. at 23–24 and n. 27.

c. That foreign nations have at least impliedly acquiesced in such exercise of authority. See 394 U.S. at 23–24 and n. 27; *United States* v. *California,* 381 U.S. 139, 172. Mere absence of protest is insufficient at least where there has been no unambiguous and notorious inland water claim.

2. (La. C. 26–27, 29, 31–33). Louisiana may invoke both federal and state actions for this purpose, notwithstanding the federal government's present disclaimer (394 U.S. at 76–77, and n. 104); but past state activities are relevant only "to the extent [that] the United States could [—albeit it does not—] rely on [them] in advancing such a claim" to historic inland waters. 394 U.S. at 77–78.

3. (La. C. 29, 31). Louisiana may not rely on any of its actions which were, at the time, "repudiated by or inimical to the interest of the national sovereign." 394 U.S. at 76, n. 103.

4. (La. F. 65–66; La. C. 13–14, 26–27). In light of the official disclaimer by the United States of any

historic inland waters along the Louisiana coast, the State has a heavy burden of proof. See 394 U.S. at 76–77.

B. EAST BAY

5. Louisiana presses its strongest case for historic inland water in the area of East Bay. In support of that claim Louisiana has submitted material purporting to show: (a) that the physical configuration of East Bay once satisfied the then international law rule followed by the United States for a juridical bay; (b) that East Bay is geographically and economically an integral part of the State; (c) that the federal government took actions in the past amounting to a claim that East Bay was inland water; (d) that state activities affecting the Bay would support a claim—which the United States could assert against foreign nations if it chose—that East Bay is an historic inland bay.

6. The United States has at all times in this litigation, since the filing of the first complaint in 1948, asserted that East Bay is not inland water within the operative meaning of that term in these proceedings.

a. The so-called "Chapman Line" of 1950, interpreting the decree of that year which recognized Louisiana's retention of "inland waters" (340 U.S. 899, para. 1), excluded East Bay.

b. In 1956, after the passage of the Submerged Lands Act which granted coastal States a 3-mile belt beyond "the line marking the seaward limit of inland waters" (43 U.S.C. 1301(c)), the United States ob-

tained an injunction against mineral operations in East Bay more than 3 miles from shore. See 351 U.S. 978.

c. The Interim Agreement of that year reflected the federal claim to the resources of the seabed of East Bay more than 3 miles from shore. Agreement between the United States and Louisiana of October 12, 1956.

d. Since 1956, the United States has consistently asserted that East Bay is not inland water—historical or juridical—under the Submerged Lands Act (43 U.S.C. 1301(c)), the Court's 1960 decree (364 U.S. 202, para. 1), the Convention on the Territorial Sea and the Contiguous Zone (15 U.S.T. 1607, T.I.A.S. 5634, Art. 7), or the Court's 1969 opinion (394 U.S. 11, 74–78). See also, 382 U.S. 288, 291, para. 3(c).

7. (La. F. 65–66). Beyond its stance in this litigation, the United States has, through responsible officers of the Department of State, officially disclaimed East Bay as inland waters of the United States. See 394 U.S. at 76–77; U.S. Exs. 108–114 and 4160.

The old bay under the old law

8. (La. F. 3, 16, 62–64). Before 1900, East Bay appears to have had such a configuration that its entrance did not exceed 10 miles in width. Since at least 1918, the entrance of the Bay has been more than 10 miles wide. La. Ex. 23.

9. (La. F. 16, 64). The evidence does not indicate that the United States adhered to a 10-mile closing rule before 1930, or that such a rule was settled in international law even as late as 1953. See *United*

States v. *California,* 381 U.S. 139, 163–164; *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports (1951) 116, 131. Nevertheless, if one applies the 10-mile closing rule until 1958, and the Convention on the Territorial Sea, and the Contiguous Zone thereafter, East Bay, if once a true inland bay, ceased to be a juridical bay ever since at least 1918. See the Chapman Line of 1950 which did not enclose East Bay; 394 U.S. at 53.

10. (La. C. 37, 38). The normal consequence of geographical changes along a seacoast, whether natural or artificial, is to alter the legal coastline. 394 U.S. at 32–34. See also, *Texas Boundary Case,* 394 U.S. 1, 3–6; *United States* v. *California, supra,* 381 U.S. at 176–177. That principle is fully applicable to a former juridical bay, like East Bay, which, because of erosion or other geographical changes, ceases to qualify as such.

11. (La. C. 39, 40). Exceptionally, an area which loses its status as a juridical bay may nevertheless remain inland water if the coastal nation continues, after the geographical change, to exercise such dominion over the area as to support a claim to historic inland waters. With respect to East Bay, however, the evidence of continued and notorious exercise of inland water authority is lacking. See paras. 16–28, *infra.*

Geographic and economic considerations

12. Geography and economic interests are not factors recognized in international law as significant to an historic bay claim. *Juridical Regime of Historic*

Waters, Including Historic Bays. But in any event Louisiana's claim is not persuasive.

13. (La. F. 1, 2, 5, 8). East Bay is not, as a matter of geography, peculiarly "inland." Far from having the appearance of an "inland lake," it is a triangular area, the whole of whose base is the open waters of the Gulf of Mexico. At all events, East Bay does not meet the objective test of the Convention (394 U.S. at 53), and subjective impressions are legally irrelevant.

14. (La. F. 5, 6). It is legally irrelevant that all lands bordering East Bay and all the tributaries entering it belong to Louisiana. That was the situation of Santa Monica Bay and San Pedro Bay, which the Court nevertheless found did not qualify as juridical bays or historic inland waters. *United States* v. *California, supra,* 381 U.S. at 170, 173. See also, Convention on the Territorial Sea and the Contiguous Zone, *supra,* Art. 7(1), and *Juridical Regime of Historic Waters, Including Historic Bays.*

15. (La. F. 7). It is equally irrelevant that East Bay is not "a waterway for intercourse between nations."

a. If East Bay were an "international strait," that might preclude its being treated as inland water. See *Corfu Channel* case [1949] I.C.J. Rep. 4.

b. But the converse is not true. Many maritime areas in the world, whether because of shallow waters, submerged obstacles to navigation, or remoteness from the commercial shipping lanes, are similarly not international "waterways." They are not, on that account, deemed inland waters. See *United States* v. *California, supra,* 381 U.S. at 172.

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16. (La. F. 9, 12). Louisiana's assertion that "from the beginning of recorded history East Bay has been vital to the economic interest of those persons inhabiting its shores" is somewhat exaggerated, and in any event irrelevant. See *Juridical Regime of Historic Waters, Including Historic Bays.*

a. There are probably less than one hundred people living on the shores of the Bay, most of them federal employees of the Coast Guard at "Port Eads" on South Pass, "Burrwood" on Southwest Pass and "Pilot Town" at the head of the two Passes.

b. Nor are the resources of the Bay more than 3 miles from shore important to the economic life of the State, except only for oil and gas operations, all of which have been conducted with notice of the federal claim to the area. (See also findings 23–27.)

c. Any state historic claim more than 3 miles from shore in East Bay based on the self-inflicted dependence on mineral revenues has been impliedly rejected by the Court, which did not accept Mr. Justice Black's dissenting views. See 363 U.S. at 98–100; 394 U.S. at 79 n. 2, 84.

Federal actions

17. (La. F. 17). During the 19th century, the United States surveyed, platted and patented to individuals lands on the banks of South Pass, Grand Pass (since eroded) and Southwest Pass. These actions, however, give no indication that the federal government viewed the water of East Bay as inland. La. Exs. 21, 93 and 94.

18. (La. F. 25). Pursuant to an Act of Congress of 1895, officials of the United States established the so-called "Coast Guard Line," landward from which the Inland Rules of Navigation would be applicable, and that line encloses the whole of East Bay. However, the Court itself has expressly rejected the contention that this line defines the seaward limit of inland waters for the purposes of this case. 394 U.S. at 19–32.

19. (La. F. 18–23). In 1907, the Tern Island Reservation was created by Executive Order and the accompanying chart indicates an oval broken line drawn in the water and encircling the entire Delta area, including East Bay. However, the text of the Executive Order expressly reserves only "all small islets commonly called "mudlumps" located within the zone indicated, and there is no indication that the United States claimed the intervening water areas (any more than the mainland areas encompassed by the line). *Cf.* 363 U.S. at 69–70.

20. (La. F. 26–28). The National Prohibition Act of 1919, 41 Stat. 305, and regulations and instructions issued thereunder in the 1920's, defined the "territorial waters of the United States" for prohibition purposes as including "bays * * * which, at their entrances, are so surrounded by the lands of the United States as to be reasonably regarded as geographically a part thereof, regardless of the distance between the opening headlands."

a. However, since the only examples given—Chesapeake Bay and Delaware Bay—are obviously far more enclosed at their entrances than East Bay, it is very doubtful that East Bay would have qualified.

b. At all events, an assertion of jurisdiction merely for the purpose of controlling smuggling would be permissible far seaward of inland waters, indeed even beyond the usual 3-mile territorial sea, and therefore does not amount to a claim that the waters affected are inland or territorial. See 363 U.S. 1, at 34 and n. 60; 394 U.S. at 23 n. 26. See also Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. 5639, Art. 24(1).

21. (La. F. 30). In connection with the 1940 census conducted by the United States Department of Commerce, the geographic area of the United States was measured and charts showing the method used show East Bay included as "state water." This evidence is ambiguous, at best, since East Bay is expressly excluded by the Department of Commerce from the category of "inland water." See Proudfoot, *Measurement of Geographic Area* (U.S. Dept. of Commerce, 1940), La. Ex. 52, pp. 37–45, 117. Moreover, the procedure followed does not suggest that East Bay was included as an "historic bay," but, rather, at a true bay under what appears to be an erroneous application of the 10-mile closing rule. See *id.* at 33.

22. (La. F. 31). Louisiana's contention that the Coast Guard has asserted jurisdiction in East Bay as inland waters of the United States, by construing the authority of the Captain of the Port of New Orleans and the New Orleans Inspection Zone as encompassing all of East Bay, is not proved on the record.

a. For some purposes, Coast Guard authority expressly extends beyond United States territorial waters

to the so-called "inland water line" (see, *e.g.,* 33 U.S.C. 151; 33 U.S.C. 152), and for other purposes, it extends even beyond that line (see, *e.g.,* 46 U.S.C. 88; 46 U.S.C. 22a; 46 U.S.C. 367). See also, 33 C.F.R. 2.10–1 (b) and (c).

b. Moreover, international law recognizes the propriety of many activities undertaken by the Coast Guard beyond American territorial waters. See Convention on the High Seas, *supra,* Art. 7; Convention on the Territorial Sea and the Contiguous Zone, *supra,* Art. 24(a); 394 U.S. at 23, n. 26.

State actions

23. (La. F. 32–35). For about a century, Louisiana has legislatively asserted a right to control oystering in all Louisiana waters, including all "bays" bordering on the Gulf of Mexico, and, during the whole of the century "East Bay" has been so designated on maps of Louisiana.

a. This is not dispositive, however, of Louisiana's intent to claim East Bay as "inland water"—any more than the omission of "Ascension Bay" from most maps forecloses Louisiana's claim to that body of water.

b. It may be that the Louisiana legislature meant only to assert authority over true bays, recognized by domestic and international law of the time, in which event East Bay would have been excluded for at least most of the century. See para. 9, *supra.*

c. At all events, as the Supreme Court held with regard to Monterey Bay, a mere legislative declara-

tion, especially an ambiguous one, cannot create historic title. *United States* v. *California, supra,* 381 U.S. at 174.

24. (La. F. 35–36). Louisiana has granted exclusive oyster leases in East Bay, but never more seaward than 3 miles from shore. See La. Ex. 67.

a. In the absence of inconsistent federal regulation, that assertion of jurisdiction within the territorial sea was probably authorized under domestic law even before the passage of the Submerged Lands Act of 1953 (which now confirms state authority within the 3-mile belt). See *McCready* v. *Virginia,* 94 U.S. 391, 394–395; *Manchester* v. *Massachusetts,* 139 U.S. 240, 258; *Johnson* v. *Haydel,* 278 U.S. 16; *Toomer* v. *Witsell,* 334 U.S. 285, 393.

b. At all events, these leases would not support a claim of historic inland waters vis-a-vis foreign nations, since they affected only American territorial waters where, as a matter of international law, the United States (whether directly or through a member State) could exercise that sort of exclusive authority, whether the waters were viewed as inland or part of the 3-mile territorial sea. See *Toomer* v. *Witsell, supra,* 334 U.S. at 393.

25. (La. F. 38–42). Louisiana has, for more than half a century, regulated shrimping and fishing along its coast, including at least portions of East Bay. Insofar as such regulation did not extend more than 3 miles from shore, it proves no claim to historic inland waters.

a. Regulation of fisheries to that distance has traditionally been deemed a prerogative of coastal nations

within their territorial seas beyond inland waters. See *United States* v. *Louisiana,* 363 U.S. 1, 34; Convention on the Territorial Sea and the Contiguous Zone, Arts. 1(1), 2, 14(5).

b. Even as a matter of domestic law, such a prerogative has been conceded to the States, at least in the absence of inconsistent federal regulation. See *Manchester* v. *Massachusetts,* 139 U.S. 240, 258; *Skiriotes* v. *Florida,* 313 U.S. 69, 75; *United States* v. *California,* 332 U.S. 19, 75; *Toomer* v. *Witsell,* 334 U.S. 385; *United States* v. *Louisiana,* 339 U.S. 699, 704; Submerged Lands Act, 43 U.S.C. 1301(e), 1311.

26. (La. F. 38–42). There is some evidence that Louisiana's regulation of shrimping and fishing has, at times, been exercised in East Bay more than 3 miles from shore.

a. The relevant statutes have not unequivocally included the whole of East Bay within their sway. See, *e.g.,* Louisiana Act 103 of 1926 (which expressly names certain bays, but not East Bay); Louisiana Act 51 of 1958 (which names East Bay, but perhaps only to the 3-fathom line—always less than 3 miles from shore); Louisiana Act 53 of 1958 (which establishes a limit 3 miles from the "Continental Coast Line"); Louisiana Act 452 of 1962 (which follows the shore inside East Bay).

b. The evidence does not establish that state officers have consistently enforced their regulations more than 3 miles from shore in East Bay. Practical considerations alone might well have led patrols to cross more seaward areas in order to police the marginal belts along the shores of the Bay.

c. The only specific incident introduced as affecting the area of East Bay seaward of the 3-mile line from shore is the arrest of three Mexican vessels in 1946. Tr. 824. That isolated occurrence—of which the Mexican Government can find no record—is wholly insufficient to found a ripened claim to historic waters. Compare the incidents deemed inadequate in *United States* v. *California, supra,* 381 U.S. at 174–175.

d. At all events, regulation of fishing up to 12 miles from shore (which would more than encompass all of East Bay) could as well be viewed as the assertion of a territorial sea of that width.

e. Indeed, Louisiana *was* legislatively asserting a 27-mile territorial sea (measured from "shore") from 1938 to 1953 (Louisiana Act 55 of 1938) and a 9-mile marginal sea from 1954 until the Court's decision of 1960 (Louisiana Act 33 of 1954).

f. Thus, any acquiescence by foreign fishermen in Louisiana's shrimping and fishing regulations as applied to the most seaward portions of East Bay would prove no more than that they were willing to treat the area as part of the American territorial sea—not inland waters of the United States.

27. (La. F. 44). Louisiana asserts that it has exercised pollution control within the whole of East Bay since 1932. However, the operative statute (Louisiana Act 68 of 1932) merely recites—ambiguously—that it applies to "any waters of the State," and there is no evidence of record that Louisiana enforced any pollution regulations in East Bay more than 3 miles from shore, except in connection with mineral operations after 1947. See para. 28, *infra.* In any event,

in the absence of conflicting federal regulation, a state has power to control pollution in its non-inland territorial waters that may affect its inland waters or its shore (see *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325), so the alleged exercise of pollution control is not of significance to the issues in this case.

28. (La. F. 45–47). Louisiana granted mineral leases apparently covering portions of East Bay before the Truman Proclamation of 1945 with respect to the continental shelf (Presidential Proclamation No. 2667, Sept. 28, 1945, 10 F.R. 12303) and the Court's first "tidelands" decision in 1947 (*United States* v. *California*, 332 U.S. 19).

a. However, the first such lease, in 1928, ambiguously embraced only "Louisiana waters" (La. Ex. 90), and subsequent documents identify the area of the lease as bounded by a 3-mile belt from shore (see La. Ex. 90).

b. Indeed, the State's brief on this point when the case was last before the Court (reproduced here in relevant part in Louisiana's "Brief in Support of Suggested Findings and Conclusions of Law") dates its claim that portions of East Bay more than 3 miles from shore were leased from 1947 only (see pp. 247–248).

c. Louisiana's leasing beyond inland waters but within the 3-mile belt, while ultimately held unauthorized (impliedly in 1947 by the first *California* decision, explicitly by the first *Louisiana* decision in 1950), was previously deemed permissible by many authorities, including the Congress and Secretary of

the Interior Ickes. See *United States* v. *California, supra,* 332 U.S. at 39; *United States* v. *Louisiana,* 363 U.S. 1, 6, n. 4, 16–18, 78–79; *United States* v. *California, supra,* 381 U.S. at 180, 185–186 (Black, J. dissenting). See also, the decree in the original *Louisiana* case (340 U.S. 899) which requires the State to account for rentals, bonuses and royalties only from June 5, 1950, the date of the decision, and the provision of the Submerged Lands Act (43 U.S.C. 1311(b)(1)) which forgives any accounting for revenues derived from the 3-mile belt.

d. At all events, the resources of the seabed within 3 miles from shore were, as a matter of international law and independently of the Truman Proclamation, part of the American territorial sea, beyond inland waters, which, so far as foreign nations were concerned, were "off-limits," whether their exploitation was assigned, under domestic law, to the federal or state government. See *United States* v. *California, supra,* 332 U.S. at 33 *et seq.*

29. (La. F. 45–47). From 1947 through mid-1956, Louisiana granted mineral leases covering portions of East Bay more than 3 miles from shore, purporting to do so as owner of the seabed. But it does not follow that such leasing activities implied—at least in the eyes of foreign nations—a claim that the overlying waters were inland.

a. On the contrary, the Truman Proclamation of 1945, while asserting the right of the United States to exploit the resources of the seabed to the edge of the continental shelf, expressly disclaimed any such as-

sertion. Presidential Proclamation No. 2667, *supra* para. 6.

b. That disclaimer was repeated in the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1332(b)), and was ultimately given full international recognition in the Convention on the Continental Shelf of 1958 (15 U.S.T. 473, T.I.A.S. 5578, Arts. 3, 5(1)).

c. Thus, from the point of view of foreign nations, Louisiana's leasing activities in East Bay, even beyond the 3-mile marginal sea, were seen merely as a derivative exercise of the right of exploitation claimed by the United States wholly independently of any assertion that inland waters were involved—exactly as they have been since 1956 when the federal and state governments entered into an Interim Agreement with respect to the disputed area.

30. Assuming the relevance of any such argument (which is most doubtful in light of the Court's prior rulings in the case), there is no basis for any claim that the United States has acquiesced in Louisiana's mineral operations in East Bay and thereby conceded the character of that area as inland water.

a. Because Louisiana did not concede the application of the 1947 *California* decision to this situation, the United States filed a separate suit against Louisiana in 1948, contesting the State's right to grant mineral leases in East Bay and elsewhere.

b. When that case resulted in a judgment enjoining Louisiana from exploiting the resources of the seabed beyond "the seaward limit of inland waters" in 1950 (339 U.S. 699); (340 U.S. 899), the federal govern-

ment sought an accounting from the State with respect to all mineral resources taken from East Bay.

c. After the passage of the Submerged Lands Act in 1953, the United States sought to reopen the earlier case to fix the boundaries of the new grant. The Court denied leave (350 U.S. 812), and the federal government then filed a new proceeding against Louisiana.

d. In mid-1956, long before the hearing of the new suit, the United States obtained an injunction against Louisiana's leasing more than 3 miles from shore in East Bay (351 U.S. 978), and all subsequent operations were undertaken pursuant to the Interim Agreement of that year (as modified by a subsequent consent judgment, 382 U.S. 288), which specifically identified as claimed by the United States all areas of East Bay more than 3 miles from the shoreline.

e. That has been the consistent position of the United States through the whole subsequent proceedings which lead to the Court's decisions in 1960 (363 U.S. 1; 364 U.S. 502) and 1969 (394 U.S. 11). See para. 6, *supra.*

f. Against this background, it would be wholly anomalous if Louisiana were to prevail with respect to the very resources in dispute merely because, during the pendency of the controversy, she had—sometimes illegally—contrived to remain in possession of them.

Conclusion with respect to East Bay

31. (La. C. 22, 24, 25, 44). Louisiana has failed to prove historic title to East Bay as inland waters from which its Submerged Lands Act 3-mile grant should be measured.

C. OTHER AREAS

32. (La. F. 69–71; La. C. 22, 24, 25, 44). Louisiana's historic inland water claim as applied to other portions of the Mississippi Delta, to Caillou Bay, and to the Shell Keys area is, in all relevant respects, either weaker or no stronger than the historic claim to East Bay. Accordingly, the conclusion must be that Louisiana has failed to prove historic title to any of these additional areas as inland water for the purpose of measuring the grant made to the State by the Submerged Lands Act.

Respectfully submitted.

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