IN THE

Supreme Court of the United States

October Term, 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

VOLUME I

Brief in Support of Exceptions of the State of California to the Report of the Special Master Dated October 14, 1952, Pursuant to Court Order of December 2, 1963.

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Summary of Prior Proceedings.

In 1945 the United States sued the State of California, alleging, in part, that the United States "is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles." The complaint prayed for a decree declaring the rights of the plaintiff in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area.

After California answered, the United States moved for judgment as prayed for in the complaint. In 1947 the Court rendered a decision in which it was held that the plaintiff was entitled to the relief sought. 332 U.S. 19, 41.

Pursuant to that decision, on October 27, 1947, the Court entered its Decree, reading in part as follows:

> "1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein." 332 U.S. 804, 805.

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

Since this Decree did not define "inland waters" or "ordinary low-water mark," the Decree was not self-executing and further proceedings were required to identify the location of the marginal belt. In January, 1948, the United States petitioned the Court for a supplemental decree to determine the exact location of the marginal belt in the three segments of the coastline which were known to contain oil, ignoring the remainder of the coastline. Two preliminary references were made to a Special Master in connection with this petition. In his first Report filed on June 6, 1949, the

Special Master recommended that the location of the marginal belt should be fixed as to seven segments of the California coastline. 337 U.S. 952. In his second Report, on May 22, 1951, the Special Master stated the issues which he found to be involved in the proceedings and on June 4, 1951, the Supreme Court permitted the parties to file briefs in relation to the Report. 341 U.S. 946.

On December 3, 1951, this Court directed the Special Master to "conduct hearings and to submit to this Court with all convenient speed his recommended answers to the following questions, with a view to securing from this Court an order for his further guidance in applying the proper principles of law to the seven coastal segments enumerated in Groups I and II of the Special Master's Report of May 31, 1949, ordered filed June 27, 1949, pp. 1 and 2 of said Report." The three questions were:

> "Question 1.—What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?
>
> "Question 2.—Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers, and other inland waters to be drawn?
>
> "Question 3.—By what criteria is the ordinary low-water mark on the coast of California to be ascertained?" 342 U.S. 891.

Hearings were held and testimony was taken in Washington, D. C., and Los Angeles, California, during January, February, March and April of 1952 followed by written briefs. On October 14, 1952, the Special Master submitted to the Court his Report under the said Order of December 3, 1951, hereinafter referred to as the "Report."

On November 10, 1952, the Report was received and ordered filed by the Court. Both parties were permitted to file, and subsequently did file, Exceptions to said Report in January 1953.

More than ten years later, in March of 1963, the United States filed a Motion For Leave to File Supplemental Complaint or Original Complaint. The State of California thereupon filed an opposition to the above motion of the United States including, in addition, a Motion to Dismiss United States v. California, No. 5, Original. The United States filed a Memorandum in reply and in opposition to the State's Motion to Dismiss, dated September 1963. Finally, in November of 1963 the parties filed a joint statement regarding their correspondence and discussions between 1954 and 1963.

The Supreme Court issued its order dated December 2, 1963 (1) granting the Motion of the United States to file a Supplemental Complaint, (2) denying California's Motion to Dismiss the case, (3) allowing California sixty days to answer, and (4) allowing sixty days to both parties, should they so desire, to file additional ex-

ceptions to the Special Master's Report together with supporting briefs.

On January 20, 1964, following a joint motion of counsel for extensions of time to file, said motion was granted and the following time-schedule approved: Answer to Supplemental Complaint on or before March 2, 1964; Additional Exceptions and Briefs on or before April 1, 1964; and answering Briefs on or before May 15, 1964. The Answer of the State of California was filed on March 2, 1964. California's additional exceptions to the Special Master's Report are being filed simultaneously with this brief.

Summary of Argument.

California's Argument in support of its Exceptions to the Special Master's Report of October 14, 1952, is divided into two principal parts.

In part I, we shall show that since the enactment of the Submerged Lands Act, the central question as to the extent of California's inland waters has been transformed from one involving the paramount rights of the United States and the extent of its external sovereignty, to one involving a determination as to the historic boundaries of the State as approved by Congress and as affected by physical shoreline changes. We shall show that all of the water areas in question are included within these historic boundaries.

In part II of California's Argument, we shall show that even to the extent that principles of international

law may affect the matters presently at issue, whether directly or by analogy, the water areas in controversy are properly included as inland waters within the State's territorial boundaries, and California's coast is to be delineated as contended by the State.

A. Summary of Part I of California's Argument.

The terms and legislative history of the Submerged Lands Act, and the judicial decisions construing that Act, clearly disclose that its purpose and intent were to restore to the states, and confirm the states' title to, all submerged lands within their historic boundaries as approved by Congress. These boundaries are to be defined in accordance with criteria established at the time of a state's admission into the Union, but are affected by subsequent changes in the physical shoreline, whether natural or artificial.

California's historic boundaries are set forth in its 1849 Constitution, which Constitution was expressly approved by Congress in the California Admission Act. Both the language and historic context of this Constitution demonstrate that California's boundaries include all bays and harbors and all submerged lands between the mainland and offlying islands. California's contentions as to the meaning of the boundary provisions contained in its 1849 Constitution are supported by the official records of California's 1849 Constitutional Convention; by historical precedents available to the framers of this Constitution; and by events occurring immediately after the 1849 Constitutional Convention confirming the general understanding as to the meaning of the boundary description.

Further evidence of the correctness of California's position are the facts that the Spanish and Mexican

governments assumed exclusive sovereignty over the water areas in controversy prior to the conquest of California by the United States, and that the Treaty of Guadalupe Hidalgo, between the United States and Mexico, demonstrates the intention to vest in the United States all that jursidiction, both territorial and maritime, theretofore asserted by the preceding governments.

California's interpretation of the State's 1849 Constitution is entirely consistent with concepts of international law generally prevailing as of 1849, which concepts are valuable aids in determining the intention of the framers of the 1849 Constitution and of the Congress which approved it.

Finally, decisions in both federal and state courts, dealing with California's bays have uniformly held them to be within the State's territorial boundaries as defined in its Constitution, and on one occasion this position was urged by United States officials.

B. Summary of Part II of California's Argument.

Contrary to the Special Master's conclusions, the United States had not, as of the time of his Report, taken any consistent, uniform or traditional position establishing the criteria for fixing the baseline of the marginal belt. On many occasions, official representatives of the United States and eminent American authorities on international law had taken positions inconsistent with the criteria urged by the plaintiff in this case. Even where these criteria were applied to specific areas, these areas were outside of the United States and its possessions, and the applications did not evidence any general adherence to such criteria by the United States.

Since the date of the Special Master's Report, the United States has ratified the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and has thus, for the first time, manifested its firm adherence to principles of general application for determining the baseline of the marginal belt. To the extent that this Court deems relevant to this controversy principles of international law and United States foreign policy, this law and policy should be determined as of the date of any supplemental decree herein, rather than as of any earlier date. California's positions both as to the status of all waters between the mainland and offlying islands, and as to its bays and harbors, are consistent with the rules set forth in the 1958 Geneva Convention.

Also occurring subsequent to the date of the Special Master's Report, were definitive United Nations studies relating to the doctrine of historic inland waters which studies demonstrate that the Special Master's basic assumptions regarding this doctrine are not tenable on the basis of modern scholarship. Under presently accepted principles of international law, all of the water areas in controversy before the Special Master (with one minor exception) qualify as historic inland waters.

Since California has defined its boundaries in a manner which is, and always has been, consistent with the law of nations, and not in conflict with United States' foreign policies, the State's actions validly establish its boundaries under the principle laid down by this Court in the case of *Manchester v. Massachusetts,* 139 U.S. 240, 264 (1890).

ARGUMENT.

I

CONTRARY TO THE SPECIAL MASTER'S FUNDAMENTAL ASSUMPTION THAT THIS CONTROVERSY IS CONTROLLED BY A QUESTION OF THE TERRITORIAL JURISDICTION OF THE UNITED STATES AS AGAINST FOREIGN NATIONS, THIS SUIT, NOW CONTROLLED BY THE SUBMERGED LANDS ACT, INVOLVES SOLELY A DOMESTIC MATTER AS TO THE STATE'S BOUNDARIES, AS APPROVED BY CONGRESS, WHICH BOUNDARIES INCLUDE ALL AREAS BETWEEN THE MAINLAND AND OFFLYING ISLANDS, AND ALL HARBORS AND BAYS.

A. The Enactment of the Submerged Lands Act Has Rendered the Special Master's Report Obsolete.

1. Introduction.

Prior to this Court's 1947 decision in this case, California maintained that pursuant to the rule of *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), the states, as an incident of sovereignty, owned the lands beneath the three mile belt of marginal or territorial sea adjacent to their respective coasts. The *Pollard* case had held that the shores of navigable waters within a state's boundaries, and soils under such waters, were not granted by the Constitution to the United States, but were reserved to the states respectively. However, this Court determined that the *Pollard* rule did not apply to the marginal sea, that California was not the owner of such lands and "that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water

area, including oil." 332 U.S. 19 at 38-39. Thereafter, this Court entered a decree which provides in part:

> "1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. . . ." 332 U.S. 804, 805.

Subsequent proceedings before the Special Master were designed to define the term "ordinary low-water mark" as applied to California and to determine whether certain specified segments of coastline were inland waters within the meaning of the decree. Toward that end the Special Master, and indeed the parties, undertook to resolve these issues on the premise that the doctrine of "paramount rights" as enunciated by this Court was controlling.

However, since the Special Master filed his Report in 1952, Congress enacted both the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C. §§ 1301-15) and the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. §§ 1331-43). By these Acts, Congress purported to divide the seabed and subsoil of the entire continental shelf, all of which appertained to and was under the jurisdiction and control of the United States, between the United States and the respective states, reserving to the United States its historically recognized control of overlying waters.

The controversy in this case has thus changed from a delineation of inland waters under a concept of paramount rights and foreign policy of the United States to an interpretation of the intent of Congress under the Submerged Lands Act, which California insists is purely a domestic issue to be resolved on the basis of the State's historic territorial boundaries. In consequence of this radical change in the posture of the case, California contends that the Master's Report is now obsolete and of little aid to the Court because it was impossible for the Master to have considered the effect of the Submerged Lands Act, subsequent judicial construction thereof, or the intent and meaning Congress attached to certain key phrases used in the Act such as "coast line" and "inland waters." [California's Present Exceptions I A, B and C.]

To evaluate properly any specific conclusion or recommendation of the Master, it is essential to review the terms and legislative history of the Submerged Lands Act, judicial decisions interpreting it, and an application of the Act to California's coast.

2. The Submerged Lands Act and the Outer Continental Shelf Lands Act Divide, for Domestic Purposes, the Seabed and Subsoil of the Entire Continental Shelf Between the Nation and the States.

The following portions of the Submerged Lands Act are especially pertinent to California's position:

a. Section 3(a)[1] recognizes, confirms, establishes, and vests in the respective states title to

[1]Section 3(a) provides:

"It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the re-

and ownership of the lands beneath navigable waters within their boundaries.

b. Section 2 defines various terms used in the Act:

(1) "Lands beneath navigable waters" means lands permanently or periodically covered by tidal waters and located between the line of mean high tide and a line three geographical miles seaward distant from the state's coastline.[2]

(2) "Boundaries" includes the seaward boundaries of a state as they existed at the time of its entry into the Union, or as approved by Congress, provided such boundaries shall not extend more than three geographical miles from the coastline into the Pacific Ocean.[3]

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spective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;"

[2]Section 2 provides:

"When used in this Act—

"(a) The term 'land beneath navigable waters' means

". . . .

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles. . . ."

[3]"(b) The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or

(3) "Coast line" means "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[4]

c. Section 4 confirms the seaward boundary of each state as being three geographical miles from the coast line.[5]

d. Sections 3(d) and 6(a) reserve to the United States its constitutional control of, and paramount

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any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Coast or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;"

[4]"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;"

[5]Section 4 provides:

"The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

rights over, the waters and the submerged lands for purposes of commerce, navigation, national defense and international affairs.[6]

e. Section 9 reserves to the United States jurisdiction and control of that portion of the subsoil and seabed of the continental shelf lying seaward of lands beneath navigable waters as defined in the Act.[7]

Shortly after the Submerged Lands Act became law, Congress enacted the Outer Continental Shelf Lands Act. 67 Stat. 462; 43 U.S.C. §§ 1331-43. This latter

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[6]Section 3(d) provides:

"Nothing in this Act shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;"

Section 6(a) states:

"The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act."

[7]Section 9 provides:

"Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed."

act, dealing with the management and exploitation of the "Outer Continental Shelf," was an implementation of the Truman Proclamation (Presidential Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884) which declared that the natural resources of the subsoil and seabed of the continental shelf beneath the high seas, but continguous to the coasts of the United States, appertain to the United States and are subject to its jurisdiction and control. Section 3(a) of the Act reiterates this policy with respect to the seabed and subsoil of the "Outer Continental Shelf," but section 3(b), like the Truman Proclamation, exempts the international character of the waters of the Outer Continental Shelf from this policy.[8] Section 2(a) defines "Outer Continental Shelf" in terms of submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in the Submerged Lands Act.[9]

Reading the two Acts together, it is readily apparent that the United States, pursuant to international law

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[8]Section 3 of the Act provides:

"(a) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act."

"(b) This Act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected."

[9]Section 2(a) provides:

"When used in this Act—

"(a) The term 'outer Continental Shelf' means all submerged lands lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 of the Submerged Lands Act (Public Law 31, Eighty-third Congress, first session), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;"

(See Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L. 55), has, as against the rest of the world, claimed jurisdiction and control over the seabed and subsoil of the entire continental shelf. For purposes of such jurisdiction it can be said that the United States has an exterior boundary at the seaward edge of the continental shelf. *Cf. United States v. Louisiana,* 363 U.S. 1, 34 (1960). It is equally clear that Congress has divided the seabed and subsoil of the continental shelf between the federal government and the respective states in accordance with the formula set forth in the Submerged Lands Act. A review of the legislative history of that Act will clarify the Congressional intent as to an application of such a formula.

3. The Legislative History of the Submerged Lands Act Clearly Demonstrates Congressional Intent to Restore to the States All Submerged Lands Within Their Historic Boundaries.

As this Court noted in *United States v. Louisiana,* 363 U.S. 1 (1960), the Submerged Lands Act was the culmination of numerous attempts to resolve federal-state conflicts over their respective rights in submerged lands (363 U.S. at 6, n. 4). Contained in Appendix A attached hereto, are extensive quotations from the legislative history of this Act.

a. The Purpose and Intent of the Act Were to Restore to the States Submerged Lands Within Their Historic Boundaries.

Prior to the decisions in *United States v. California,* 332 U.S. 19 (1947), *United States v. Lousiana,* 339 U.S. 699 (1950), and *United States v. Texas,* 339 U.S. 707 (1950), it was generally assumed that the

states owned all lands beneath navigable waters within their respective boundaries; but these cases held to the contrary with respect to lands beneath the marginal belt. The primary purpose of the Submerged Lands Act was to uphold the historical expectations and usage of the various states, and to confirm or restore state title to and ownership of the submerged lands within their historic boundaries. As stated by the author of the Act, Senator Holland:

> "The truth is that Senate Joint Resolution 13 [which became the Submerged Lands Act] simply restores or gives back to the States the submerged lands within their historic boundaries which they have possessed, used and developed in good faith for over 100 years. It confirms the property to the same people who have always owned and used it. . . ." 99 Cong. Rec. 4361.[11]

Moreover, Senator Holland explained the basic concept upon which the Act was predicated, in the following words:

> ". . . It would write the law for the future as it was believed to exist in the past by restoring to the States all lands beneath navigable waters within their historic boundaries." 99 Cong. Rec. 4361.

b. THE SEAWARD EXTENT OF STATE BOUNDARIES UNDER THE ACT IS DEFINED IN TERMS OF THE STATES' HISTORIC BOUNDARIES, SUBJECT TO MAXIMUM STATUTORY LIMITATIONS.

Having decided to restore to the states ownership of submerged lands within their historic boundaries,

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[11]See also: 42 Ops. Atty. Gen. No. 16 (Dec. 20, 1963) at 3, 4, 13.

Congress had to delineate the seaward boundaries of the original states which supposedly owned no marginal sea (*United States v. California, supra,* 332 U. S. at 32-35), establish a maximum extent for such seaward boundaries, and prescribe the criteria for ascertaining a state's historic boundaries.

On the Atlantic and Pacific Coasts, Congress limited the states' seaward boundaries to three geographical miles from the coastline. §§2(a)(2) and 2(b); 99 Cong. Rec. 4114-16. Such action was predicated upon the concept that Congress was restoring ownership of submerged lands within "historic" state boundaries, provided that such boundaries did not extend beyond three geographic miles. § 2(b); 99 Cong. Rec. 4175, 2545-51, 4094-95, 4096-98. The seaward boundary of each original coastal state was confirmed at three geographical miles from its coastline. § 4; 99 Cong. Rec. 2697, 4095. Any state admitted subsequent to the formation of the Union which had not already done so was authorized to extend its boundary to a line three geographical miles from its coastline. § 4; 99 Cong. Rec. 2698; 4095. However, Congress did not intend to fix the location of the boundaries of any state. As Senator Daniel, a member of the Senate Committee on Interior and Insular Affairs and a supporter of the Act, explained:

> "Mr. President, the Holland joint resolution does not fix any boundaries or change any boundaries; it simply follows the boundaries that have been in existence since the States entered the Union, or the boundaries that heretofore have been approved by the Congress." 99 Cong. Rec. p. 4477; see also *id.* at 2632.

c. THE TERM COASTLINE REFERS TO A LINE CHANGING IN ACTUAL LOCATION BUT DEFINED IN ACCORDANCE WITH HISTORIC CRITERIA.

The term "coast line" as defined in section 2(c) does not specify whether it means a coastline fixed as of the time a state entered the Union or a changing coastline. Nor did Congress define the term "inland waters." Yet Congressional intent as to the meaning of these terms is readily ascertainable.

Whereas, in the Submerged Lands Act, Congress set a state's seaward boundaries as they existed at the time the state entered the Union, that is its historic boundaries, Congress envisioned measuring those boundaries from the coastline as it currently exists. As stated by Senator Cordon, the Acting Chairman of the Senate Committee on Interior and Insular Affairs:

> ". . . Those who prepared this bill [S. J. Res. 13] over the years took the view—and that is the way the bill is before us—that 'coastline' means the line of ordinary low water along that portion of the Coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. That is in the present tense. *It is the coastline as of now. . . .*" (Hearings in Executive Session Before the Committee on Interior and Insular Affairs, United States Senate 83d Congress, 1st Session on S.J.Res. 13, Part II, p. 1354 (1953).) (Emphasis added.)

This intention became abundantly clear when the Senate Committee on Interior and Insular Affairs debated the amendment offered by Senator Long which would have allowed a measuring of three geographical miles from the coast as it existed at the time of entry into

the Union. (1953 Senate Hearings, Part II, *supra,* 1344-45, 1353-58.)[12] Relative to the manner of measurement under S. J. Res. 13, Senator Long pointed out:

> ". . . Where there have been accretions, both manmade and natural, it is agreed under the terms of this bill that the coastline would be measured from the outward limit of those accretions." 1953 Senate Hearings, Part II, *supra,* 1357.

Further evidence that Congress was contemplating the present coastline is found in the defnition of lands beneath navigable waters in section 2(a)(3) as including "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters. . . ." As a consequence there were restored to the states all accretions to their coast. (See 42 Ops. Atty Gen. No. 16 (Dec. 20, 1963).)

In addition, Senator Cordon, in discussing S. J. Res. 13 on the Senate floor said:

> "The Senator from Oregon cannot say that as a result of the enactment of the pending measure the exterior boundary will always be as here established, since it may vary because of a change in coastline in 150 years." 99 Cong. Rec., p. 2697.

Thus, Congress not only did not intend to limit a state to its physical coastline as of the time of entry into the Union, but actually foresaw a changing coastline as a result of accretion and erosion.

Concerning the meaning of the term "inland waters" which appears in the statutory definition of "coast line" in section 2(c) of the Submerged Lands Act, it is evi-

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[12]This debate is set forth in Appendix A.

dent that: (1) Congress deliberately refused to define the term, leaving it to the courts to do so, and (2) Congress intended to place the states in the position they believed themselves to be before the decision in this case and prior to the Special Master's Report.

S. J. Res. 13 in its original form defined coastline as follows:

> "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, which includes all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." Senate Report No. 133, 83rd Cong., 1st Sess., p. 14.

The Committee eliminated all of the language after "inland waters," explaining:

> "The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it.
>
> "In this connection, however, the committee states categorically that the deletion of the quoted language in no way constitutes an indication that the so-called 'Boggs Formula,' the rule limiting

> bays to areas whose headlands are no more than 10 miles apart, or the artificial 'arcs of circles' method is or should be the policy of the United States in delimiting inland waters or defining coastlines. *The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto.*" Senate Report No. 133, 83d Cong., 1st Sess., p. 18. (Emphasis added.)

Earlier in the Committee hearings, Senator Cordon had stated:

> ". . . It does not attempt to settle by definition what are or are not inland waters. Your Chairman felt that was a field in which you could not go legislatively for years, and it was a matter that we found in the condition it is. We leave it where we found it.
>
> "We used the term 'inland waters' without attempting to say what is comprehended within the term." 1953 Senate Hearing, Part II, *supra*, p. 1285.

At this time, the Senate Committee had before it the Special Master's Report with its definition of inland waters (1953 Senate Hearings Before the Committee on Interior and Insular Affairs, pp. 1211-29); but the Committee report refused to adopt the Special Master's criteria. Indeed, the Committee debates disclose that the statutory definition of coastline did not purport to incorporate the approach that the identity of inland

waters is determined by the State Department in its international relations.

"Senator Cordon. It was sought not to get into that field because you were in a field then where, in our attempts to take care of a *purely domestic matter,* we might be putting the United States on record with a precedent *which we intended only to apply domestically* but which might be applied internationally. That was my understanding of it, and the reason that I felt there was sound reason for excluding all of these words. I do not like to exclude 'straits' if there had been straits, so-called, which are not simply broad seaward connections between the open sea on one side and the open sea on the other. I do know that there are bodies of water that are called straits that do not meet that definition." 1953 Senate Hearings, Part II, *supra,* p. 1378. (Emphasis added.)

"Senator Cordon. There is no question in the Chairman's mind as that we are not bound by any opinion, expert or otherwise, that is not comprehended in the statutes of the United States or in the decision of its courts.

". . .

"Senator Anderson. I think my position is clear in the record: that I do not regard the Boggs formula as being confirmed or denied or involved in the action we have just taken, nor do I regard the Boggs formula as being binding at all upon any of these States. I subscribe fully to what the chairman said quite awhile ago in pointing out that this bill does not seek to take away from or add to the position of these states *as they came into the*

Union." 1953 Senate Hearings, Part II, *supra,* p. 1385. (Emphasis added.)

(See Appendix A for further debates on this subject.)

Specifically, an attempt was made by Senator Douglas to amend the bill to have the three geographic miles measured from the mainland, thereby precluding any possibility that offshore islands might form the coastline. 99 Cong. Rec. pp. 4240-42. This amendment was defeated. 99 Cong. Rec. 4243. Thus, the question as to whether particular islands are included within the meaning of coastline involves a case-by-case examination, "each needing an answer depending upon the depth and nature of the waters, the distance of the islands, and many other factors." 99 Cong. Rec. pp. 2633-34.

> "Mr. Cordon. I believe that paragraph (c) is perfectly clear. It does not take into consideration the question of outside islands as islands. To the extent that they may affect the measuring of inland waters, they are comprehended." 99 Cong. Rec. p. 2634.

d. THE LEGISLATIVE HISTORY OF THE ACT DEMONSTRATES THAT THE DIVISION OF THE CONTINENTAL SHELF IS A DOMESTIC QUESTION.

As previously mentioned, one of the reasons advanced by the Acting Chairman of the Senate Committee on Interior and Insular Affairs for eliminating from the definition of coastline the phrases covering bays, straits, etc. was to avoid intruding into the international field in what was plainly a domestic matter. 1953 Senate Hearings, Part II, *supra,* p. 1378. Clearly, this Committee understood that the United States claimed

full jurisdiction over the seabed and subsoil of the entire Continental Shelf and that the proposed legislation was designed to divide that jurisdiction between the nation and the states. This allocation did not affect in any way the international relations of the United States, but involved only a domestic issue. This becomes clear from testimony before the Committee of Jack B. Tate, Deputy Legal Advisor to the State Department:

> "I should like to make it clear at the outset that the [State] Department is not charged with responsibility concerning the issue of Federal versus State ownership or control." 1953 Senate Hearings, *supra,* p. 1051.
>
> "As far as concerns the matter of the States versus the Federal Government, and the Federal Government against the States, I do not think that is a matter the State Department could pass on." 1953 Senate Hearings, *supra,* p. 1056.

Later, Mr. Tate in the course of legislative hearings approved a State Department letter to Senator Connally, which recited:

> " 'Generally speaking, so far as concerns the right of a Nation to control its own citizens at sea, the line between territorial waters and high seas is of no consequence, since the Nation has the same right of control both within and beyond that line. *The division of that control between the Federal Government and the several States of the Union is a question of domestic law which the Department is not competent to answer.* The claim of the State of Texas as to control, by its legislation citizens of other States within 3 leagues of the Texas coast may of course present

> the incidental issue of the legal extent of the territorial waters, but the essential question of jurisdiction is a matter of domestic law.' " 1953 Senate Hearings, *supra,* p. 1061. (Emphasis added.)

For further quotations from this testimony, see Appendix A.

The concept of shared jurisdiction over the continental shelf between nation and state, and the concept that such division involved only a domestic question rather than foreign policy were debated extensively on the floor of the Senate. 99 Cong. Rec. pp. 2946-47, 4074-75 (See Appendix A.) To clarify this point, section 6 of the Act reserved the paramount rights of the United States in the waters over the continental shelf. Senator Daniel explained this section:

> "Mr. Chairman, right at this point I would like to say, in further clarification of what I understand the intention of this paragraph to be, that these constitutional powers of the Federal Government are all, of course, retained by the Federal Government; they are retained without us saying so here. But in this paragraph we are making it plain that these constitutional governmental powers are paramount to the proprietary rights and to the proprietary uses of the States or their grantees. And I might add further that, the governmental powers of the Federal Government being paramount, of course, it makes the proprietary rights of the States and their grantees subordinate, and they cannot use the property in any way to interfere with the exercise of the paramount governmental powers. . . ." 1953 Senate Hearings, Part II, *supra,* p. 1324.

Thus, the Submerged Lands Act did not entirely abrogate the paramount rights doctrine announced in the *California, Louisiana* and *Texas* cases. Rather, the Act limited the paramount rights of the United States to the traditional constitutional purposes of commerce, navigation, national defense and international affairs, but transferred to the States the right to exploit a portion of the seabed and subsoil of the continental shelf.

4. Judicial Decisions Interpreting the Submerged Lands Act Demonstrate That There Has Been a Fundamental Change in the Prior Controversy, That State Ownership Is Now to Be Defined in Terms of Historic State Boundaries, and That the Question of the Extent of State Ownership Is One of Domestic Law.

Since the Submerged Lands Act was enacted in 1953. the courts have had occasion to interpret this statute.[13] A brief review of these cases should be helpful to place the Act in its proper perspective as it now affects this case.

In March 1954, in *Alabama v. Texas,* 347 U.S. 272 (1954), motions for leave to file complaints challenging the constitutionality of Submerged Lands Act of 1953 were denied, this Court ruling that: "The power of Congress to dispose of any kind of property belonging

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[13]The only cases to date which interpret the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331-43 appear to be cases determining whether compensation to be paid to injured employees is subject to Federal law or the law of the adjacent state, pursuant to the terms of that Act. See *e.g., Pure Oil Company v. Snipes,* 293 F.2d 60, 62 (5th Cir., 1961); *Guess v. Read,* 290 F.2d 622, 625 (5th Cir., 1961); *Krause v. Republic Aviation Corporation,* 196 F.Supp. 856 (E.D.N.Y., 1961); *Corrosion Rectifying Co. v. Freeport Sulphur Co.,* 197 F.Supp. 291 (S.D. Tex., 1961). See also, *Stanolind Oil and Gas Company v. Seaton,* 242 F.2d 23 (D.C. Cir., 1956), dealing with effect of Act on leases existing prior to effective date of Act.

to this United States 'is vested in Congress without limitation.' . . ." *Id.* at 273.

A United States District Court in *Justheim v. McKay,* 123 F. Supp. 560 (D.D.C. 1954) held that marginal sea lands were not "public lands" within the meaning of the Mineral Leasing Act of February 25, 1920. 41 Stat. 437, as amended, 30 U.S.C. § 181 et seq. In its opinion the court reviewed the history of control of submerged lands under the marginal sea, the 1947 decision in the instant case, and the effect of the Submerged Lands Act thereon. Specifically, the court wrote:

> "It was not until the decision in the case of United States v. California, supra, that this erroneous belief in the State ownership of all submerged land within its territorial jurisdiction was finally dispelled. In that decision the Court held that the Federal Government had paramount rights in and power over the three mile marginal belt along the California coast. This decision while it established the interest of the Federal Government in these lands did not hold that they were subject to lease under the Mineral Leasing Act. . . . The Court in the California decision did not hold that the marginal sea lands were 'owned' by, or 'belonged' to, the United States, it merely held, 332 U.S. at page 38, 67 S.Ct. at page 1668, that
>
> '* * * California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the State has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.'
>
> ". . . .

"In consideration of the belief which prevailed for many years that the States held title to all submerged lands within their territorial jurisdiction, and of the California decision which finally established the interest of the United States in these lands but did not hold that they were owned by the United States, the Court is of the opinion that the marginal sea lands have not been and cannot now be regarded as public lands of the United States.

"*The holding of the Supreme Court in the case of United States v. California, supra, was nullified by the passage of the Act of May 22, 1953, commonly known as the Submerged Lands Act.* This Act quit-claimed the paramount interest of the United States in the submerged coastal lands and confirmed and established State title to these lands. . . ." 123 F.Supp. at 566-67. (Emphasis added.)

Later, in *Justheim v. McKay,* 229 F.2d 29 (D.C. Cir., 1956), *cert. denied,* 351 U.S. 933 (1956), the District Court decision was affirmed, the Circuit Court noting: "In support of its conclusion the District Court rendered a memorandum opinion. We think its reasoning was sound and we need not repeat it here. . . ." 229 F.2d at 30.

Superior Oil Co. v. Fontenot, 213 F.2d 565 (5th Cir.), *cert. denied,* 348 U.S. 837 (1954) affirmed a dismissal of a suit by a lessee of the State of Louisiana to recover severance taxes imposed by that State for oil and gas removed from areas in the marginal sea during the period between June 5, 1950 (on which date *United States v. Louisiana,* 339 U.S. 699 [1950] was decided), and May 22, 1953 (when the Submerged Lands Act became operative). In discussing the effect of the

Submerged Lands Act on the title of the states to the submerged lands beneath the marginal sea, the court said:

> "So here, when the long and heated struggle over the title and right to possession of the land, which had been waged between the government and the state, came to an end in Public Law 31 [Submerged Lands Act], the state and appellants, as its lessees, found themselves in one of two positions equally favorable in law. *By virtue of the Act which nullified the theory on which the opinion and decision of the Supreme Court had been based, they must be held, notwithstanding the opinion of the Supreme Court, to have always and at all times had the title and right of possession, or,* if the passage of Public Law 31, which brought the long struggle to an end, is to be regarded as then conferring title on them, *this title, by the very terms of the Act declaring or establishing it, related back so as to confirm and maintain the possession and title of State and lessee as good from the beginning.*" 213 F.2d at 569. (Emphasis added.)

Subsequently, this court in 1960 decided *United States v. Louisiana,* 363 U.S. 1, *supra,* which dealt with ". . . the geographic extent to which the statute [the Submerged Lands Act] ceded to the States the federal rights established by . . . [The *California, Louisiana* and *Texas*] decisions." 363 U.S. at 7.

After an extensive review of its terms and legislative history, this Court in the 1960 *Louisiana* case recognized that the purpose of the Submerged Lands Act was to restore to the states those lands which they would have owned had the *Pollard* rule been applied to

the marginal sea. 363 U.S. at 18. Pointing out that the Act was framed in terms of "lands beneath navigable waters within State boundaries," the Court explained:

> "This framework was employed because the sponsors understood this court to have established, prior to the *California* decision, a rule of state ownership itself defined in terms of state territorial boundaries, whether located at or below low-water mark." 363 U.S. at 19-20.

This subsequent recognition of the materiality of state territorial boundaries under the Submerged Lands Act is in sharp contrast with the approach of the Special Master herein that California's boundaries were irrelevant to the question of ownership of the seabed underlying the three-mile marginal belt (see *e.g.*, Rep. pp. 37, 39). California asserts that with the passage of the Act its State territorial boundaries not only became relevant but controlling.

To determine a state's territorial boundaries, this Court in the 1960 *Louisiana* case perceived in the Act a two-fold test, to wit: ". . . boundaries which existed at the time of admission and boundaries heretofore approved by Congress." 363 U.S. at 27. This was predicated upon the basic theory ". . . that the States should be 'restored' to the ownership of submerged lands within their present boundaries, determined, however, by the historic action taken with respect to them jointly by Congress and the State." 363 U.S. at 28.

Of vital significance herein, is the conclusion by this Court in *United States v. Louisiana,* that the fixing of a national-state boundary in the continental shelf is a domestic issue. Rejecting a strong contention by the

United States that the delineation of a state's boundary in the continental shelf is circumscribed and determined solely by United States foreign policy, the Court said:

> ". . . It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. *Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable inland waters and underlying lands owned by the State under the* Pollard *rule.* Were that rule applicable also to the marginal sea—the premise on which Congress proceeded in enacting the Submerged Lands Act—it is clear that such a boundary would be similarly effective to circumscribe the extent of submerged lands *beyond* low-water mark, and within the limits of the Continental Shelf, owned by the State. For, as the Government readily concedes, the right to exercise jurisdiction and control over the seabed and subsoil of the Continental Shelf is not internationally restricted by the limit of territorial waters.
>
> "We conclude that, consonant with the purpose of Congress to grant to the State subject to the three-league limitation, the lands they would have owned had the *Pollard* rule been held applicable to the marginal sea, a state territorial boundary beyond three miles is established for purposes of the Submerged Lands Act by Congressional action so fixing it, irrespective of the limit of territorial waters. . . ." 363 U.S. at 35-36 (Emphasis added except for words "inland" and "beyond".)

The emphasized language demonstrates that the aforesaid principles apply with even greater force to inland

waters which are landward of the marginal belt and are thus even more clearly governed by domestic law.

Similarly, in discussing the boundaries of Texas, the Court, on page 51 of 363 U.S. said:

> "As we have noted, the boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new states and to define the extent of their territory, not by virtue of the Executive power to determine this country's obligations *vis-a-vis* foreign nations."[14]

5. Conclusions as to the Effect of the Submerged Lands Act.

The conclusion that the delineation of inland waters, as between the United States and the states, was and is a domestic rather than an international matter is buttressed by the provisions of sections 3(d) and 6 of the Submerged Lands Act which reserve the authority and

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[14]The Court in the *Louisiana* case rejected the argument of the States of Louisiana, Mississippi and Alabama that since their boundary descriptions included all islands within a specified distance of the mainland, their offshore boundaries extend to that distance even in areas where there were no offlying islands. The Court pointed out that "[t]he construction here contended for . . . would, in contrast, sweep within the State's jurisdiction waters and submerged lands which bear no proximate relation to any islands, and which would otherwise be part of the high seas." (363 U.S. at 69-70.) California's claim, of course, is limited to intervening waters having such proximate relation to the islands, *i.e.*, those water areas between the mainland and the islands. It is interesting to note that the United States conceded the inland water status of all such lands off the Louisiana, Mississippi, and Alabama coasts. (363 U.S. at 66, n. 108, 83.) As shown by the maps opposite page 34, California's Santa Barbara Channel is geographically analogous to the Breton and Chandeleur Sounds off the Louisiana coast. The United States' concession was apparently based upon the proposition that the ten mile limit as to bays should likewise apply to straits and sounds (U.S. Brief Before the Special Master at.172). All distances in the Santa Barbara Channel are

paramount rights of the United States for purposes of commerce, navigation, flood control, the production of power, national defense and international affairs. In the Submerged Lands Act the United States is fully protected in the performance of its international obligations and foreign affairs. Control over navigable waters remains in the United States. California's objective is to secure recognition of the State's entitlement to a valid statutory division of the seabed and subsoil of the continental shelf.

The present relevancy under the Submerged Lands Act of a state's territorial boundaries and the classification of such delimitation as a domestic issue, are diametrically opposed to the basic premise of the Special Master in this case that the delimitation of inland water and the marginal sea ". . . involves a question of the territorial jurisdiction of the United States as against foreign nations, *i.e.,* a question of external sovereignty." (Rep. p. 6.)[15] California has excepted to this basic premise of the Special Master [California's Present Exceptions I, A,B,C,], and vigorously contends that the entire controversy must be re-examined as one involving a division of the continental shelf between the nation and state pursuant to the Submerged Lands Act, which division in no wise affects the international relations of the United States.

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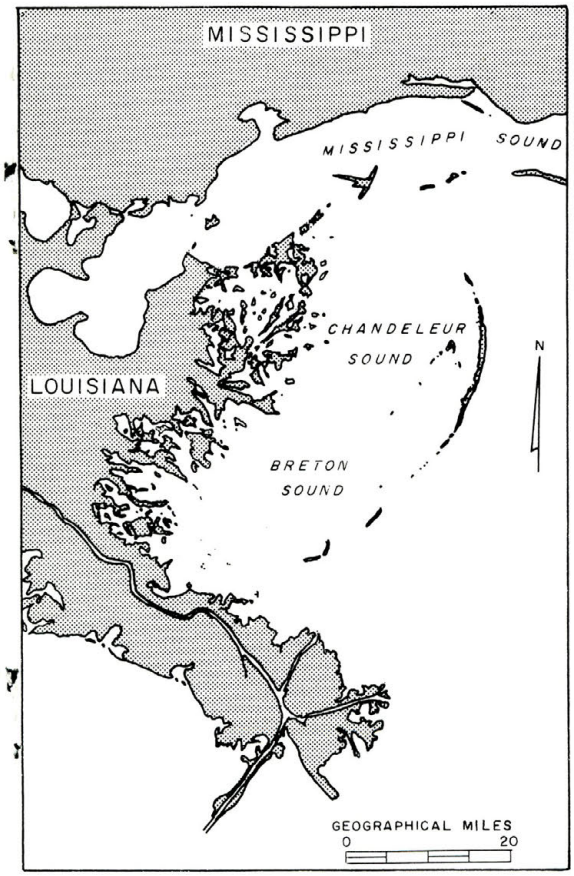
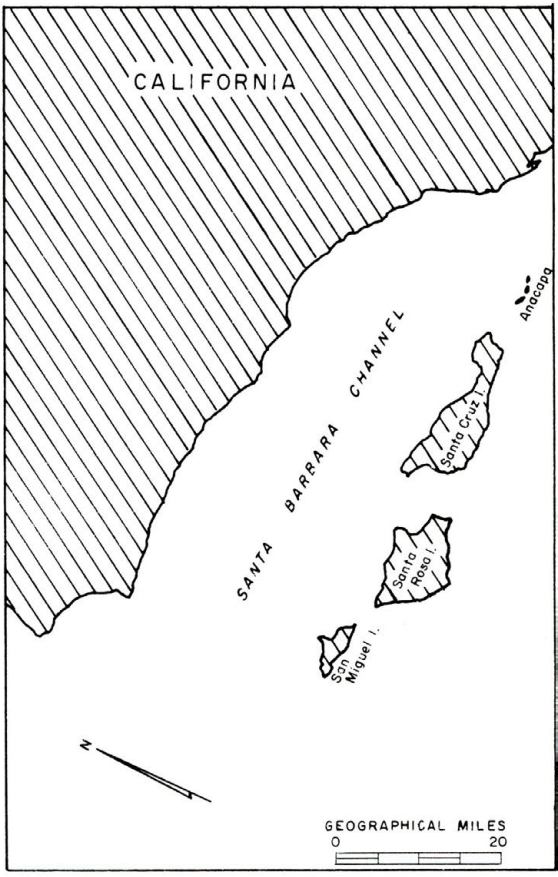
less than the maximum of twenty-four miles permitted for bays under Article 7 of the 1958 Geneva Convention as the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L. 52), which Convention is now expressive of United States foreign policy. (2 *International Legal Materials,* 527, 528 (1963).)

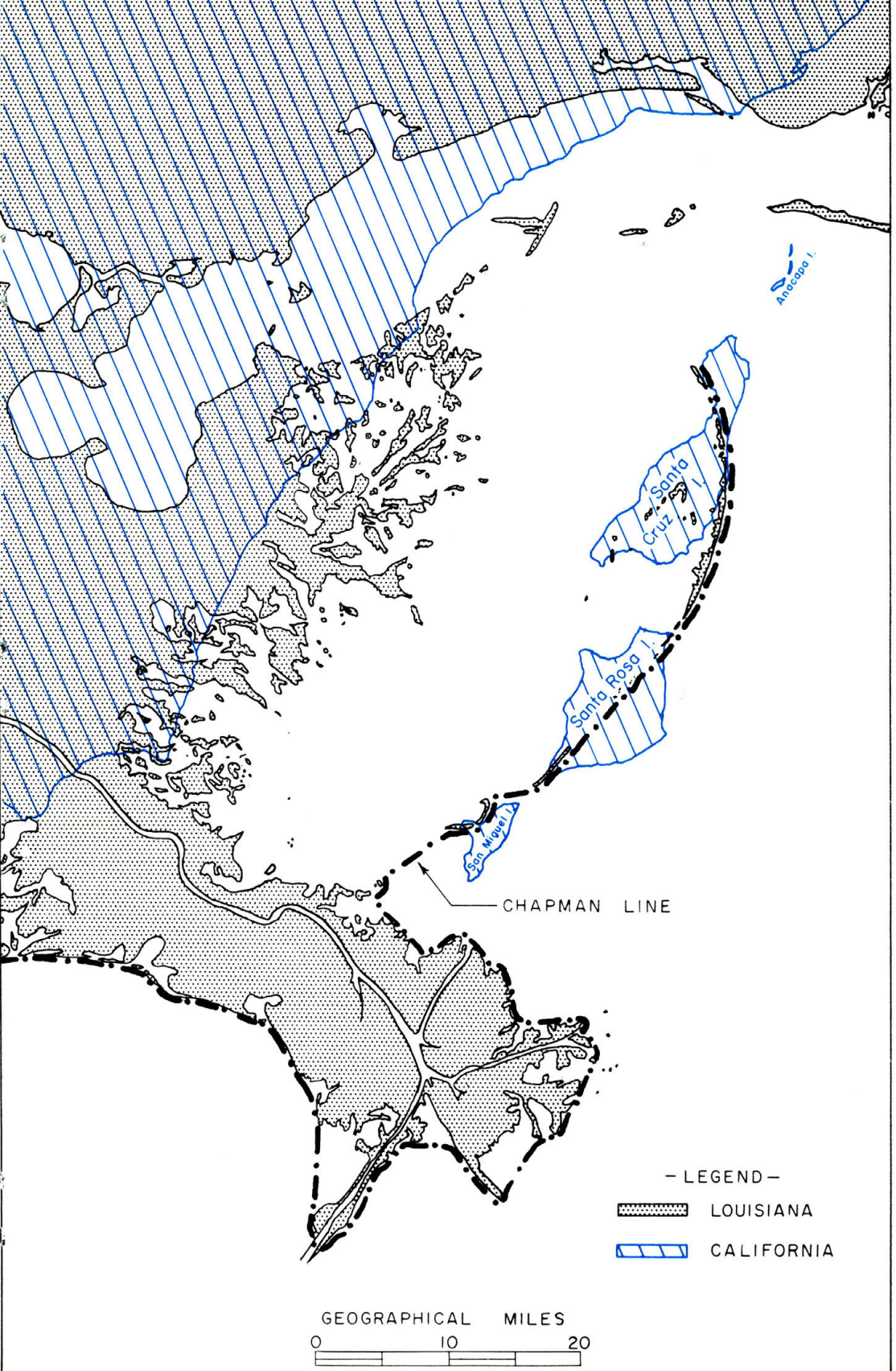
[15]All references to a Special Master's Report (Rep. p. ....) will be to his Report dated October 14, 1952, unless otherwise indicated.





Above are presented maps, in identical scale, of three areas in the Gulf of Mexico which Plaintiff concedes are inland waters within the meaning of Submerged Lands Act, and the Santa Barbara Channel, which California contends likewise constitutes inland waters.

The map on the next page is an overlay, for comparison purposes, of the Santa Barbara Channel on the map of the Gulf areas.


Anacapa I.
Santa Cruz I.
Santa Rosa I.
San Miguel I.
CHAPMAN LINE
— LEGEND —
LOUISIANA
CALIFORNIA
GEOGRAPHICAL MILES
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10
20

In light of the terms of the Submerged Lands Act, its legislative history, and the cases interpreting it, it is now necessary to turn to California's history to ascertain the territorial boundaries of California within the meaning of that Act.

B. The Boundaries of California as Established by the Constitutional Convention of 1849, and as Approved by Congress, Include All Waters and Submerged Lands Between the Mainland and Offlying Islands, and All Harbors and Bays.

Article XII of the California Constitution of 1849 established the boundary of the State of California in the following language:

> "The Boundary of the State of California shall be as follows:—
>
> "Commencing at the point of intersection of 42d degree of north latitude with the 120th degree of longitude west from Greenwich, and running south on the line of said 120th degree of west longitude until it intersects the 39th degree of north latitude; thence running in a straight line in a south easterly direction to the River Colorado, at a point where it intersects the 35th degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and Mexico, as established by the Treaty of May 30th, 1848; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast to the 42d degree of north latitude, thence on the line of said

> 42d degree of north latitude to the place of beginning. Also all the islands, harbors, and bays, along and adjacent to the Pacific Coast."[16]

Congress approved the 1849 Constitution in admitting California to the Union. (Act of Admission, September 9, 1850, 9 Stat. 452.) Although the Admission Act makes no specific reference to boundaries, the approval of this Constitution carried with it approval of the state's boundaries set forth in the Constitution. *United States v. Florida,* 363 U.S. 121 at 127-28 (1960).

The key language in the California constitutional boundary description is the phrase ". . . thence running in a northwesterly direction, and following the direction of the Pacific Coast . . ." and the concluding sentence "Also all the islands, harbors and bays along and adjacent to the Pacific Coast." Under the Submerged Lands Act, it is essential to ascertain the meaning of this phrase and sentence in order to determine the extent of the State's historic boundaries adopted in the 1849 California Constitution.

It is California's position: (a) that its seaward boundary runs three miles from a line along the shore where that shore is in direct contact with the open sea and, where this is not the case, from a line drawn across entrances to harbors and bays and along the seaward side of the islands adjacent to the coast;[17] and (b) that the

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[16]The boundary provisions of Article XII are repeated in virtually identical language in Article XXI of the California Constitution of 1879.

[17]California contends that three water areas before the Special Master are included within the boundaries of California within the meaning of the aforementioned phrase "Also all islands . . . along and adjacent to the Pacific Coast.":

1. The Santa Barbara Channel, being Segment No. 1 before the Special Master (see Report of Special Master,

term "bays" means any body of water that was considered a bay in 1849, regardless of its size or dimension.[18]

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dated May 22, 1951, Appendix I, pp. 38-44), consisting of that area between the mainland and the Santa Barbara Channel Islands within a line from Point Conception to Richardson Rock, around the seaward side of the Channel Islands to Point Hueneme, (See Map, Appendix BIC.)

2. The so-called "over-all unit area," also being within Segment No. 1 before the Special Master, under California's contention, consisting of that area landward of a line drawn from Point Loma around the islands off the Southern California coast to Point Conception. (See Map, Appendix BID.)

3. The Crescent City Segment, which is Segment 5 before the Special Master, constituting the waters within a line drawn from Prince Island to Northern Seal Rock, following the islands and rocks back to the rocks of Battery Point. (See Map, Appendix IV.) As for the remainder of California's contention as to this Segment, namely, the area between Battery Point and False Klamath Rock, with the exception of what constitutes Crescent City Harbor, it is California's understanding that this is no longer in dispute between the parties, as an envelope line drawn three miles from the shore or low tide elevations within the three miles encompasses virtually all the area formerly disputed. (See Section II C, *infra.*)

[18]The Court's attention is directed to the fact that there is no controversy as to California's ownership of the Bays of San Francisco and San Diego. Still in dispute herein are those bays considered by the Special Master, *i.e.,* Monterey, San Luis Obispo, Santa Monica, and San Pedro. To point up the radical change in the posture of this case, the status of Pelican Bay should be considered. This bay lies adjacent to Oregon and California. (See Map, Appendix IV.) A portion of this bay lies within California's claim as to Segment 5 before the Special Master, which Segment California contends is inland waters by virtue of an application of the straight baseline method of delimitation (see Section II C, *infra*) and by virtue of its being landward of "islands," as comprehended in California's constitutional boundary. Pelican Bay will not qualify as a bay under present criteria established by Article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L.52) due to insufficient depth, nor under the criteria proposed by the plaintiff. Yet evidence set forth in the Appendix can only lead to a conclusion that Pelican Bay was a known bay in 1849. As such it qualifies as Cali-

1. The Language Selected From Various Proposals Shows an Intention by the California Constitutional Convention to Select a Seaward Boundary Other Than the Shoreline

The delegates to the California Constitutional Convention of 1849 were presented with alternative boundary proposals, from which the Convention adopted the language heretofore quoted.[19] While it is true that the major boundary dispute concerned the location of the eastern boundary (*e.g.*, Browne, *Report of the Debates In the Convention of California on the Formation of the*

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fornia territory within the meaning of the California Constitution, and as inland waters within the meaning of the Submerged Lands Act. However, California has never had an opportunity to prove any claim to Pelican Bay. California also claims other bays by virtue of its Constitutional boundary description, such as Drake's Bay and Bodega Bay.

[19]In addition to the proposal finally adopted, several boundary proposals were discussed by the delegates. The Convention appointed a Committee on the Boundary (Browne, *supra,* at 54), which Committee reported a boundary, the seaward portion of which stated:

> ". . . thence west, . . . to the Pacific Ocean; thence, in a northerly direction, following the course of the Pacific Coast, to the said parallel of forty-two degrees north latitude, extending one marine league into the sea from the southern to the northern boundary, and including all the bays, harbors, and islands adjacent to the said coast; and thence, . . ."
> (Browne, *supra,* at 123-24.)

Thereafter during the debate on the boundary, various delegates submitted boundary descriptions, the seaward portions of which were:

> [McDougal Proposals:] "That the boundary . . . shall include . . .; also, the harbors, islands, and bays adjacent and along the Pacific Coast; also, to extend three English miles into said Pacific Ocean and along the coast from the 32nd to the 42nd degree of latitude north; . . . ."
> [alternate provision:]
> ". . . thence running west . . . to the Pacific Ocean, and extending therein three English miles; thence, running in a northeasterly [sic] direction and following the direction of the Pacific Coast to the 42d degree of north latitude to the place of beginning; also, all the islands, harbors,

State Constitution (Washington, 1850), 175-200), nevertheless, the Convention did consider the seaward boundary. (*Id.*, 168, 199.) Significantly, the seaward boundary ultimately adopted used the language "following the direction of the Pacific Coast" rather than some of the more restrictive proposals such as "along the coast," "following the course of said Pacific Coast," or "bounded by the said ocean." Moreover, each proposal referred to, and specifically included, all the islands, harbors, and bays adjacent to the coast. We shall demonstrate below that the language embodied in the State Constitution, in the context of the time, the territorial extent of Mexican "Upper California," the history of California and the then existing law, supports California's present contentions as to what are inland waters.

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and bays along and adjacent to the Pacific Coast." (*Id.* at 168.)

[Gwin Proposal:]

". . . to the Pacific Ocean; thence southerly along the coast of the Pacific Ocean, including the islands and bays belonging to California, to the place of beginning." (*Id.* at 169.)

[Sharmon Proposal:]

". . . thence westerly . . . to the Pacific Ocean; thence following the course of said Pacific Coast to the parallel of forty-two degrees north latitude, extending one marine league into the sea from said coast, and including all the bays, harbors, and islands adjacent to said coast, to said forty-second degree, ..." (*Id.* at 170.)

[Hastings Proposal:]

". . . thence west . . . to the Pacific Ocean; thence northerly, bounded by the said ocean, to the said 42d parallel of north latitude, includiig all the bays, harbors, and islands adjacent to, and in the vicinity of the said coast; . . ." (*Id.* at 417.)

2. The Background of the Convention Shows an Intent to Include Within California's Boundaries All the Bays and All the Waters Between the Islands and the Mainlands

California's pre-admission history is relevant to aid in construing the boundary provision of 1849. *United States v. Louisiana, supra,* 363 U.S. at 71.

a. THE BOUNDARIES SET BY THE CONVENTION ENCOMPASSED THE TERRITORY OF UPPER CALIFORNIA CEDED TO THE UNITED STATES BY MEXICO.

There is no doubt that the delegates at the California Constitutional Convention of 1849, in settling California's boundaries, dealt with all of what was then known as Upper California which had been ceded to the United States by the Republic of Mexico by the Treaty of Guadalupe Hidalgo, 1848. For example:

(1) Delegate Halleck stated:

> "In the first place, the boundary includes all of Upper California, as has always been recognized by Mexico and by the Congress of the United States, so far as any action has been had on that subject. By the treaty with Mexico and the discussions with Mexico previous to the treaty, and the maps that have been published of California since that time, and all the orders which have proceeded from our Government, these limits have been acknowledged and recognized as the limits of Upper California. . . ." [*Id.* at 175.]

(2) Delegate Carrillo, one of the delegates of Mexican descent, and a landowner under Spanish and Mexican land grants, said:

> "So far as I understand the question before the House, it is as to what are the proper limits of

> Upper California. In the year 1768, the Spanish Government formed certain limits for this country. Afterwards, when the Spanish possessions here fell into the hands of the Mexicans, the Government of Mexico always recognised and respected that as the boundary of Upper California. I am of the opinion that the proposition of the gentleman from San Francisco (Mr. Gwin) adapts the proper boundary as fixed by old Spain. . . . The only question is, what is California? It is the territory defined as such by the Government of Spain, and always recognised as such by the Mexican Government. I do not conceive that this Government has any right whatever to take the least portion away that has been ceded by the Gorverment [*sic*] of Mexico. . . ." (*Id.* at 193.)[20]

Included within the territory of Upper California ceded by Mexico was the water area lying between the mainland and the offshore islands, and all the bays. This is clearly demonstrated by the history of the Spanish and Mexican periods of California, deemed irrelevant by the Special Master (Rep. pp. 37-38). This history was ably summarized as follows by the California Supreme Court in recognizing that Monterey Bay was a bay within the meaning of the California Constitution:

> ". . . It is needless to detail the history of the increasingly troubled effort of Spain and later of Mexico to assert and maintain the sovereignty of each in turn over the indefnite region known as California and its adjacent islands, inlets, and seas;

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[20]See also the Memorial addressed to Congress by California, March 12, 1850. Browne App. XIV at XIX.

but the interesting fact may be noted as having its bearing upon whatever question of international law is involved herein that the dispute between Spain and England in the year 1790 growing out of the northwest coast fur trade was for the time being settled by the so-called Nootka Convention, wherein as between these two powers, which were then the greatest maritime powers of the known world, it was agreed that the exclusive sovereignty of Spain should be recognized and respected over all parts of the northwest coast already occupied by subjects of Spain and for a distance of ten leagues into the ocean. The agreements of this convention were ratified by the contracting powers and the claims of Spain to exclusive sovereignty and jurisdiction over the coasts of what is now California and Oregon as far north as the mouth of the Columbia River on land and to a distance of ten leagues into the ocean were conceded and confirmed. This jurisdiction over these coasts and seas and adjacent islands Spain and her successor Mexico thereafter asserted and insisted upon through rigid maritime regulations over the increasing coastal traffic during the half century or so following the date of said treaty and down to the time of the occurrence of the war between the United States and Mexico and consequent seizure of California by the former, manifested by the raising of the American flag at Monterey on July 7, 1846, and by the subsequent events which marked the passing of the old dominion. . . ." *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 242, 252 Pac. 722, 724 (1927).

In support of the California Court's summary, we have included within Appendix B hereto materials tracing the discovery, occupation, use and control of the maritime areas of Upper California during the Spanish and Mexican periods including all of the water areas presently in controversy.

The history of the Treaty of Guadalupe Hidalgo, 1848, makes it abundantly clear that the Mexican government intended to cede to the United States all water areas along the coast over which Mexico exercised dominion and control.

During the negotiation of this treaty, the Mexican representative proposed a boundary description which provided, in part:

> ". . . it shall then continue along the middle of this river to its confluence with the Colorado; and from the point of confluence of the two rivers the dividing line shall run straight to the westward to three leagues from land. . . ." 5 Miller, *Treaties and Other International Acts of the United States of America* 325 (1937).

Although as executed, the treaty contained a boundary description with a terminal point on the Pacific Coast (5 Miller, *supra,* at 326), this Mexican proposal clearly indicates the seaward extent of Upper California's boundaries under Mexican dominion.

Attached to both the American and Mexican copies of the Treaty of Guadalupe Hidalgo was a map entitled "MAPA de los ESTADOS UNIDOS DE MEJICO," generally referred to as the Disturnell Map. A reproduction of this map (Lo Publican J. Disturnell, 102 Broadway, Nueva York (1847 Revised Edition)) is

attached to volume 5 of Miller, *Treaties, etc., supra.* California regards this map to be of such pivotal significance herein that it has caused a full color reproduction to be made, a copy of which is contained in Appendix C to this brief. This map clearly discloses that water areas between the mainland and offshore islands, including the Santa Barbara Channel and the remainder of the "over-all unit area," and all bays along the coast, were regarded as part of Upper California and were ceded to the United States by Mexico pursuant to the Treaty. It is to be noted that all of these water areas are shaded so as clearly to include them within the territorial boundaries of Upper California. An examination of the Disturnell Map as a whole demonstrates that such shading was adopted on a highly selective basis, and in light of Spanish and Mexican assertions of sovereignty in these areas must be regarded as significant.

The delegates to the California Constitutional Convention of 1849 were aware of and referred to the Disturnell Map attached to the Treaty of Guadalupe Hidalgo (Browne, *supra,* at 189, 453) and nearly all of the boundary proposals made reference to the Treaty.

As the California Supreme Court stated in *Ocean Industries, Inc. v. Superior Court, supra,* 200 Cal. at 242-43, 252 Pac. at 274:

> ". . . By the terms of the Treaty of Guadaloupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1838, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. By virtue of this Treaty the United States assumed that juris-

diction over the region thus ceded, *both territorial and maritime,* which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of California and for a considerable though perhaps indefinite distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast. . . ." (Emphasis added.)

b. THE CONVENTION FOLLOWED AN OREGON PRECEDENT IN DRAWING SEAWARD BOUNDARIES AROUND OFFLYING ISLANDS AND ACROSS BAYS AND HARBORS.

The Constitutional Convention had as a precedent an Act of December 24, 1844 by the provisional government of the Territory of Oregon, which defined the boundaries of Oregon as follows:

". . . That Oregon shall consist of the follow ing territory: Commencing at that point in the Pacific Ocean where the parallel of forty-two degrees of north latitude strike the same, as agreed upon by the United States and New Mexico; thence north along the coast of said ocean, so as to include all the islands, bays and harbors contiguous thereto, to a point on said ocean where the parallel of fifty-four degrees and forty minutes of north latitude strikes the same; thence east. . . ." (Oregon, Laws of a General and Local Nature Passed by the Legislative Committee and Legislative Assembly, 1843-1849 [Salem, Oregon, 1853], 72-73.)

This Oregon boundary clearly includes all islands, bays and harbors as an integral part of the description and of necessity compels a drawing of the boundary

line around offlying islands and across bays and harbors. Such a boundary was of more than academic interest since the claim at that time was that the Oregon Territory extended to fifty-four degrees and forty minutes north latitude, which thus included many islands, bays and straits.

Indicating that the delegates to the California Constitutional Convention were aware of this provision is the fact that the Oregon Act of December 24, 1844 was signed by M. M. McCarver, as Speaker of the Oregon Legislative Assembly. Mr. McCarver also was a delegate to the California Convention in 1849. See Browne, *supra,* at 478. The reasonable inference to be drawn is that when the California Convention drew the State boundary to include all islands, harbors and bays along and adjacent to the Pacific Ocean, it intended to encompass all waters between the mainland and the offshore islands as well as waters within all harbors and bays.

c. Prior and Contemporaneous International Law and United States Practice as of 1849 Demonstrate That California's 1849 Constitution Included the Areas in Controversy Within the State's Historic Boundaries.

California contends that the phrases "following the direction of the Pacific Ocean" and "also including all islands, harbors and bays, along and adjacent to the Pacific Coast" used in its 1849 constitutional boundary were deliberately chosen to include within California's territory all waters between the mainland and offlying islands adjacent to the coast, together with all habors and bays. At this point, California will show that the

great weight of international law authority both in the United States and throughout the world at the time of the adoption and approval of the State's 1849 Constitution fully supports California's position as to the meaning of this Constitution. California maintains that the extent of the State's seaward boundaries is a question of domestic law. However, concepts of international law as of 1849 are highly relevant in determining the meanings generally attributed to the terms used in the State's 1849 Constitution at the time of its adoption, and thus are valuable aids in determining the intent of the framers of the 1849 Constitution and of the Congress when it approved this Constitution, including the boundary provisions contained therein.

1. *Contemporaneous Interpretation Demonstrates That the Terminology "All the Islands . . . along and adjacent to the Pacific Coast" Used in the California Constitutional Boundary Description Was Intended to Include Within California All Intervening Waters.*

The Special Master concluded that each island offlying the California coast has its own marginal belt. (Rep. p. 3.) However, the separation of islands in the vicinity of the coast from the territorial sea, *i.e.,* the principle that islands may have their own territorial belts, is a completely modern idea which was virtually unknown in 1849. Originally, dominion over islands followed from dominion over the sea. This concept was first noted in the fourteenth century in the classical works of Bartolus, who believed that the coastal sovereign had jurisdiction over the adjacent sea within one hundred miles, and as a result of such jurisdiction, had sover-

eignty over all islands lying within that one hundred mile belt.

> Sereni, *The Italian Conception of International Law* 71-72 (1943); see also, Fenn, *The Origin of the Right of Fishery in Territorial Waters* 101-04 (1926); 3 Gidel, *Le Droit International Public de la Mer* 26-27 (Paris, 1934).

The one hundred mile limit has long since been abandoned. However, recognition of this concept of ownership of islands lying within such a belt is found, for example, in the original charters to the colony of Virginia in 1606 and 1609, which included ". . . the islands thereunto adjacent or within 100 miles off the coast thereof" and ". . . also all the islands lying within 100 miles along the coast." (1 Hening's (Va.) Stats. (1823), 57, 80, 88 cited in Ireland, *Marginal Sea Around the States,* 2 Louisiana L. Rev. 252, 436 at 472 (1940).)

In a work published in 1872, Grotius maintained that islands in the sea belong to those who controlled the waters. (Wright, *Some Less Known Works of Hugo Grotius,* 7 Bibliotheca Viseriana 131 at 161-62 (1928).) A similar concept was expressed by Lord Hale in his classical treatise, "De jure maris" (written 1667, published 1786 by Hargrave, and reprinted in Moore, *A History of the Foreshore,* 370, 405 (3d ed. 1888).)

The Italian jurist Galiani, one of the persons principally responsible for the development of the doctrine of the three mile limit of territorial waters wrote:

> ". . . in these places where the land curves and opens into bays and gulfs, the rule is accepted by

> the most civilized nations that a line should be drawn from one point to another on the mainland, or from islands which are located beyond the promontories of the land, and all that branch of the sea should be considered as part of the territory, even where the distance between its center and the neighboring land should in every direction be larger than three miles." (Galiani, *Dei doveri dei principi neutrali* 422 Milan, 1782; see also, Azuni, *The Maritime Law of Europe,* Vol. I, at 206 (1806).)

Sir William Scott, in his decision in the English case involving "The Anna" in 1805, ruled that the three-mile limit should be measured from a group of small islands near the mouth of the Mississippi River, and not from the shore of the mainland. In support of this ruling, he clearly implied that the territory of the United States included the intervening water, stating: ". . . the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border . . ."[21] and "the right of territory is to be reckoned from those islands." (5 Robinson, *Admiralty Reports* 373, at 385c—385d (1806); Crocker, *The Extent of the Marginal Sea* 541, 542-43 (1919).)

Another well-known early 19th century author, Joseph Chitty, stated: "All writers seem so [*sic*] admit that there may be a property in Gulphs, and even in streights [*sic*], which are open at both ends." (1 Chitty, *A Treatise on the Laws of Commerce and Manufactures,* 90 (1824).)

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[21]The record before the Special Master shows that the islands off the Coast of Southern California are geologically a part of the mainland. (Tr. pp. 1059-60, 1062-64.)

The American views in the late 18th and early 19th centuries were consistent with the above European cases and authorities.

As early as 1793, the Attorney General of the United States cited with approval international law authorities indicating that gulfs, channels and straits belong to the people who own the lands adjacent thereto.

1 Ops. Att'y Gen. U.S. 32, 36 (1852).

Secretary of State Pickering, in 1796, took the position that the three-mile rule of territorial jurisdiction does not apply to "any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may." 1 Moore, *Digest of International Law* 704 (1906).

The phrase "any waters" clearly includes straits, and Pickering on another occasion, in 1797, spoke expressly of "bays and sounds" which "may be said to be landlocked, and within the jurisdiction of the Sovereign of the adjacent Country." 5 *British and Foreign State Papers* 17, 28 (1837).

The following quotation of Chancellor Kent demonstrates that waters were regarded as "landlocked" although spanning very substantial distances. It should be noted, for example, that he advocates that exclusive United States control should extend to waters enclosed by the line from Cape Ann to Cape Cod (which is thirty-eight miles) and by the line from Nantucket Island to Montauck Point (which is seventy-four miles):

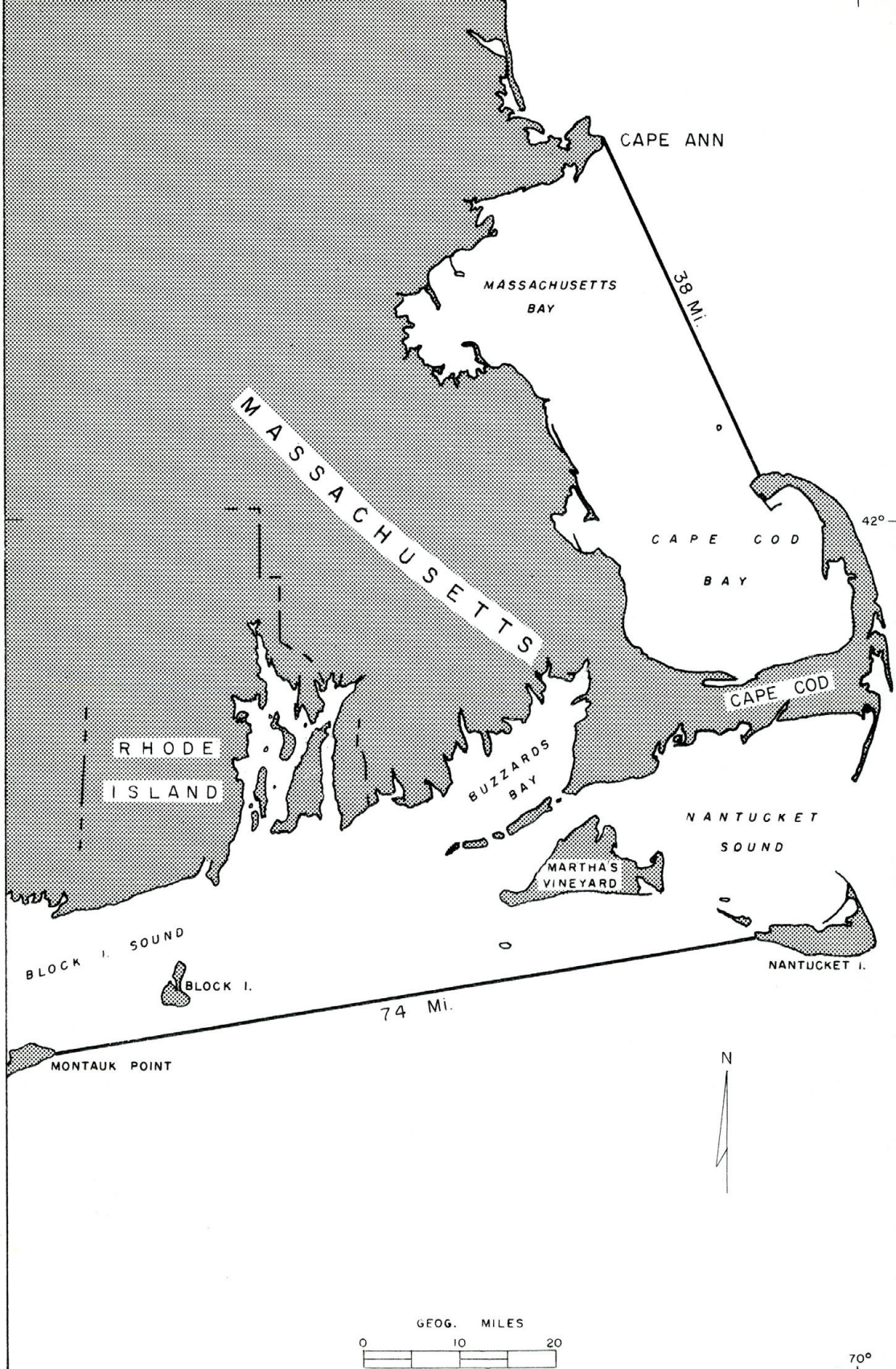
> "The extent of jurisdiction over the adjoining seas, is often a question of difficulty and of dubi-

ous right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable rivers which flow through a territory, and the sea-coast adjoining it, and the navigable waters included in bays, and between headlands and arms of the sea, belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation, and to the undisturbed use of the neighbouring shores. . . .

"It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbours, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end. A more extended dominion must rest entirely upon force, and maritime supremacy. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon shot will reach, and no farther, and this is generally calculated to be a marine league; and the congress of the United States have recognized this limitation, by authorizing the District Courts to take cognizance of all captures made within a marine league of the American shores. The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our ter-

ritorial jurisdiction; and it rested its claim upon those authorities which admit that gulfs, channels, and arms of the sea, belong to the people with whose lands they are encompassed; and it was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea, beyond the reach of cannon shot.

"Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauck Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon shot, as cruising ground for belligerent purposes. In 1793, our government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the sea shores; and, in 1806, our government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast,


CAPE ANN
MASSACHUSETTS BAY
38 Mi.
MASSACHUSETTS
42°
CAPE COD BAY
CAPE COD
RHODE ISLAND
BUZZARDS BAY
NANTUCKET SOUND
MARTHAS VINEYARD
BLOCK I. SOUND
BLOCK I.
NANTUCKET I.
74 Mi.
MONTAUK POINT
N
GEOG. MILES
0
10
20
70°

and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore. It ought, at least, to be insisted, that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within 'the chambers formed by headlands, or any where at sea within the distance of four leagues, or from a right line from one headland to another.' "

I Kent, *Commentaries on American Law* 25-30 (3d ed. 1836). (See Map, Opposite p. 52.) A similar method of delimiting the American Coast is found in Gardner, *A Treatise on International Law* 137-39 (1844).

"The maritime territory of every state extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state." Wheaton, *Elements of International Law* 142 (1836).

By a convention in 1846, the United Kingdom and the United States divided ownership of the waters of the Strait of Juan de Fuca, which strait has an opening of over 12½ miles and reaches a width of 17 miles. (1 Moore, *Digest, supra,* 158-59; See Map opposite page 54.)[22]

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[22]It should be noted that the Submerged Lands Act provides that the State of Washington may, for purposes of the Act, extend its boundaries to the center of this strait if it has not already done so. (§ 4, 67 Stat. 30; 43 U.S.C. § 1312.)

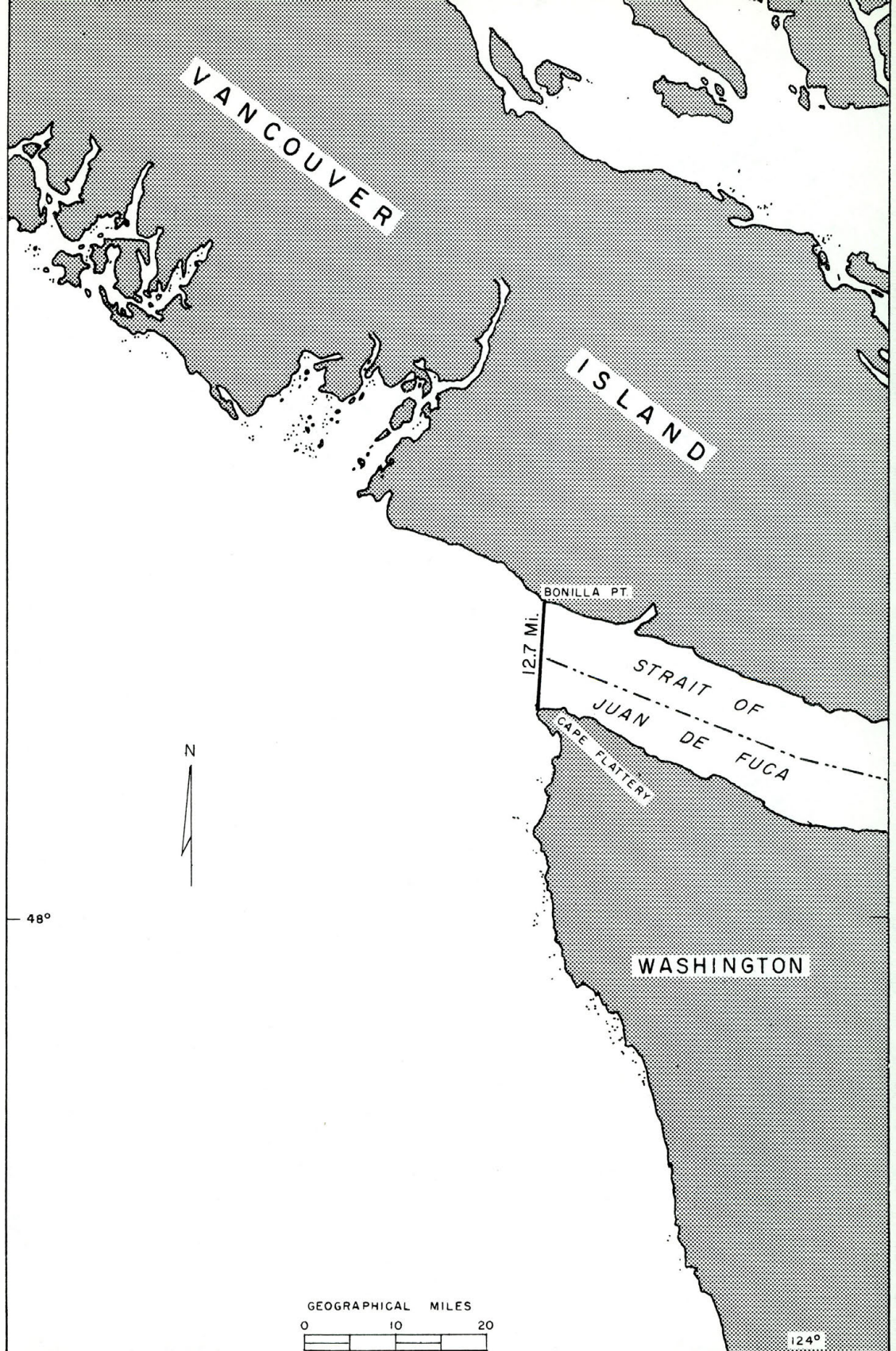
With this background, United States Secretary of State Buchanan's statement of January 23, 1849, is illuminating: "The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands; and also, to the distance of a marine league, or as far as a cannon-shot will reach from the shore along its coasts." (1 Moore, *Digest, supra,* 705.)

The above state of American and International thinking in 1849 concerning the delimitation of the marginal sea, indicates that the framers of the California Constitution of 1849 intended California's seaward boundary to be drawn three miles from a line across the entrances to bays and harbors and from a line from the mainland to the islands adjacent to the coast and along those islands.

2. *Contemporaneous Interpretation Demonstrates That the Terminology also "All . . . bays along and adjacent to the Pacific Coast" Used in the California Constitutional Boundary Description Was Intended to Include Within California All Water Areas Then Known as Bays Regardless of Their Size or Dimensions*

A review of American and international writings up to 1849 reveals what is meant by the inclusion of the phrase "Also all the . . . bays, along and adjacent to the Pacific Coast" in the California Constitutional boundary description.

The right of a state to its bays has always been regarded as a corollary of the doctrine of state sov-


VANCOUVER
ISLAND
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12.7 Mi.
STRAIT OF
JUAN DE FUCA
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ereignty over its territorial sea.[23] This was not merely a concept of sovereignty, but also involved ownership.

> "In the arms and inlets of the sea, and also in the sea itself, so far as the right of national dominion extends, the sovereign power not only exercises a right of jurisdiction, but also *a right of property or ownership.* . . ." Angell, *A Treatise on the Right of Property in Tide Waters* xii-xiv (1826).

Angell later defined an arm of the sea broadly, to include bays. (*Id.* at 60-61.)

Relying on many international law scholars, United States Attorney General Randolph in 1793 concluded that the waters of Delaware Bay belonged to the United States. (1 Ops. Att'y Gen. U.S. 32 (1852).) Secretary of State Jefferson relied on this opinion in his letter to the French Minister of May 15, 1793, and the French acquiesced. (I State Papers and Publick Documents of the United States 69, 71, 77 (3d ed. 1819).)[24]

This concept of sovereignty and ownership over bays as applied by the United States during the first half of the nineteenth century was not subject to any speci-

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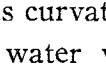
[23]See, *e.g.*, Fulton, *The Sovereignty of the Sea* 119, 156 (1911); *Direct U.S. Cable Co. v. Anglo-American Telegraph Co.* [1877] 2 A.C. 394, 417 (tracing the concept of inclusion of bays in the territory of the coastal State.)

[24]See also: Note of Secretary of State Jefferson November 8, 1793 to the French and British Ministers (I Moore, *Digest, supra,* 702-03); Article XXV of Jay Treaty of November 19, 1794 between the United Kingdom and the United States (1 Malloy, *Treaties . . . Between the United States of America and Other Powers* 590, 604 (1910);) and Article XI, Treaty of Amity, Commerce and Navigation between the United States and Mexico, April 5, 1831 (1 Malloy, *Treaties, supra,* at 1088).

fic limitations as to the distances between headlands, and was in fact applied to bays having quite distant headlands and generally to all bodies of water commonly considered as bays.

In a note to the Secretary of the Treasury on September 8, 1804, President Jefferson stated:

> "The rule of the common law is that wherever you can see from land to land, all the waters within the line of sight is in the body of the adjacent country and within common-law jurisdiction. Thus, if in this curvature  you can see from *a* to *b*, all the water within the line of sight is within common-law jurisdiction, and a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about 25 miles. I suppose that at New York you must be some miles out of the Hook before the opposite shores recede 25 miles from each other. The *3 miles* of maritime jurisdiction is always to be counted from this line of sight."
>
> (Crocker, *The Extent of the Marginal Sea* 641 (1919).

See also:

> *Commonwealth v. Peters,* 12 Met. (Mass.) 387, 392 (1847).

In a Convention concerning fisheries and other matters, concluded by the United States and the United Kingdom on October 20, 1818 (which Convention stayed in effect in its original form until amended in 1912), the United States renounced the "liberty" to take fish "within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's domin-

ions in America," with the exception of certain areas on the coast of Newfoundland and Labrador. (1 Malloy, *Treaties, etc., supra,* 631, 632.) This provision concerning bays led to a serious dispute between the parties which was submitted to the Permanent Court of Arbitration in 1910, with the United States contending that the term was limited to bays of less than six miles from headland to headland. (1 *Proceeding in the North Atlantic Coast Fisheries Arbitration,* 1/s. Doc. No. 870, 61st Cong., 3d Sess. 64 (1910).) The award of the Court of Arbitration provided that "In the case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay." (*Id.* at 97.) In resolving the problem of what is a "bay," that court said:

> "Now, considering that the treaty used the general term 'bays' without qualification, the Tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, . . .
>
> "The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of 'bays'; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which, for any one of the different bays, are to be appreciated; the relation of its width to the length

> of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general." (*Id.* at 92, 97.)

This decision makes it clear that in 1818 the jurisdiction of a State over all its bays was beyond question, and that the term "bay" was then understood in its broadest geographical sense. The writings of Wheaton and Kent, and the note of Secretary of State Buchanan in 1849, which have already been quoted, are in a similar vein. (Wheaton, *Elements of International Law, supra,* 142; Kent, *Commentaries on American Law, supra,* 25-30; 1 Moore, *Digest, supra,* 705.)

Immediately prior to the California Constitutional Convention, the Congress of the United States provided, in an Act to Extend the Revenue Laws of the United States over the Territory and Waters of Upper California, on March 3, 1849, that "all the ports, harbors, bays, rivers, and waters of the mainland of the territory of Upper California shall constitute a collection district by the name of Upper California." (9 Stat. 400.)

In the light of the state of international law and American thought at the times, the only reasonable conclusion which can be drawn is that the delegates to the California Constitutional Convention of 1849 deliberately intended to include within California all water areas then known as bays along the Pacific Coast

regardless of their geographic extent, since the dominion of a coastal nation at that time extended over all such bays.

3. Acts Occurring Immediately After the 1849 Convention Confirm California's Interpretation of Its Constitutional Boundary Provision.

Events occurring immediately after the Constitutional Convention of 1849 confirm California's contention as to the meaning of the boundary described in Article XII of the Constitution.

Between the adjournment of the California Constitutional Convention of 1849, and the admission of California into the Union on September 9, 1850, Congress had before it several resolutions concerning the formation of a Territory of California. The boundary descriptions or provisions of some of the resolutions are substantially similar to the description contained in the California Constitution. The use of such similar terminology in other boundary proposals dealing with the California coast indicates that the language used in the State Constitution to describe the State's seaward boundaries was generally recognized, and that California's coastal boundaries included the water areas referred to in its Constitution.[25]

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[25]On January 16, 1850, Senator Foote authored a proposal to form the "Territory of California" with the following seaward boundary:

> ". . . to the shores of the Pacific Ocean; thence northerly by and with the said shore to place of beginning, extending one marine league into the sea from the southern to the northern boundary aforesaid, and including all bays, harbors, and islands adjacent to the said shore, . . ." 21 Congressional Globe 168.

On February 15, 1850, Representative Doty offered a resolution instructing the Committee on Territory to prepare and report a bill providing for the admission of California into the

While the Act admitting California to the Union (9 Stat. 452) is silent on the subject of boundaries, such an act carries with it approval of the boundaries set forth in the state constitution. *United States v. Florida, supra,* 363 U.S. at 132.

One of the first acts of the California Legislature was to subdivide the State into counties. (California Statutes of 1850, 58, 59.) The first descriptions of the coastal counties shed no particular light on the boundary problem. However, a change in the Santa Barbara County

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Union ". . . with the boundaries and limits defined in the Constitution of said State of California." 21 Congressional Globe 375.

On August 1, 1850, Senator Foote presented an amendment as follows:

> "And that the said State of California shall never hereafter claim as within her boundaries, nor attempt to exercise jurisdiction over any portion of the territory at present claimed by her, except that which is embraced within the following boundaries, to wit: commencing in the Pacific ocean, three English miles from the shore at the 42d degree of north latitude; thence with the southern boundary line of the Territory of Oregon, to the summit of the Sierra Nevada; thence along the crest of that mountain to the point where it intersects the parallel of latitude of 35° 30′; thence, with said parallel of latitude *to a point in the Pacific Ocean three English miles from the shore; and thence to the beginning, including all islands, bays, and harbors, adjacent to or included within the limits hereby assigned to said State.* And a new Territory is hereby established, to be called Colorado, to consist of the residue of the territory embraced within the limits of the said State of California, as specified in the constitution heretofore adopted by the people of California; for the government of which Territory so established, all the provisions of the act relating to the Territory of Utah, except the name and boundaries therein specified, are hereby declared to be in force in said Territory of Colorado, from and after the day when the consent of the State of California shall have been expressed in some formal manner to the modification of her boundaries above described." 21 Congressional Globe 1504. (Emphasis added.)

description by Act of April 24, 1852 is significant. That statute described the County boundary as:

> "Beginning on the coast of the Pacific, at the mouth of the Creek which divides that part of the Rancho of Guadalupe, called La Larga, from that part called Oso Falco; thence up the middle of said Creek to its source; thence northeast to the summit of the Coast Range of mountains, the farm of Santa Maria, falling within Santa Barbara County; thence following the summit of said Coast Range to its intersection with the northwestern boundary of Los Angeles County; thence southwesterly, following the boundaries of Los Angeles County *to the Ocean, and three miles therein; thence in a northwesterly direction, including the Islands of Santa Barbara, San Nicolas, San Miguel, Santa Rosa, Santa Cruz, and all others in the same vicinity, to a point due west of the place of beginning; thence to the place of beginning.* The Seat of Justice shall be at Santa Barbara." Calif. Stats. 1852, c. 133, p. 218. (Emphasis added.)

This boundary conforms to the interpretation contended for by California, as the designated islands constitute an integral part of Santa Barbara County's maritime boundary.[26] This is particularly significant in view of

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[26]As a possible aid to the Court in ascertaining the intention of the California Constitutional Convention of 1849, there is attached to this brief in Appendix C, a copy of a map which has drawn on it lines indicating the boundaries of the various California counties. These lines are drawn so as to include the Santa Barbara Channel and the Channel Islands within Santa Barbara County and the remaining offshore islands within Los Angeles and Santa Barbara Counties. This map has written on its face the notation that "This very map was used by the Convention of 1849 from Alex. S. Taylor." The

the rules set by the California Supreme Court in harmonizing county boundaries with the State boundaries as set forth in the constitution:

> ". . . In interpreting this act [describing a county boundary], intended to set off the land and water area of California into appropriate political subdivisions, we are to do so in such a way as to reconcile its terms, if reasonably possible, with the language of the constitution, since it would not be presumed to be the intent of the legislature to do that which it would have no power to do, viz., to exclude from the jurisdiction of the state of California or its political subdivisions any of its land or water areas which had been embraced therein by the express terms of its constitution. This being so, if there are any ambiguities in the act in question they are to be resolved in harmony with the text of the organic law. . . ." *Ocean Industries, Inc. v. Superior Court, supra,* 200 Cal. at 243-244.

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original of this map now resides in the archives of the Santa Barbara Mission. Alexander S. Taylor was a resident of Monterey (1848-1860) and a Clerk of the Federal District Court there. In 1860 he moved to Santa Barbara where he lived until his death in 1876. He is sometimes referred to as Californía's first biographer. (See *Bancroft's Works Vol. XXII, History of California,* Vol. V, pp. 743-744 (San Francisco, 1886).) The map on which the lines were drawn was referred to as "Fremont's Map," or more particularly as the "Map of Oregon and Upper California From the Surveys of John Charles Fremont and Other Authorities, Drawn by Charles Preuss, Under the Order of the Senate of the United States, Washington City, 1848." Such a map was referred to by the delegates at the Constitutional Convention of 1849. Browne, *supra,* at 169, 171, 200, 443, 450-452, 453.

4. Court Decisions Dealing With California Bays Uniformly Held Them to Be Within California's Boundaries.

Finally, and of the greatest significance, the Supreme Court of California and Federal District Courts have construed the meaning of "bays" as used in Article XII of the State Constitution. The bays involved in each case were held to be part of California within the purview of California's Constitution.

1. *Monterey Bay*

a. *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 243, 252 Pac. 722, 724 (1927):

". . . This language in our first constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all those several bays and harbors which indent its coast. . . ."

b. *Ocean Industries, Inc. v. Greene,* 15 F.2d 862, 863 (N.D. Calif. 1926):

". . . The quoted [constitutional] language declares in effect that Monterey Bay is a part of the territory of the state."

2. *San Pedro Bay*

United States v. Carrillo, 13 F.Supp. 121, 122 (S.D. Calif. 1935):

"The Constitution of California (Const. Calif. 1849, art. 12) in its boundary description provides that the 3-mile limit shall be followed, and that the bays and harbors along the coast are included. . . ."

3. *Santa Monica Bay*

People v. Stralla, 14 Cal.2d 617, 631, 96 P.2d 941, 947 (1939):

". . . But the fundamental law (Const. art. XXI, sec. 1) has declared that the territorial bounds of the state shall include the bays and harbors along its coast; . . ."

Indeed, while the *Stralla* case was pending in the California Supreme Court, the United States Attorney at the direction of the Attorney General of the United States, filed a brief as Amicus Curiae on behalf of the State urging that Santa Monica Bay was within the territorial jurisdiction of the State of California (Amicus Curiae Brief, California Supreme Court case, Crim. No. 4227.)

It is submitted that in light of the foregoing authorities, any water areas which were generally recognized as bays at the time of the adoption of the 1849 Constitution necessarily are part of California. The general recognition of Monterey, Santa Monica, San Pedro, and San Luis Obispo Bays as such, is demonstrated beyond question in Appendix B hereto.

5. Conclusions as to California's Historic Boundaries.

From the materials previously discussed it is apparent that the California Constitution of 1849, as approved by Congress, set a seaward boundary which differs greatly from Special Master's delineation of California's inland waters. In reaching his conclusions the Special Master considered California's historic boundaries as irrelevant. (Rep. p. 37.) Whether such approach was or was not justified in 1952 is not important. What is vital is the fact that the Submerged Lands Act makes

California's historic boundaries relevant, indeed crucial, to a proper delimitation of the State's seaward boundaries. The law and the interests of fairness dictates that California should be offered an opportunity to establish that its Constitution as approved by Congress compels drawing a boundary line three geographic miles from its coast, which includes a line drawn across the mouths of all bays and harbors and from the mainland to California's offlying islands and along those islands.

C. California's Seaward Boundary Under the Submerged Lands Act Also Includes the Submerged Lands Within Three Geographic Miles of Its Present Coastline, Regardless of Past Changes Caused by Natural or Artificial Means.

The basic purpose of the enactment of the Submerged Lands Act was to restore to the states ownership and control of submerged lands within their historic boundaries. Nevertheless, our review of the terms and legislative history of the Act discloses that areas in addition to those within historic boundaries were also involved, *i.e.,* all areas within three "geographic miles"[27]

[27]In the discussion of California's historic boundaries, it was pointed out that Article XII of the 1849 Constitution spoke of "3 English miles," which term was repeated in Article XXI of the Constitution of 1879. In 1949 the California Legislature added section 170 to the Government Code (Calif. Stats. 1949, ch. 65, p. 82) to give greater precision to the constitutional boundary, and used the term "three English nautical miles." The "English" mile, otherwise known as a "statute" mile contains 5,280 feet. (Webster's New International Dictionary [2d ed. 1938] p. 1557.) The "geographical" mile, also called the "nautical" or "sea" mile contains 6,076.10,333 feet. (See "Definition of Terms Used in Geodetic and Other Surveys," U. S. Coast and Geodetic Survey, p. 57 (1948); "Technical News Bulletin," National Bureau of Standards (August, 1954).) The 1949 change is a permissible boundary extension within the contemplation of section 4 of the Submerged Lands

from the present coastline; filled lands; and accretions to the changing "coastline" itself. How does this affect the California coast?

As to lands along the Pacific Coast which have been filled or reclaimed since California's admission into the Union in 1850, the Submerged Lands Act clearly includes such lands with those to be restored to California by defining lands beneath navigable waters to include "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters." (§ 2 (a)(3); 43 U.S.C. § 1301 (a) (3).)

Obviously, it must be determined from what "coast line" of California the three geographic miles are to be measured.[28] The Special Master concluded that the ordinary low water mark should be measured along the coast as it existed at the time of survey, thereby including artificial accretions and filled lands in the shore. (Rep. pp. 4, 44-46.) He also concluded that inland waters included those waters lying landward of outermost harborworks[29] (Rep. pp. 4, 46-48), which can be considered artificial accretions or filled or made lands. California agrees with these conclusions.

Under the review of the terms and history of the Submerged Lands Act above, we have demonstrated that Congress intended the three geographical miles to

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Act. That section authorized any state admitted subsequent to the formation of the Union to extend its seaward boundaries to a line three geographical miles from its coast line and further approved any state statute so extending its boundaries. Thus, for purposes of the Submerged Lands Act, California's boundary extends three geographical miles from its coastline.

[28]For the proper method of measuring the three geographic miles, once the coast line is established, see Section II C, *infra*.

[29]This problem of "outermost harborworks" will be dealt with more fully in Section II, C, *infra*.

be measured from changing coastline as it currently exists, rather than as of 1850, and beginning at the seaward side of any accretions, be they natural or artificial. The three geographical miles, then, are to be measured from the line of ordinary low water, as it is now located on the shore, where the coast is in direct contact with the open sea, and from the line of outermost harborworks or other inland waters.

D. Conclusion to Part I of California's Argument

Briefly stated, it is California's position that the entire controversy over the precise location of the State's seaward boundaries is dependent upon the ascertainment of the intent of Congress in enacting the Submerged Lands Act and the application of that Act to the California coast. There is no doubt but that the purpose and effect of the Submerged Lands Act were to restore to the states all submerged lands within their respective boundaries, as approved by Congress. California believes that the foregoing discussion has established that all of the water areas considered by the Special Master were within the State's historic boundaries, which conclusion completely sustains California's claims to the water areas in controversy before the Special Master and also is determinative of the issues presently before this Court. However, in the second portion of this argument, we shall demonstrate that even to the extent that international law principles may affect these issues, California's position is fully supported.

II

CALIFORNIA'S CLAIMS ARE, AND ALWAYS HAVE BEEN, CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LAW AND UNITED STATES FOREIGN POLICY

A. Introductory Statement

As stated above, California's primary contention is that the enactment of the Submerged Lands Act has converted the boundary controversy from one involving the territorial extent of the paramount rights of the United States, to one involving the State's historic boundaries as recognized and approved by Congress.

Stated otherwise, we are now faced with a domestic law question as to the division of the seabed and subsoil of the continental shelf as between the State and Federal governments, a question which does not involve the foreign relations of the United States nor the territorial extent of our external sovereignty as against foreign nations.

However, without retreating from this basic position, California intends in this portion of its brief to demonstrate that its contentions are fully supported by international law principles and United States foreign policy even if such principles or policy *are* deemed relevant to this controversy (whether directly or by way of analogy).

California contends that the Special Master's conclusions were erroneous when made, and, perhaps even more importantly, that these principles have been so modified and clarified by events occurring since the filing of the Special Master's Report of October 14, 1952, as to require a complete reexamination of his former conclusions.

As stated by this Court in *Manchester v. Massachusetts,* 139 U.S. 240, 264 (1890): "Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea. . . ." Thus, even if international law principles are to be considered in determining California's boundaries, the historic boundaries asserted by this State (as set forth in part I of this Argument) are valid unless they go beyond what is permitted by the law of nations, or are contrary to principles or policies specifically adopted by the United States in the conduct of its foreign relations.

The Special Master (Rep. pp. 7, 8, 9), as well as the parties, recognized that there did not exist, as of 1952, any customary, generally recognized rule of international law that established as a matter of common right under the "law of nations" the criteria by which the baseline of the marginal belt was to be located.

In the following discussion, we intend to demonstrate that, contrary to the Special Master's assertion (Rep. pp. 21, 27, 36), the United States had not, as of 1952, taken a consistent and uniform, or "traditional" position for the fixing of the marginal belt. Thus, as of 1952, California's historic boundaries were entirely valid, even if subject to considerations involving external sovereignty.

California further intends to show that since the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L.52) (ratified by the United States with the advice and consent of the Senate in 1961) there *now do exist* rules of international law establishing the criteria by which the baseline of the marginal belt is to be located, and

that the boundaries asserted and historically established by California are consistent with these rules.

In conformity with the well established rule that courts will apply the law in effect at the time of adjudication, it is California's position that international law principles (to the extent they are deemed applicable) should be applied as they exist today. This rule applies with special force to the present situation where formerly no true criteria were available, but where such criteria have now been clearly and unequivocally adopted.

B. The United States Had Not Either as of 1947 or 1952, Taken a Consistent, Uniform, or Traditional Position Establishing the Criteria for Fixing the Baseline of the Marginal Belt

In its present exceptions[30] California has taken issue with the Special Master's following conclusions:

> 1. "[T]he United States has traditionally taken the position that the baseline of the marginal belt is the low-water mark following the sinuosities of the coast, and not drawn from headland to headland, except that at bays, gulfs or estuaries not more than ten miles wide the baseline is a straight line drawn across the opening of such indentations, or where such opening exceeds ten miles in width, at the first point therein where their width does not exceed ten miles; and that it has not in its international relations asserted the criteria proposed by California or any criteria that would mark as inland waters any greater water area on the coast

[30]See California's Present Exceptions V A, IV A, IV E and G, VIII C, VIII B, and IV B.

of California than is here conceded by the United States, except for a possible but not now significant hiatus as to the depth of bays. . . ." (Rep. p. 21.)

2. "Subject to the special case of historical waters (post p. 30) it seems clear enough that the rule stated by the Secretary of State in his letter of November 13, 1951 [covering each offshore island having its own marginal belt] is and has traditionally been the position of the United States in international relations. . . ." (Rep. p. 27.)

3. "Subject to the special case of historical waters, the position of the United States as to straits connecting two areas of open sea, as set forth by the Secretary of State (*ante* p. 9), is that if both entrances are less than six nautical miles wide the strait is territorial waters but never inland waters. Otherwise, the marginal belt is to be measured in the ordinary way. If the strait is merely a channel of communication to an inland sea the ten-mile rule regarding bays should apply." (Rep. p. 27.)

4. "The rationale of all the decisions [*Ocean Industries Inc. v. Superior Court,* 200 Cal. 235, 252 Pac. 722 (1927); *Ocean Industries Inc. v. Greene,* 15 F.2d 862 (N.D. Calif., 1926); *People v. Stralla,* 14 Cal.2d 617, 96 P.2d 941 (1939); *United States v. Carrillo,* 13 F.Supp. 121 (S.D. Calif. 1935)] is, I think directly in conflict with the position which the United Stats had then taken and now takes in its international relations." (Rep. p. 34.)

5. "It is equally clear, however, that the position taken in that [amicus curiae] brief [of the United States in *People v. Stralla, supra*] is squarely in conflict with the traditional position of the State Department in our international relations." (Rep. p. 36.)

6. "The discussion [in California's Brief] starts with the interpretation of California's Constitution which California successfully pressed in the Courts, and which I have found to be contrary to the interpretation inherent in the traditional position of the United States limiting the headland-to-headland doctrine to bays not more than ten miles wide (*ante* pp. 34-35)." (Rep. p. 37.)

With respect to the aforesaid exceptions, California maintains that as of the time of the Master's report the United States had no firm, consistent or traditional policy or position concerning the criteria for delimiting the marginal belt.[31]

A review of the history of the foreign relations of the United States demonstrates that, as of 1952 the United States had adopted no consistent policy on the delimitation of the marginal belt and inland waters and that any specific determinations were not promulgated as standards of general application, but rather were simply *ad hoc* solutions to particular problems dealing with limited geographical areas, and were subject to many exceptions.

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[31]California does not dispute that the United States has traditionally adhered to the position that the width of the marginal sea is three nautical miles. *United States v. California,* 332 U.S. 19, 33 (1947); *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 122-24 (1923). What is controverted is the method by which the baseline for measuring the three mile marginal belt should be determined.

In a prior discussion of California's historic boundaries, we have described the international law principles generally accepted in the United States up to 1850 with respect to delineation of the territorial sea. (See Section IB, *supra.*) At this point, we shall carry this historical study through the next hundred years in order to demonstrate the inaccuracy of the Special Master's aforesaid conclusions.

By a convention in 1846, the United Kingdom and the United States divided ownership of the waters of the Strait of Juan de Fuca, which strait has a seaward opening of twelve and one-half miles and reaches a width of seventeen miles. 1 Moore, *Digest, supra,* 158-159. (See Map, opposite p. 54.) Since this Strait exceeds ten miles in width, and is an important internationally used waterway, its classification as inland waters subject to the exclusive jurisdiction of the adjoining nations is, of course, entirely inconsistent with the so-called "traditional" position of the United States.

Both before and during the American occupation of Cuba following the Spanish-American War, the United States recognized and asserted that the Cuban marginal belt was to be measured from the seaward side of the offlying keys or islands.[32] It was also clearly implied that the United States took a similar view regarding the Florida keys.[33] As shown on the map opposite p. 74,

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[32](See Letter from Secretary of State Seward to Spanish Minister, 1863, 1 Moore, *Digest, supra,* 711; Letter from Secretary of State Fish to the Secretary of the Navy, 1869, *Id.* at 713; Ordinance for Custom Collection in Cuba promulgated by the United States Secretary of War, 1901, 2 Coleccion Legislativa de Cuba, p. 91.)

[33]See Secretary of State Seward's letter, 1 Moore, *Digest, supra* 711.

some of the water distances between these keys were far greater than the ten mile limit referred to by the plaintiff and the Special Master.

Assistant Secretary of State Wilson in 1909, in noting that certain waters and bays are not included when measuring the marginal belt, used the oft-repeated phrase ". . . any waters or bays which are so landlocked as to be, without question, only in the jurisdiction of the United States," without prescribing any geographic criteria or formula for defining such areas. 1 Hackworth, *Digest of International Law* 634 (1940). This phraseology, that ports, harbors, bays and other inclosed arms of the sea form a coastline from which the marginal belt it to be measured, without prescribing the manner in which such waters are to be determined, permeates the entire history of United States foreign policy.[34] This Court used similar language in *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 122 (1923). This phraseology has been applied to water areas having quite distant headlands and which do not comply in other respects to the criteria contended for by the plaintiff and approved by the Special Master.[35] Indeed,

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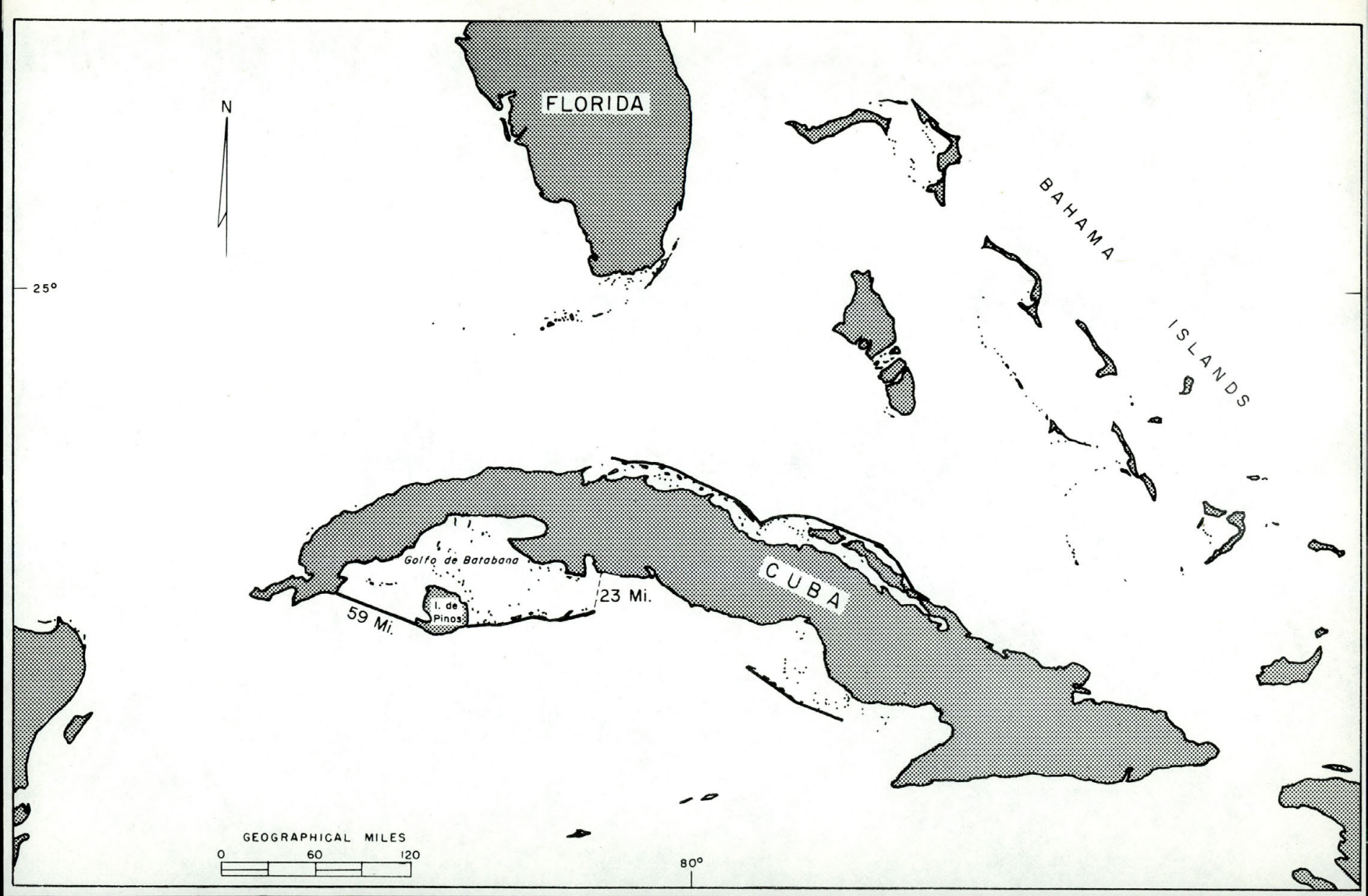
[34]This phrase was used as early as 1793 in the famous notes of Secretary of State Jefferson to the British and French Ministers. (1 Moore, *Digest, supra,* 702-03.) See also: Letter from Secretary of State Pickering to the Lieutenant Governor of Virginia, September 2, 1796 (*Id.* at 704). Similar language appears in the regulations of the Commissioner of Internal Revenue pursuant to the National Prohibition Act of 1919 (41 Stat. 305 (1919), 42 Stat. 222 (1921) which regulations defined the territorial waters of the United States. (Reg. 60, II-1 Cum. Bull. 327 (1923); 2 United States Bureau of Industrial Alcohol, Regulations § 2201 (1931).) See also: Article 1 of Liquor Treaty between the United States and Great Britian (January 27, 1924), 43 Stat. 1815 (1924), and the United States Comment regarding this Article. I Foreign Relations of the United States 217-18 (1923).

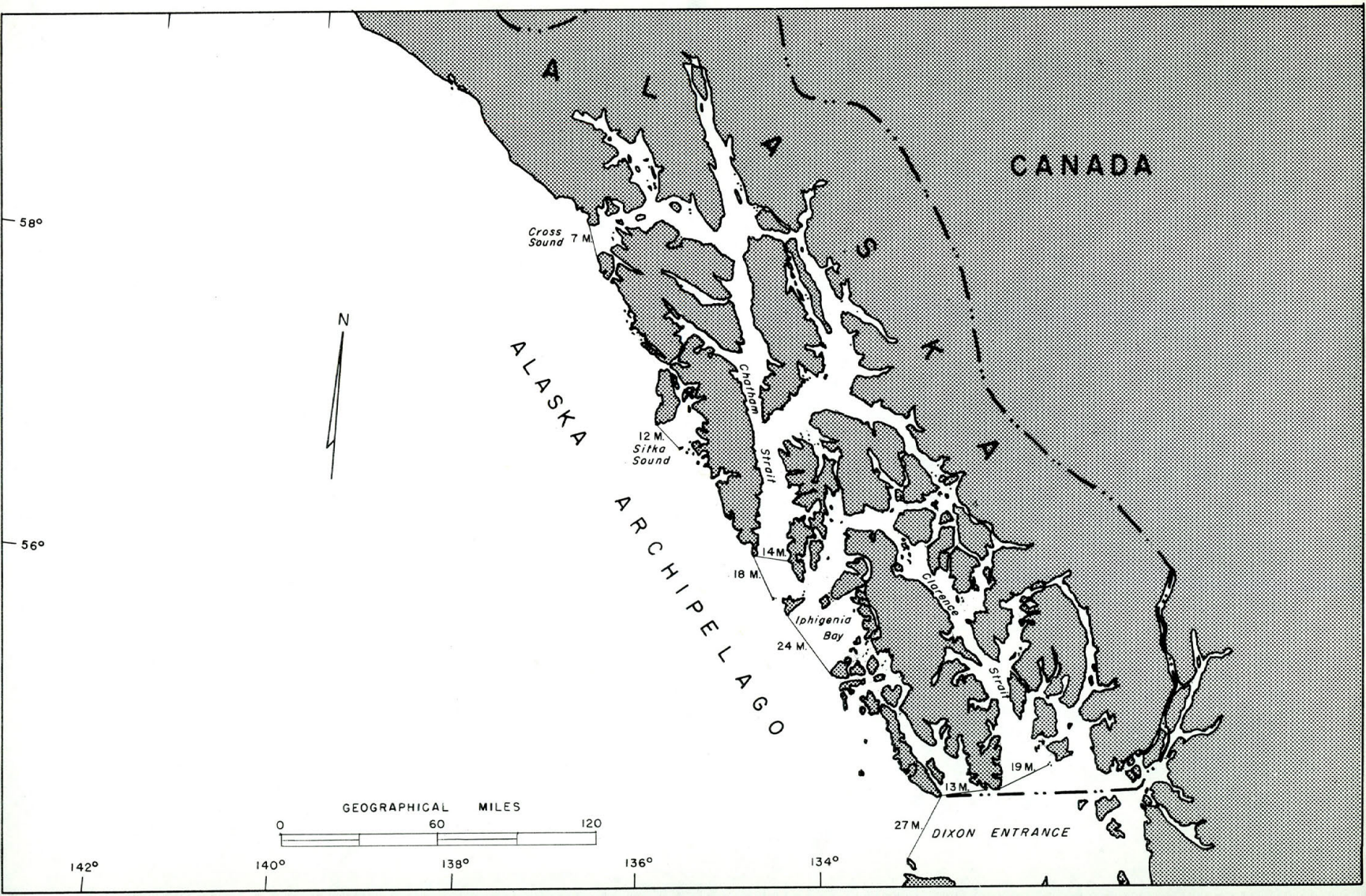
[35]*E.g.,* 1 Ops. Att'y Gen. U.S. 32 (1852), applying this language to Delaware Bay having headlands over ten miles apart.


N
FLORIDA
BAHAMA
ISLANDS
25°
CUBA
Golfo de Batabano
I. de Pinos
59 Mi.
23 Mi.
GEOGRAPHICAL MILES
0
60
120
80°

as will be shown below, it has been applied specifically to two of California's bays (Monterey and San Pedro) at issue in the present litigation.

Under the discussion of the meaning of the phrase "all . . . harbors and bays . . ." contained in California's Constitutional boundary description [part I B, *supra*], we noted that the Permanent Court of Arbitration in 1910 held that the term "bays" as used in the treaty of 1818 between the United States and Great Britain (1 Malloy, *Treaties, etc., supra,* 631, 632), referred to any bay generally known as such, regardless of its size or dimensions. (*Proceedings in the North Atlantic Coast Fisheries Arbitration,* 1 S. Doc. No. 870, 61st. Cong., 3d Sess. 64, 94-97 (1912).) The inconsistent attitude of the United States during this period is demonstrated by these arbitration proceedings. There was an attempt to amend the original Treaty of 1818 which was involved in the aforesaid dispute, by another Treaty of February 18, 1888 (79 British and Foreign State Papers 267, 268). This latter treaty limited the term "bays" to those areas of less than ten miles in width, but was never ratified by the United States. In the course of the 1910 arbitration, the United States contended that the 1818 treaty applied only to bays of less than six miles between headlands. (*Proceedings, etc., supra,* at 94-97.) The Tribunal rejected this contention, but recommended to the parties that they adopt a ten mile closing rule for bays for *future* application, which recommendation was adopted in a treaty dated July 20, 1912 between the United States and the United Kingdom. (37 Stat. 1634, 1636-37 (1912).) Yet even then this treaty provided for numerous exceptions.

The attitude of the United States before the Permanent Court of Arbitration in 1910 in the North Atlantic Coast fisheries dispute is in sharp contrast with the position of the Government in the Alaska Boundary Arbitration of 1903, involving the location of the boundary line between Alaska and British Columbia set by treaty at ten leagues landward from the "coast." In the Alaskan matter, the representative of the United States asserted that in locating the "coast" for purposes of measuring the marginal belt (as distinguished from the physical coast which was to be used for purposes of measuring the disputed boundary), the baseline was to be a line circumscribing the numerous islands, bays, inlets, straits and channels of the Alaska Archipelago. (*Proceedings of the Alaskan Boundary Tribunal,* 5 S. Doc. No. 162, 58th Cong., 2d Sess. 15-16 (1903).) Before the Special Master in the instant case, the United States argued that as a matter of fact no opening in the Alaska Archipelago exceeded ten miles (United States Brief Before the Special Master, pp. 85-88), and therefore the Government's attitude with respect to the Alaskan coast was consistent with the "traditional position of the United States." However, as shown on the map opposite p. 76, many of the openings in the Alaska Archipelago are far in excess of ten miles. There is, of course, an inherent inconsistency between the United States recognition of such an exterior coastline in the Alaskan arbitration in 1903, and the urging of a six mile limitation in the North Atlantic Coast Fisheries Arbitration in 1910. Moreover, the very drawing of a baseline outside the Alaskan Archipelago constituted a drastic departure from the so-called "traditional position" of the United


ALASKA
CANADA
58°
56°
Cross Sound
7 M.
N
ALASKA ARCHIPELAGO
Chatham Strait
12 M.
Sitka Sound
14 M.
18 M.
Clarence Strait
Iphigenia Bay
24 M.
19 M.
13 M.
27 M.
DIXON ENTRANCE
GEOGRAPHICAL MILES
0
60
120
142°
140°
138°
136°
134°

States that the baseline of the marginal sea follows the sinuosities of the coast, especially in light of the extensive water distances traversed by such a baseline.

This inconsistency and lack of definite criteria for delimiting bays continued during the 1920's. For example: In 1927, Under Secretary of State Grew, in a note to the Chairman of the International Fisheries Commission, wrote:

> "In the absence of any accepted standard as to their size and conformation, it is difficult to determine in any given case whether a bay, gulf or recess in a coast line can be regarded as territorial waters. Under the applicable general principles of international law, however, as evidenced by writers on the subject, it may be stated that gulfs and bays surrounded by land of one and the same littoral State whose entrance is of such a width that it cannot be commanded by coast batteries are regarded as non-territorial. . . ." 1 Hackworth, *Digest of International Law* 708 (1940).

This reference to the width commanded by coastal batteries, made in 1927 when the range of such batteries was in excess of fifteen miles,[36] is highly significant.

In 1929, the State Department advised the Norwegian Legation:

> "The geographic points for drawing up the basic lines for the territorial waters and the fishery boundary, with the exception of certain limited areas covered by special treaty or agreement, *have not been determined by the United States.* Agen-

[36]Tschappet, *Text Book of Ordinance and Gunnery* 355 (1917).

> cies of the Federal Government have made their own determinations for administrative purposes; for example, the Steamboat Inspection Service has made certain decisions regarding lines separating inland waters from the high seas. However, *no final determination has been made which would be binding alike upon all agencies of the Federal Government.*
>
> "No general statutes defines the territorial waters of the United States." 1 Hackworth, *Digest, supra,* pp. 644-45. (Emphasis added.)

Nor is there any such statute today.

As the Special Master in the instant case correctly pointed out:

> "At the Hague Conference of 1930, a carefully prepared attempt was made to reach agreement on some such rules [fixing the baseline of the marginal belt] among the maritime nations there represented. . . ." (Rep. p. 8.)

However, this attempt was notably unsuccessful.[37] An uninstructed United States delegation (I Foreign Relations of the United States 208-09 (1930)) attended this Conference and proposed various rules, some of which are the basis for the conclusions in the State Department letter of November 13, 1951 relied upon by the plaintiff in proceedings before the Special Master. (United States Brief, pp. 167-73.)[38] The "Boggs"

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[37]The rules embodied in the report of the Second Sub-Committee were never adopted by its parent Second Committee or by the Convention itself. (3 Acts of Conference for the Codification of International Law, 217 (1930); 24 Am.J. Int'l. L. Supp. 247 (1930).

[38]As will again be noted below, the State Department letter is strangely silent on two proposed rules discussed and drawn up

formula for measuring depth of bays was never adopted and was admittedly only a "first attempt" to obtain a rule in this area. 3 *Acts of Conference for the Codification of International Law,* 218-19 (1930); Boggs, *Delimitation of the Territorial Sea,* 24 Am. J. Int'l. L. 541, 555 (1930). Significantly, the plaintiff has apparently abandoned the Boggs formula in these proceedings, as is shown by the criteria set forth in paragraph X (b) of the Supplemental Complaint.

Demonstrating that the rules and criteria enunciated in the report of the Second Sub-Committee at the Hague Conference did not represent the position of the United States on these matters in 1930, is the fact that there have been many subsequent departures from these rules and criteria. These departures are apparent from the following examples of positions taken by the United States and its courts between 1930 and 1952.

In 1935, the United States District Court for the Southern District of California held that San Pedro Bay from Point Fermin to Point Lasuen, a distance of more than ten miles, and encompassing an area that does not meet the Boggs formula, consists of inland waters rather than high seas. *United States v. Carillo,* 13 F.Supp. 121, 122 (S.D. Calif. 1935). In that case the Department of Justice took a position contrary to the holding, but did not appeal the decision. This decision, then being the highest determinative authority on the question presented, is binding on the United

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by the Second Sub-Committee of the Second Committee, concerning low-water mark and harbor works. (See *Report of Sub-Committee No. II,* 24 Am. J. Int'l L. Supp. 247-53 (1930); 3 Acts of Conference 206, 218 (1930).) The rule concerning outermost harbor works was proposed by the United States. (3 Acts of Conference 200.)

States and has become part of the Government's official position. It cannot be dismissed by a statement that it is contrary to the so-called traditional position of the United States, particularly when it has been given world-wide notoriety as establishing the status of this area in international law and has been cited and relied upon as international law authority by the United States State Department. (See United Nations International Law Commission, II, Yearbook 61 (1950).)

Additionally, in 1939 the United States Attorney for the Southern District of California, pursuant to permission from the Attorney General of the United States (United States Reply Brief Before the Special Master, App. pp. 86-87) filed an amicus curiae brief in support of the People of the State of California in *People v. Stralla,* 14 Cal.2d 617, 96 P.2d 941 (1939). (California Brief Before the Special Master, Apps. 2 and 3.) That brief forcefully urged that Santa Monica Bay between Point Dume and Point Vicente, a distance of more than ten miles and containing an area less than required by an application of the Boggs formula, was within the territorial boundaries of California. The significance of the United States' position in the *Stralla* case cannot be dissipated by an assertion that the Government's attitude therein was contrary to the traditional position of the United States. (Rep. p. 34.) Certainly, a brief filed with the permission of the Attorney General of the United States, with or without consultation with the State Department, should be regarded as an integral part of the Government's policy. At the very least, the United States' *Stralla* brief is strong evidence that the alleged traditional criteria advocated by plaintiff before the Special Master in 1952

were not well defined or well known in 1939, even within the confines of the United States Government.

In the 1945 edition of his leading treatise on international law, Professor Hyde, former Solicitor of the State Department, wrote concerning the position of the United States regarding offshore islands:

> "Moreover if, in a particular case, the geographical relationship of the entire series to the neighboring mainland coast causes the islands to be a natural frontier between itself and the ocean, it is believed that that circumstance may not unreasonably be made the basis of a broad territorial claim to water that connects them with each other." 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 485 (2d ed., 1945).

In the same volume Professor Hyde expressed his view that certain broad bays and sounds along the coast of Alaska and Maine could be claimed by the United States, without regard to the distance between headlands.

> "The coast of Alaska is indented by certain bays of broad dimensions which by reason of their relation to the land, appear to belong in a geographical sense to the sovereign thereof. Kotzebue Sound (facing the Arctic Ocean) or the inner portions of it, Golofnin Bay inside of a line from Cape Nome to St. Michaels Island, Kuskokwim Bay, Bristol Bay (inside of a line drawn from Igagik to Protection Point, Cook Inlet from a line drawn between Cape Elizabeth and Kaguyak, and Yakutat Bay inside of Ocean Cape, are instances. They are water areas which, regardless of the distance

> between headlands, it is believed that the United States may formally claim to be its own without violating any requirement of international law. Again, on the coast of the State of Maine, the outer reaches of Penobscot Bay inside of a line connecting Monhegan Island, Matinicus Rock, Seal Island, Isle Au Haut, and Long Island are understood to be deemed by the United States to be a part of its territorial waters." (*Id.* at 473.)

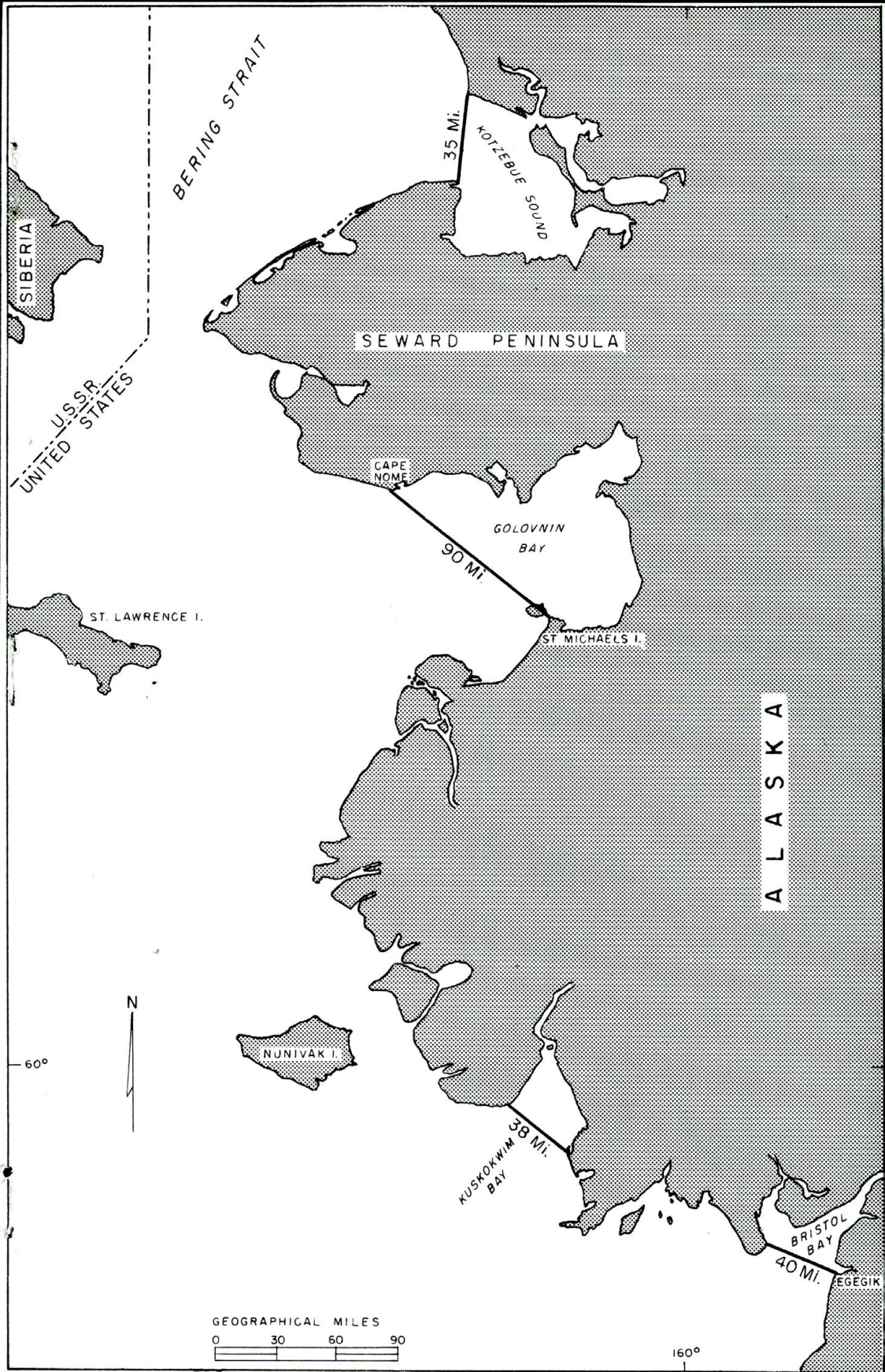
(See Maps opposite page 82, showing the distances involved in the areas mentioned by Professor Hyde.)

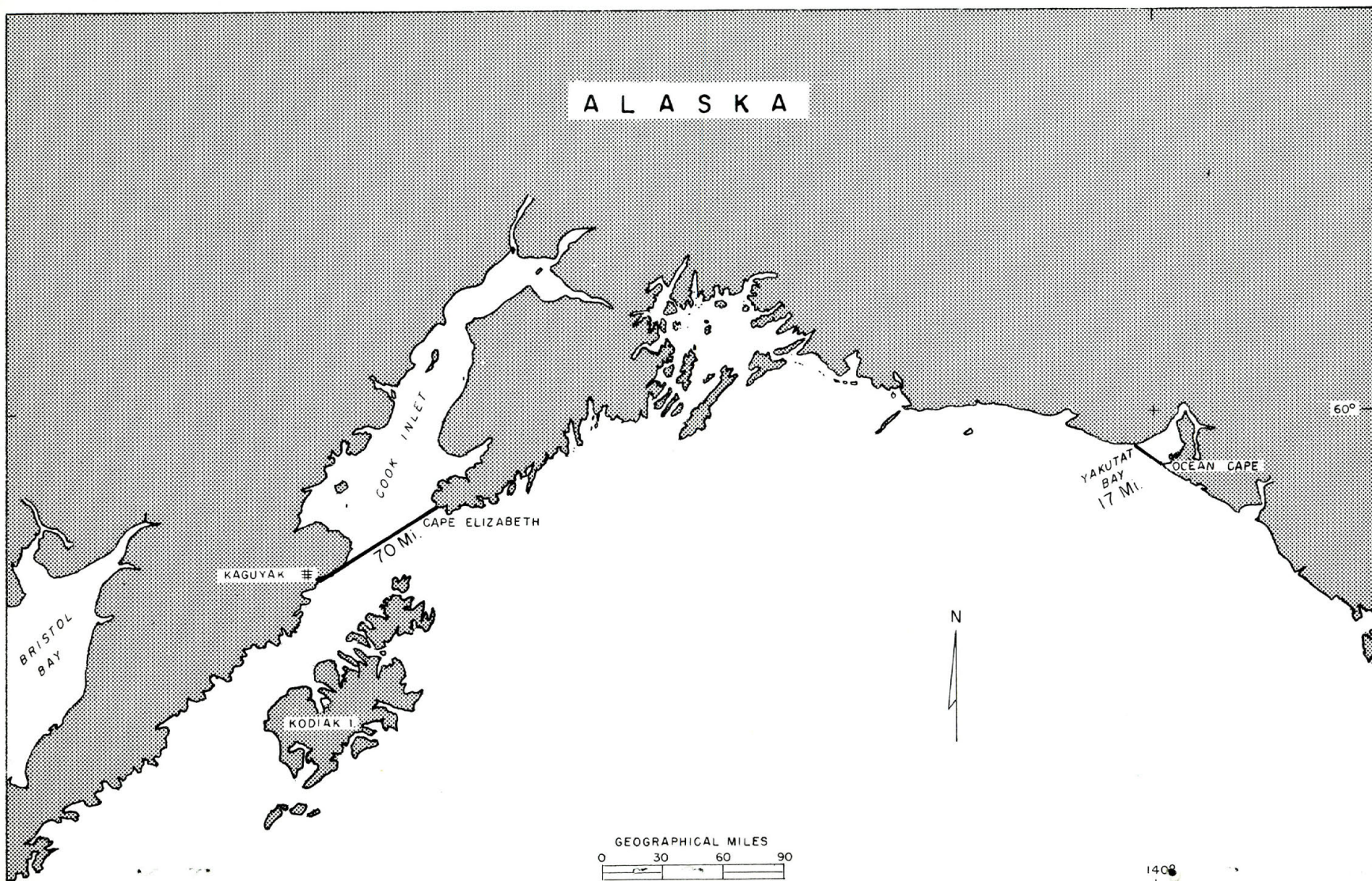
United States' adherence to the principle advocated by Professor Hyde concerning the use of a "series" of islands as a frontier between the mainland and the ocean is indicated by its position in the 1960 *Louisiana* case, wherein the United States conceded that all waters lying between the gulf islands and the mainland of the States of Louisiana, Mississippi, and Alabama constituted inland waters, so that the marginal belt was to be measured from the outer rim of these islands. (*United States v. Louisiana, supra,* 363 U.S. at 66, n. 108; 82nn. 135, 139; Brief for the United States in Support of Motion for Judgment on Amended Complaint, at p. 177, 254, 261.)[39]

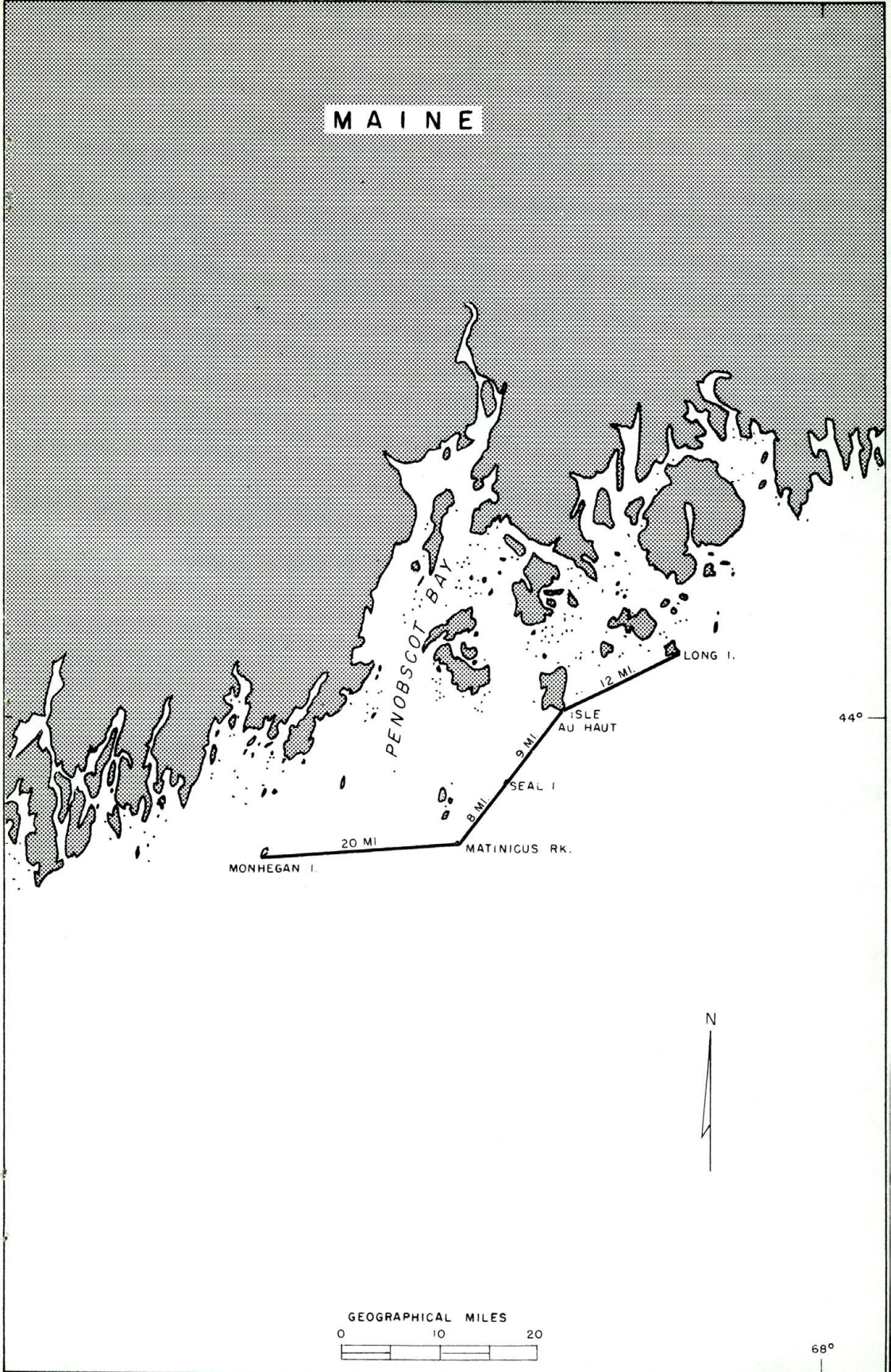
As late as 1950, the State Department repeated the generalization concerning landlocked bays and waters being within the jurisdiction of the adjacent nation:

> "Since the high seas are bounded by territorial waters, the delimitation of territorial waters becomes of moment to the regime of the high seas.

[39]See Maps opposite page 34 illustrating some of the areas involved in this concession.


BERING STRAIT
SIBERIA
U.S.S.R.
UNITED STATES
35 Mi.
KOTZEBUE SOUND
SEWARD PENINSULA
CAPE NOME
GOLOVNIN BAY
90 Mi.
ST. LAWRENCE I.
ST. MICHAELS I.
ALASKA
N
60°
NUNIVAK I.
38 Mi.
KUSKOKWIM BAY
BRISTOL BAY
40 Mi.
EGEGIK
GEOGRAPHICAL MILES
0 30 60 90
160°


ALASKA
COOK INLET
70 Mi.
CAPE ELIZABETH
KAGUYAK
BRISTOL BAY
KODIAK I.
YAKUTAT BAY
17 Mi.
OCEAN CAPE
60°
N
GEOGRAPHICAL MILES
0 30 60 90


MAINE
PENOBSCOT BAY
LONG I.
12 MI
ISLE AU HAUT
9 MI
SEAL I
8 MI
20 MI
MATINICUS RK.
MONHEGAN I.
44°
N
GEOGRAPHICAL MILES
0
10
20
68°

> The United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore, *with the exception of waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent state: . . .*" (Emphasis added.) United States Memorandum on the Regime of the High Sea, annexed to a Note to the United Nations, United Nations International Law Commission, II Yearbook 61 (1950).

Although use of the phrase "landlocked" here and in earlier declarations may be urged by the United States as indicating support of its present contentions, it should be noted that among the authorities cited in support of the foregoing quotation are the cases of *United States v. Carrillo,* 13 F.Supp. 121 (S.D. Calif. 1935) and *Ocean Industries, Inc. v. Superior Court of California,* 200 Cal. 235, 252 Pac. 722 (1927), which held that San Pedro and Monterey Bays were part of California.

Finally, the Senate Committee recommending passage of the Submerged Lands Act seriously questioned whether the ten-mile rule and the Boggs formula are, or should be, the policy of the United States in delimiting inland waters or defining coastlines. (S. Rep. No. 133, 83rd Cong., 1st Sess. 18 (1953).)

To establish the existence of a firm and definite policy on how to delimit inland waters and the marginal sea, plaintiff relied upon the State Department letter of November 13, 1951 (U.S. Brief Before the Special Master, pp. 167-73) which recites that the position of the Department of State "has been and is guided by

generally accepted principles of international law and by the practice of other states in the matter." Yet subsequent to this letter, the International Court of Justice in the *Anglo-Norweigian Fisheries Case (United Kingdom v. Norway* [1951], I.C.J. Rep. 116) held that the principle that the baseline follows the sinuosities of the coast and the ten-mile rule regarding bays had not acquired the authority of a general rule of international law. (*Id.* at 129, 131.) Indeed, the State Department, in its letter of February 12, 1952, recognized this holding by the International Court. (U.S. Brief Before the Special Master, pp. 173-75.) Hence it is clear that the State Department letter of November 13, 1951 could never legitimately support the conclusion that generally accepted rules of international law required following the sinuosities of the coast in fixing a baseline, or the adoption of any ten mile closing line in measuring bays. Indeed, earlier in these proceedings, the plaintiff itself apparently conceded that the United States had not at that time adopted criteria for establishing the baselines for the marginal sea. (Report of Special Master of May 22, 1951, pp. 8, 34.)

In recapitulation, the following appears to have been the past position of the United States as of 1952 pertaining to delimiting the territorial sea:

1. The United States has traditionally claimed a width of only three miles for its marginal belt.

2. This marginal belt has been measured from the coastline.

3. Where the shore of the mainland is in direct contact with the open sea, the shore itself (*i.e.*, the low water mark) has constituted the coastline; and where the shore is indented or fringed by off-

lying islands, the coastline has been the outer line of bays, harbors, ports, channels, sounds, gulfs and other adjacent arms of the sea ". . . that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State. . . ." (United Nations International Law Commission, II Yearbook 61 (1950).)

4. The term "landlocked" was in fact applied to bays and other waters not qualifying as inland waters under the criteria here urged by plaintiff.

5. Contrary to the Special Master's conclusion, the United States had not by 1952 adopted a firm and consistent policy as to criteria to be applied in determining whether adjacent arms of the sea were to be considered inland waters.

The plaintiff has not cited a single instance wherein the United States, in its relations with foreign nations, ever applied to any portion of the coast of the United States or to any of the Government's possessions, the specific criteria for determining inland waters set forth in the Secretary of State's letter of November 13, 1951.

Thus, even assuming the validity of the Special Master's approach that United States foreign policy is determinative in delimiting California's inland waters, the absence of a firm and consistent policy in this field allows California to determine the question for itself within the limits allowed by international law. *Manchester v. Massachussets, supra,* 139 U.S. at 264. That California has determined this question has been shown previously under the discussion of the State's historical boundaries. The validity of California's claims under general principles of international law as of 1952 and today will be hereafter demonstrated.

C. California's Claims Are Consistent With Principles of International Law and Present United States Foreign Policy

1. Introduction

California has excepted to the Special Master's Report on the basis of the impossibility of his considering the effect of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L.52) and its ratification by the United States in 1961 (44 Dept. of State Bulletin 609) with the advice and consent of the Senate (106 Cong. Rec. 11174-92 (1960).) (California's Present Exceptions II B and C.) The Secretary of State has specifically recognized that the principles enunciated in the Convention must be regarded ". . . as the best evidence of international law on the subject at the present time. . ." and as ". . . having the approval of this Government and as expressive of its present policy. . . ." (Letter, U.S. Secretary of State to U.S. Attorney General, January 15, 1963, 2 International Legal Materials 527, 528 (1963).)[40]

California has also excepted to the Special Master's Report on the basis of the impossibility of his considering the authoritative international law studies which accompanied the 1958 Geneva Convention. (California's Present Exception VIII D.) These studies require modification of many of the Master's conclusions, especially those relating to the doctrine of historic inland waters. In addition, California has excepted to the Special

[40]This letter was appended to an Amicus Curiae Brief of the United States filed February 11, 1963, in the Alaska Supreme Court in case No. 316, *Arctic Maid Fisheries, Inc. v. State of Alaska.*

Master's statement that he was concerned with United States policy as of October 27, 1947, when the Decree in this case was entered, rather than the date of the supplemental decree. (California's Present Exception III.)

In this section, California will show that to the extent international law principles are deemed to affect the issues in this case, they should be applied as they exist today, rather than as they may have existed in 1947. We shall further show that California's claims are consistent with presently applicable principles of international law as recognized by the United States, and as clarified by definitive studies. We shall also demonstrate that international law principles require consideration of the special characteristics of the Pacific Coast, as distinguished from less isolated areas in which the interests of foreign nations are more likely to be involved.

2. To the Extent That International Law Principles Are to Be Applied to the Present Controversy, These Principles Should Be in Accordance With Present Law

In its brief before the Special Master, the plaintiff argued that the law to be applied to this controversy is the law in effect at the time of the entry of a supplemental decree. (U.S. Brief Before the Special Master, 163-66.) As the Government put it:

> "In entering a supplemental decree, the Supreme Court should adjudge the status of inland waters and the boundary lines between inland waters and marginal sea as they exist at the time the decree is entered. The Special Master should make his recommended answer on the basis of the criteria and rules existing at the time of his Report." (*Id.* at 165.)

However, the Special Master regarded as critical the date of the initial decree herein, October 27, 1947. (Rep. p. 22.) The United States excepted to the conclusion (Exception of the United States, January 1953, No. 5), and California also excepts to that conclusion. (California's Present Exception III.)

As this Court stated long ago:

> "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . ." *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 102, 110 (1801).

See also: *United States v. Alabama,* 362 U.S. 602, 604 (1960).

In the instant proceedings, the United States has sought equitable relief both by way of injunction and declaration of rights. The foregoing principle has been held to apply with special force to proceedings in equity.

> ". . . It is familiar doctrine that an appeal in an equity suit opens up inquiry as of the time of the ultimate decision. To decide this appeal on the basis of a legal situation that ceased to exist not only prior to the taking of this appeal but also before issue was finally joined in the District Court, would be to make a gratuitous advisory judgment. It is the case that is here now that must be decided, and it must be decided on the basis of the circumstances that exist now. . . ." *Public Utilities Commission v. United Fuel Gas Co.* 317 U.S. 456, 466 (1943).

See also:

American Steel Foundaries v. Tri-City Central Trade Council, 257 U.S. 184, 201 (1921);
Duplex Printing Press Co. v. Deering, 254 U.S. 443, 494 (1921).

The aforesaid doctrine applies whether the intervening change in law is the result of a new or amended statute,[41] a change in case law,[42] a change of policy and position by an administrative agency,[43] an amended or new administrative regulation,[44] or a change in state law as enunciated in state judicial decisions.[45] The doctrine is also applicable in trial courts,[46] and in administrative proceedings.[47]

It is apparent that the foregoing rule should apply with special force in a situation where the governing legal principles were highly uncertain at an earlier stage of the proceedings, but where these principles have been clarified and firmly established.

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[41]*Hines v. Davidowitz,* 312 U.S. 52, 60 (1941); *Carpenter v. Wabash Ry. Co.,* 309 U.S. 23, 26-27 (1940); *Dinsmore v. Southern Express Co.,* 183 U.S. 115, 119-20 (1901); *United States ex rel Pizzuto v. Shaughnessy,* 184 F.2d 666, 667 (2d Cir. 1950); *McMahan v. Hunter,* 179 F.2d 661, 663 (10th Cir. 1950); *In re Moneys Deposited, etc.,* 243 F.2d 443, 446 (3d Cir. 1957).

[42]*Zank v. Landon,* 205 F.2d 615, 616 (9th Cir. 1953); *Schaff v. Clayton,* 144 F.2d 532, 533 (D.C. Cir. 1944); cf. *Brownell, v. Kaufman,* 251 F.2d 374, 375 (D.C. Cir. 1957).

[43]*N.L.R.B. v. Continental Baking Co.,* 221 F.2d 427, 432 (8th Cir. 1955); *N.L.R.B. v. National Gas Co.,* 215 F.2d 160, 163 (8th Cir. 1954).

[44]*Jacobs v. Office of Housing Expeditor,* 176 F.2d 338, 340 (7th Cir. 1949); *Standard Oil Co. of Kansas v. Angle,* 128 F.2d 728, 730 (5th Cir. 1942).

[45]*Huddleston v. Dwyer,* 322 U.S. 232, 236 (1944); *Vandenburk v. Owens-Illinois Glass Co.,* 311 U.S. 538, 543 (1941).

[46]*Vandenbark v. Owens-Illinois Glass Co., supra.*

[47]*Zifferen, Inc. v. United States,* 318 U.S. 73, 78 (1943).

In the instant case, the Special Master correctly observed that as of 1952 there were no definite, generally applicable rules of international law concerning the delimitation of the marginal sea. (Rep. at pp. 8-9.) This conclusion is amply supported by the International Court of Justice in the *Fisheries Case*.[48] We have demonstrated in Section II B, above, that as of 1952 there was no definite United States foreign policy on this subject. Consequently, the Special Master was forced to rely upon isolated acts of the Executive Department, designed to deal with specific problems, and not reflecting any general adherence to carefully considered overall policies, or upon tentative proposals of subordinate officials which proposals were never formally approved by the United States or the international community. Now that the United States and a significant portion of the world community have unequivocally adopted such carefully considered policies designed for general application, it seems obvious that these policies, to the extent they are relevant, must be considered in resolving the present controversy.

We now propose to examine these newly defined principles of international law, as aids in determining whether areas along the California coast constitute inland waters within the meaning of the Submerged Lands Act.

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[48]In its decision, the International Court of Justice pointed out that the arcs of circles method of measuring the marginal sea was "not obligatory by law" (I.C.J. Rep. [1951] at 129), that "the ten-mile rule has not acquired the authority of a general rule of international law" (*Id.* at 131), that the general practice of nations as to delimiting inland waters in cases of groups of islands "does not justify the formulation of any general rule of law" (*Ibid*), and ". . . the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities." (*Id.* at 129.)

3. California's Claims Are Supported by the Criteria Established by the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

a. ARTICLE 4 AND THE STRAIGHT BASELINE SYSTEM.

The International Court of Justice in its Decision in the *Anglo-Norwegian Fisheries Case* (*United Kingdom v. Norway,* [1951] I.C.J. Rep. 116) held that the Norwegian system of setting the baseline of its territorial sea by drawing straight lines between salient points along its coastline, including lines to and from and between various islands off the coast, did not violate international law. As shown on the map set forth opposite page 92 hereof, many of the baselines used by Norway traverse wide expanses of water. During the pendency of the *Fisheries Case,* the United States called this Court's attention to the fact that the baselines presented by Norway "resemble those claimed by California" and that the *Fisheries Case* placed before the International Court "a controversy which is in many respects similar to that involved at the present stage of these proceedings, particularly insofar as it will require a delimitation of the marginal sea along a coastline where there are numerous indentations as well as offlying rocks and islands." (*United States' Memorandum in Regard to the Report of the Special Master, etc.,* August 1951, pp. 26-27.)

In upholding this Norwegian system of delimitation, the International Court established certain criteria for its establishment:

> (1) The baseline must follow the general direction of the coast (*Fisheries Case, supra,* [1951] I.C.J. Rep. 116, at 129, 133); but a coastal ". . . State must be allowed the latitude necessary . . .

to adapt its delimitation to practical needs and local requirements, . . ." (*Id.* at 133.)

(2) In selecting baselines, the important question is ". . . whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters." (*Id.* at 133.)

(3) Also, ". . . certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" are to be considered. (*Id.* at 133.)

(4) The waters between the baseline and the mainland are inland or internal waters. (*Id.* at 133.)

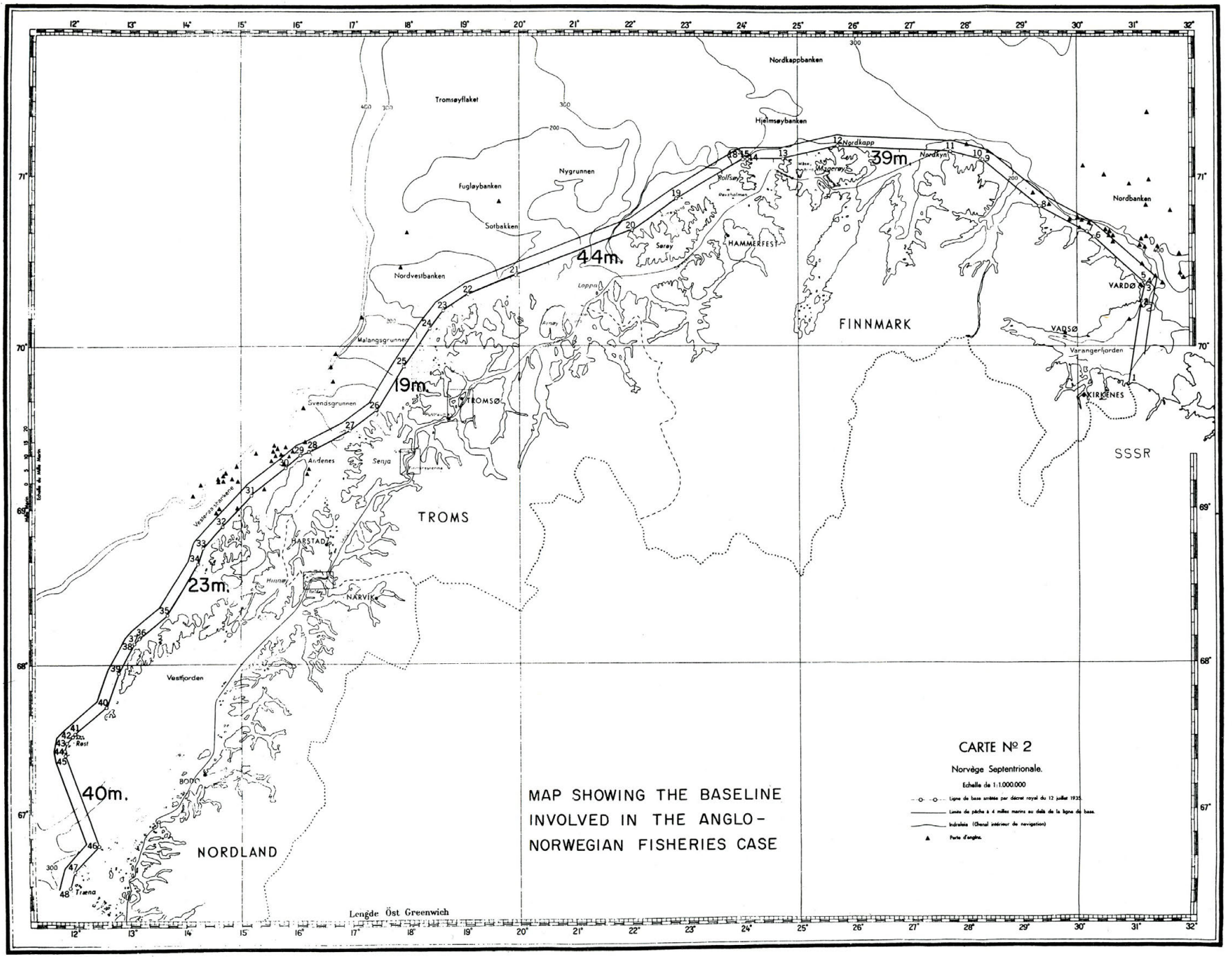
(5) The straight baseline system may be applied where the coast is deeply indented and cut into, or where it is bordered by a group of islands. (*Id.* at 128-129, 130.)

(6) There is no limit to the distance between salient points. (*Id.* at 131.)

Subsequently, in 1958 the Geneva Convention adopted Article 4 which provides:

"1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baseline joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying with-


MAP SHOWING THE BASELINE
INVOLVED IN THE ANGLO-
NORWEGIAN FISHERIES CASE
CARTE Nº 2
Norvège Septentrionale.
Echelle de 1:1.000.000
Ligne de base arrêtée par décret royal du 12 juillet 1935
Limite de pêche à 4 milles marins au delà de la ligne de base
Indrelede (Chenal intérieur de navigation)
Porte d'engins
39m.
44m.
19m.
23m.
40m.
FINNMARK
TROMS
NORDLAND
SSSR
HAMMERFEST
TROMSØ
HARSTAD
NARVIK
VARDØ
VADSØ
KIRKENES
Nordkapp
Nordkyn
Tromsøyflaket
Nordkappbanken
Hjelmsøybanken
Nygrunnen
Fugløybanken
Sotbakken
Nordvestbanken
Malangsgrunnen
Svendsgrunnen
Andenes
Senja
Hinnøy
Vestfjorden
Rost
Bodø
Træna
Nordbanken
Varangerfjorden
Lengde Öst Greenwich

in the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

"5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given." (U.N. Doc. A/Conf. 13/L.52.)

Article 4 was the result of extensive preparatory work by the International Law Commission and by the United Nations Conference on the Law of the Sea. Its purpose was to codify the *Anglo-Norwegian Fisheries Case*. (Report of The International Law Commission, U.N. General Assembly Official Records, 9th Sess. Suppl. No. 9 [U.N. Doc. A/2693] pp. 14-15 (1954); 51 Am. J. Int'l L. 154, 184 (1957).)

The history of the development of Article 4 is interesting in several respects:

1. No limitations were placed on the length of straight baselines from the mainland to islands or

between islands or across other water areas. None were established in the *Fisheries Case*.[49]

2. The concept of a "fringe" of islands is not limited to a geographical situation such as exists in Norway. The history and the text of Article 4 as adopted by the Conference conclusively demonstrates that the application of the straight baseline system is not limited to a coast such as Norway's, that the system may be applied where *either* the coast is deeply indented and cut into, *or* there is a

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[49]In April 1953, a Committee of Experts for the International Law Commission recommended a limit of ten miles between headlands and between islands and five miles between the mainland and islands. (Addendum to the Second Report on the Regime of the Territorial Sea, Internat. L. Comm'n Yearbook, V.II (1953) at 78, U.N. Doc. A/CN. 4/61 Add. 1, Annex, pp. 3-4.) The International Law Commission draft Article in 1954 contained similar limitations. (Report of the International Law Commission, 1954, U.N. Doc. A/2693 [General Assembly Records, 9th Sess. Suppl. No. 9] p. 14.) In 1955, however, after much discussion on the question of the validity for any such limitation, the Commission deleted the limitation, (Report of the International Law Commission, 1955, U.N. Doc. A/2934 [General Assembly, Official Records, 10th Session, Suppl. No. 9] pp. 28, 36, 39, 40, 47) and the draft article submitted by the Commission to the 1958 Geneva Convention contained no maximum allowable distances. (United Nations Conference on the Law of the Sea, Official Records, Vol. III, p. 209, A/Conf. 13/39 (U.N. Doc. A/3159).)

The First Committee at the Conference dealing with the law of the territorial sea, adopted a draft article that provided a maximum length of fifteen miles for a straight baseline. (United Nations Conference on the Law of the Sea, Official Records, Vol. II, p. 123, A/Conf. 13/38. (U.N. Doc. No. A/Conf. 13/C.1/L.168/Add. 1).) In plenary session, however, this limitation was removed and other similar restrictions rejected (*Id.*, Vol. II, pp. 62-63; Vol. III, pp. 235, 252, 148, 156, 160.) The final text of Article 4 thus contains no mileage limitation on the length of any particular baseline. This fact is amplified by paragraph 6 of Article 7 of the Convention which specifies that restrictions on bays, such as a maximum of twenty-four miles for a closing line, do not apply "in any case where the straight baseline system provided for in Article 4 is applied." (U.N. Doc. A/Conf. 13/L.52.)

fringe of islands in its immediate vicinity, and a "fringe" means more than one island, but need not be "numerous." Perhaps the best test was pointed out in the Comment of Sweden in 1955, suggesting that the criterion should be a geographical one, *i.e.*, whether "the expanse of water in question is so surrounded by land, including the islands along the coast, that it seems natural to treat it as part of the land domain." (Report of International Law Commission, 1955, U.N. Doc. A/2943, p. 39.)[50]

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[50]In 1955, the United States had proposed that "the presence of a few isolated islands" should not be considered as a justification for drawing straight lines. (Report of the International Law Commission, 1955, *op. cit.*, p. 46.) The Special Rapporteur then suggested that the word "numerous" be inserted before the phrase "islands in its immediate vicinity." (Yearbook of the International Law Commission, 1955, I, p. 196.) When it was noted that the International Court of Justice had not used the term "numerous," it was agreed to state in the Comment to the draft of the Article that ". . . the Commission interpreted the International Court of Justice's decision as meaning that a single island would not be enough to justify the application of the straight baseline rule, but that a certain number of islands were necessary." (*Id.* at 200, 205.) The Article drafted by the International Law Commission covering straight baselines used the terminology ". . . because there are islands in its immediate vicinity. . . ." (U.N. Conf. Off. Records, *op. cit.* Vol. III, p. 209 (U.N. Doc. A/Conf. 13/39).)

At the 1958 Conference, the United States proposed to amend the draft Article in quesion to read, in part:

> "'1. Where a considerable length of coast, viewed as a whole, is very broken because of bays and a fringe of numerous islands and low-tide elevations. . . .'" (U.N. Conf., Off. Rec., *op. cit.*, Vol. III, p. 235; A/Conf. 13 C.1/L.86.)

The Comment to this proposal stated:

> "(e) The declaration in the International Law Commission's text that bays or islands will permit use of straight baselines is contrary to the facts of the Fisheries case, since both bays and islands appear all along the section of the Norwegian coast at issue in that case. The present wording permits the unwarranted construction that a straight baseline system may be used wherever bays and islands appear on a short sector of coast, whereas this construction cannot be

Thus, the assertion by the Special Master (Rep. p. 12) and by the State Department in its letter of February 12, 1952, that the straight baseline system is limited to "the peculiar geography of the Norwegian Coast" is clearly untenable at the present time, if indeed it was ever tenable.

3. An attempt to require that the coastline "as a whole" must be deeply indented in order to permit drawing of straight baselines was rejected. (U.N. Conf. Off. Records, *op. cit.*, Vol. III, p. 160; Vol. II, p. 62; see also U.S. Proposal, footnote 50, *supra.*)

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justified on the ruling of the International Court of Justice.

"(f) The present text of the International Law Commission fails to refer to the number of bays and islands which must be present to justify a straight baseline system. The text proposed by the United States includes the term 'very broken', which was used by the International Court of Justice to describe the Norwegian coast when 'viewed as a whole' . . . The proposed text also refers to the 'fringe' of 'numerous' insular formations which must exist in order for such a baseline system to be used. The amendment is in strict keeping with the facts of the Fisheries case, since the dominant feature on the north Norwegian coast there considered was the existence of an estimated 120,000 separate off-shore formations in the 600-mile disputed sector. . . .'"

This United States amendment attempted to restrict the application of the straight baseline system to geographic situations identical to that of Norway so as to require both a very broken coast as shown by bays *and* islands, and *numerous* islands. However, the United States withdrew its proposed amendment. (*Id.*, Vol. III, p. 148.) Furthermore, an earlier discussion and report of the 1955 Session of the International Law Commission made it clear that straight baselines could be drawn between islands and from the mainland to islands. (Report of the International Law Commission, 1955, *op. cit.*, p. 17, Yearbook of the International Law Commission, 1955, I, pp. 250-256.)

The term "fringe of islands" as finally used in Article 4 appears to have come from the proposal of the United Kingdom (U.N. Conf. Off. Rec., *op. cit.*, Vol. III, p. 228, A/Conf. 13/C.I/L 62, Corr. 1) which was finally adopted by the First Committee. (*Id.*, Vol. III, p. 258.)

In light of the development of Article 4, a coastal nation may define its territorial sea by establishing straight baselines if:

1. The coastal section involved is deeply indented and cut into *or* if there is a fringe of islands in its immediate vicinity;

2. The straight baselines do not depart to any appreciable extent from the general direction of the coast (but there is no limitation on the length of any baseline);

3. The sea areas lying within the lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters; and

4. The application of a straight baseline system is given publicity.

When drawing particular baselines "economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage" may be considered. (Article 4 of the Geneva Convention.) Once such a system is justified and applied, the water areas lying between the straight baseline and the mainland are inland waters. (Article 5 of the Geneva Convention.)

b. Article 4 and the Straight Baseline System as Applied to the California Coast

Applying the above criteria to the Southern California coast, the conclusion follows that all the water areas lying between the mainland and the islands, particularly the Santa Barbara Channel, are inland waters.

These islands constitute the requisite "fringe" of islands in the immediate vicinity of the coast. Mr. Shalowitz, Special Assistant to the Director of the

Coast and Geodetic Survey, who was a witness for the plaintiff before the Special Master (Trans. p. 46 et seq.) so concedes. (Shalowitz, *Sea and Shore Boundaries,* 160 (1962).) As shown by the map in App. B.I.C., this concept of an offlying "fringe" of islands is especially applicable to the island chain, which together with the mainland forms the Santa Barbara Channel from Point Hueneme to Point Conception. (See also Ireland, *Marginal Seas Around the States,* 2 Louisiana L. Rev. (1941), 252, 269, and n.81.)[51]

Examination of a map of the Southern California coast (see App. B.I.D.) also reveals that a series of straight baselines drawn from Point Loma, near San Diego around the offshore islands to either Point Conception or Point Arguello in Santa Barbara County does not "depart to any appreciable extent from the general direction of the coast." The same can be said of a series of straight baselines drawn from Point Hueneme around the Santa Barbara Channel islands to Point Conception. Furthermore, this series of straight baselines does "follow the direction of the Pacific Coast" as called for in Article XII of the 1849 Constitution which set California's boundaries. In short, it should be concluded that the expanse of water between the California mainland and its islands, and the Santa Barbara Channel in particular, "is so surrounded by land, including the islands along the coast, that it seems natural to treat it as part of the land domain." (Comment of Sweden to the International Law Commission, 1955, *supra,* p. 39, U.N. Doc. A/2934.

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[51]It should be noted that the longest expanse of water between points of land in the Santa Barbara Channel is only twenty-one miles (see map in App. B.I.D.) a far shorter distance than several of the baselines upheld in the *Anglo-Norwegian Fisheries Case.* (See map opposite page 92.)

The history of the islands and the mainland and the use of the intervening waters, particularly the Santa Barbara Channel, establishes a long standing interdependence.[52] These areas have been traditionally considered and treated as part of the State of California and as part of Upper California under Mexican and Spanish dominion. Their geographic composition is such that it may be said that "the sea areas lying within the lines [are] sufficiently closely linked to the land domain to be subject to the regime of internal waters." Moreover, there is evidence before the Special Master that the islands off the Southern California coast are geologically an extension of the mainland. (Tr. pp. 1059-60, 1062-64.) Just as the International Court of Justice in the *Fisheries Case* held that the islands therein involved ". . . are in truth but an extension of the Norwegian mainland." (*United Kingdom v. Norway* [1951], I.C.J. Rep. 116, 127), the same is equally true of California's offlying islands.

Although Article 4 recognizes that in particular instances baselines can deviate from the general direction of the coast because of "economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage," it is not necessary to rely upon such deviation off the Southern California coast. Undoubtedly the history of the area between the mainland and the islands shows a long-continued important economic interdependence between the mainland, the islands and the water which would permit such a variance. However, the islands offlying Southern California are so located in relation to the

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[52]For a historical discussion see Sec. IB; Sec. IIC4, and Appendix B.

mainland that the straight baselines can be drawn naturally between well known landmarks, and these baselines will not depart to any appreciable extent from the general direction of the coast. The same can be said for the lines enclosing the Santa Barbara Channel.

Historically, the State of California, and its predecessors, have asserted a consistent claim to these intervening waters as inland waters. These claims are of long duration and have received widespread publicity.[53]

Additionally, the Crescent City area is naturally suited for an application of the straight baseline system. Presented to the Special Master as Segment 5, it encompassed an area from Prince Island to Northwest Seal Rock in the St. George Reef, back along that Reef to the various rocks off Battery Point and then south to False Klamath Rock. (See Map, App. BIV) As to the claim of the southern portion of this Segment from Battery Point to False Klamath Rock, it is California's understanding that there is now no dispute between the parties.[54] As to the remaining, or northern portion of

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[53]These claims may be traced from the Nootka Sound Convention of 1790 wherein Spain excluded the British from the area (Crocker, *The Extent of the Marginal Sea, supra,* at 540), through the Mexican claims of jurisdiction (see App. B), and the Disturnell Map attached to the Treaty of Guadalupe Hidalgo, 1849 (App. C), to the California boundary description contained in Article XII of the Constitution of 1849 which was repeated in Article XXI of the Constitution of 1879 and clarified by California Government Code section 170, 171 and 172 in 1949. (Calif. Stats. 1949, ch. 65, pp. 82-83.) The international recognition of these claims is shown by the inclusion of California's Constitutional boundary description under a chapter entitled "Juridical Status, Breadth and Delimitation of the Territorial Sea" in *Laws and Regulations of The Regime of The Territorial Sea,* United Nations Legislative Series, Vol. I (New York, 1957), pp. 56-57.

[54]This for two reasons:

1. The United States has conceded that the three geographic miles are to be measured pursuant to Article 6 of the 1958

the Crescent City Segment, this is a coastal area dotted with numerous islands, rocks, and reefs which in effect "fringe" the mainland. With the exception of the closing line from Northwest Seal Rock to Prince Island, no island, rock or reef is more than three miles from its nearest neighbor. As Judge Hudson indicated in his testimony before the Special Master, the straight baseline system approved in the *Anglo-Norwegian Fisheries Case* had particular applicability to the Crescent City Segment. (Trans. pp. 79-80.)

From the foregoing, it is evident that California's claims to all water areas lying between the mainland and the islands off the Southern California coast (with particular emphasis on the Santa Barbara Channel) and to that portion of the Crescent City Segment still in dispute, are permissible under international law by virtue of Article 4 and the *Anglo-Norwegian Fisheries*

Geneva Convention. (Memorandum for the United States (1) In Reply to Opposition to Motion for Leave to File Supplemental Complaint on Original Complaint, and (2) In Opposition to Motion to Dismiss (September 1963), p. 8, footnote 4.) This article provides in effect an application of the so-called "envelope line." California assumes that this concession also includes an application of Article 11 of the Convention, which provides that low-tide elevations situated within three geographic miles of the mainland or an island may be used as the baseline for measuring the three miles. By applying this system, virtually all the area from Battery Point to False Klamath Rock which was formerly in dispute is now contained within the boundaries of California for purposes of the Submerged Lands Act.

2. Before the Special Master, California alternatively claimed that Crescent City Bay, contained within the entire Segment was an historic bay and thus inland waters. As mentioned, the entire bay now is within California's boundaries. The Special Master considered that the controversy as to Crescent City Bay involved a problem of harbors, not bays (Rep. p. 26, fn. 19), and thus the line demarking inland waters in this area is the line of the outermost harborworks. (Rep. pp. 46-48.) California now accepts this determination as to Crescent City Harbor (or Bay), but not as to the remainder of the entire Crescent City Segment.

Case. Article 4 now represents United States foreign policy. California's application of the straight baseline system to its coast is consistent with the Nation's foreign policy and is therefore justified under the doctrine of *Manchester v. Massachusetts, supra,* 139 U.S. at 264.

c. Article 7 and Bays

Article 7 of the 1958 Geneva Convention provides, in substance, that a coastal indentation not exceeding twenty-four miles in length between its headlands and containing an area as large or larger than that of a semi-circle whose diameter is a line drawn across the mouth of that indentation shall constitute a bay.[55]

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[55]Article 7 of the 1958 Geneva Convention provides:

"1. This article relates only to bays the coast of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn

California has taken issue with the criteria employed by the Special Master to fix the status of bays. (California's Present Exceptions V A-E.) Essentially, the Master held that the waters within a bay are not to be considered inland waters unless the opening is less than ten miles across, and the bay is sufficiently deep to satisfy the so-called "Boggs Formula." (Rep. pp. 3-4, 17-26.)

Article 7 of the 1958 Geneva Convention sets a maximum opening of 24 miles, as opposed to the ten miles recommended by the Master, and provides that the requisite depth of a bay is to be determined by a comparison of the area of the bay to a semi-circle whose diameter is a line drawn across the mouth of that indentation. Thus, the two basic criteria adopted by the Special Master, the ten-mile rule and the Boggs Formula, are rejected and are no longer, if they ever were,[56] part of the United States foreign policy. California agrees with the Special Master that "historic" bays are not subject to any such mathematical or geographical

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within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

"6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied." (U.N. Doc. A/Conf. 13/L. 52.)

[56]The Special Master, as did the plaintiff, recognized that the Boggs formula never was part of American foreign policy, but recommended its adoption as a convenient method of determining whether a bay was deep enough to qualify as inland waters. (Rep. pp. 25-26.) That the formula is in fact unworkable is shown by the fact that an application of the formula to San Diego Bay, which everyone concedes to be inland waters, would result in a determination that that bay does not have sufficient depth to qualify. (See Shalowitz, *op. cit.* 38.) Also plaintiff appears to have abandoned the Boggs formula in its Supplemental Complaint. (Par. X(b).)

criteria (Rep. pp. 11, 12), and paragraph 6 of Article 7 so recognizes.

Noteworthy too, is use of the term "landlocked" which appears in paragraph 2 of Article 7. Apparently, it is agreed that the United States has always excluded from the measuring of the marginal belt those water areas ". . . that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State. . . ." (Yearbook of the International Law Commission, 1950, Vol. II, p. 60 at 61.) Whereas prior to 1958 the term "landlocked" was essentially undefined in international law,[57] the criteria for determining what bays are landlocked are now set forth in Article 7 of the Geneva Convention.

Once the criteria in Article 7 are related to the California coast, it is apparent that Monterey Bay constitutes inland waters. The opening of the Bay in 19.6 nautical miles, and the area included within that opening line exceeds the area contained in a semi-circle whose diameter is 19.6 nautical miles. (See App. BIC.) California also claims Monterey Bay as historical inland waters. (See section II C4, *infra.*)

d. The Concept of "Fictitious Bays" as Applicable to the Santa Barbara Channel

California further asserts that the concept of "fictitious bays" is available to fix the status of the Santa Barbara Channel as inland waters. Stated simply, a "fictitious bay" is formed by a string of islands taken together with a portion of the mainland coastline.

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[57]Although, as we have noted above (Sec. IIB), Monterey and San Pedro Bays were cited as "landlocked" in a United States Memorandum Annexed to a Note to the United Nations. (Yearbook of the International Law Commission, 1950, Vol. II, pp. 60-61.)

Although the terminology was not specifically employed, the idea of a fictitious bay is implicit in the November 13, 1951 letter of the Secretary of State stating the United States' position that the rules regarding bays should apply to a strait which is a channel of communication to an inland sea. (U.S. Brief Before the Special Master, p. 167 at 172.) Similarly, the International Court of Justice emphasized that the idea of water areas being ". . . sufficiently closely linked to the land domain to be subject to the regime of internal waters" was ". . . at the basis of the determination of the rules relating to bays. . . ." (*United Kingdom v. Norway, supra,* at 133.) Thereafter in 1953, the concept of a "fictitious bay" was discussed and recognized, in just such words, by the Committee of Experts of the International Law Commission which, in recommending rules for a straight baseline system, stated that "a 'fictitious bay' may also be formed by a string of islands taken together with a portion of the mainland coastline. . . ." (Yearbook of The International Law Commission Vol. II, 1963 at 78 (U.N. Doc. A/CN. 4/61/ Add. 1, Annex).)[58] By applying either the international law concept of "fictitious bays," or the rules regarding bays to straits leading to inland seas, the Santa Barbara Channel should be classified as inland waters.

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[58]See also the draft Article 10 concerning groups of islands prepared by the Special Rapporteur which provided:

> "3. A 'Fictitious bay' may also be formed by a string of islands taken together with a portion of the mainland coastline. . . ."

(U.N. Doc. A/CN, 4/61 Add. 1 (May 18, 1953), p. 7.) However, the International Law Commission did not adopt an article on groups of islands. (Yearbook of the International Law Commission, 1955, I, pp. 217-18.)

Unquestionably, the Santa Barbara Channel leads only to an inland sea or waters.[59] The westerly entrance to the Santa Barbara Channel begins at a line between Point Conception and Richardson Rock where the California Coast makes a sharp turn to the East. The string of islands from Richardson Rock to Anacapa Island, no one of which is more than six miles from its adjoining island, parallels the mainland coast. The closing lines of the channel are 21 and 11 miles respectively. (See Map, App. BIC.), well within the maximum closing lines of twenty-four miles allowed for bays in Article 7 of the Geneva Convention. Likewise, a comparison of the area of the channel to that of a semi-circle whose diameter is equal to the total length of all the baselines shows that the area enclosed is of sufficient penetration to satisfy the requirement of paragraph 2 of Article 7 but is not so large or exorbitant as to place the area beyond any logical connection with the adjacent land.[60]

California has appended to this brief maps designed to show the similarity of the Santa Barbara Channel to Breton, Chandeleur and Mississippi Sounds in the

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[59]See *infra* Sec. IIC3e.

[60]The total length of the baselines across water from Point Conception to Point Hueneme by way of Richardson Rock and the Channel Islands is approximately 50¼ nautical miles. Using this length as the diameter, based on Article 7(3) (". . . When, because of the presence of islands, an indentation has more than one mouth, the semi-circle should be drawn on a line as long as the sum total of the length of the lines across the different mouths."), a semi-circle has the total area of approximately 992 square nautical miles, while the water area in the Santa Barbara Channel equals approximately 1500 square nautical miles. As computed pursuant to the last provision of Article 7(3) (which provides that "Islands within an indentation shall be included as if they were part of the water area of the indentation"), the area including water and the islands is approximately 1650 square nautical miles.

Gulf of Mexico (See maps opposite p. 34), which areas the plaintiff has conceded constitutes inland waters within the meaning of the Submerged Lands Act. (*United States v. Louisiana, supra,* 363 U.S. at 66, n. 108, 82 nn. 135 and 139.) The plaintiff will undoubtedly argue that due to the shallowness of the waters in the Gulf areas, no comparison can be made. However, no rule of international law has ever been established which makes the depth of water determinative of whether a particular area constitutes inland waters. Actually, the mass of substantial islands on the seaward side of California's Santa Barbara Channel is far more imposing than the unstable sand spits along the Gulf. The United States' concession as to the aforesaid Sounds was apparently based upon the proposition that the ten mile closing limit as to bays should likewise apply to straits and sounds. (United States Brief Before the Special Master at 172.) Since all water distances between points of land delimiting the Santa Barbara Channel are less than the twenty-four mile closing limit now adopted by the United States as to bays, this criterion is similarly applicable to the Santa Barbara Channel.

e. STRAITS

The 1958 Geneva Convention did not adopt any separate criteria for delineating straits the coasts of which are owned by one nation.[61] Article 12 only delimits waters the coasts of which are owned by two or more

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[61]Proposed Article 12(3) of the International Law Commission text would have made rules as to straits applicable regardless of the number of States owning the coasts. (Report of International Law Commission, 8th Session [General Assembly, Official Records, 11th Session, Suppl. No. 9 (A/3151), pp. 17-18].) This provision, however, was stricken by the Conference.

countries. (U.N. Doc. A/Conf. 13/L. 52; U.N. Off. Rec., *op.cit.*, Vol. III, pp. 188-93.)

As heretofore demonstrated, Article 4 of the Geneva Convention authorizes the drawing of straight baselines across openings to straits. In addition, the international law concept of "fictitious bays" evidences an intent to apply to straits those rules applicable to bays. It is worth examining international law regarding straits since the Santa Barbara Channel and other water areas off Southern California between the islands and the mainland, are straits.

In discussing United States foreign policy up to 1952 (Sec. II B, *supra*), we have demonstrated that on numerous occasions the Government has expressed the view that specific straits are within the jurisdiction of the United States.[62] Moreover, the United States has

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[62]Opinion of Attorney General Randolph, May 14, 1793 (1 Ops. Att'y Gen. U.S. 32, 36 (1852): " 'The gulfs and channels, or areas of the sea, are according to the regular course, supposed to belong to the people with whose lands they are encompassed.' . . .";

Letter, Secretary of State to American delegate at Paris, July 15, 1797 (5 *British and Foreign State Papers*, 17, 28 (1837)) ". . . and in what situations Bays and Sounds may be said to be landlocked . . . .");

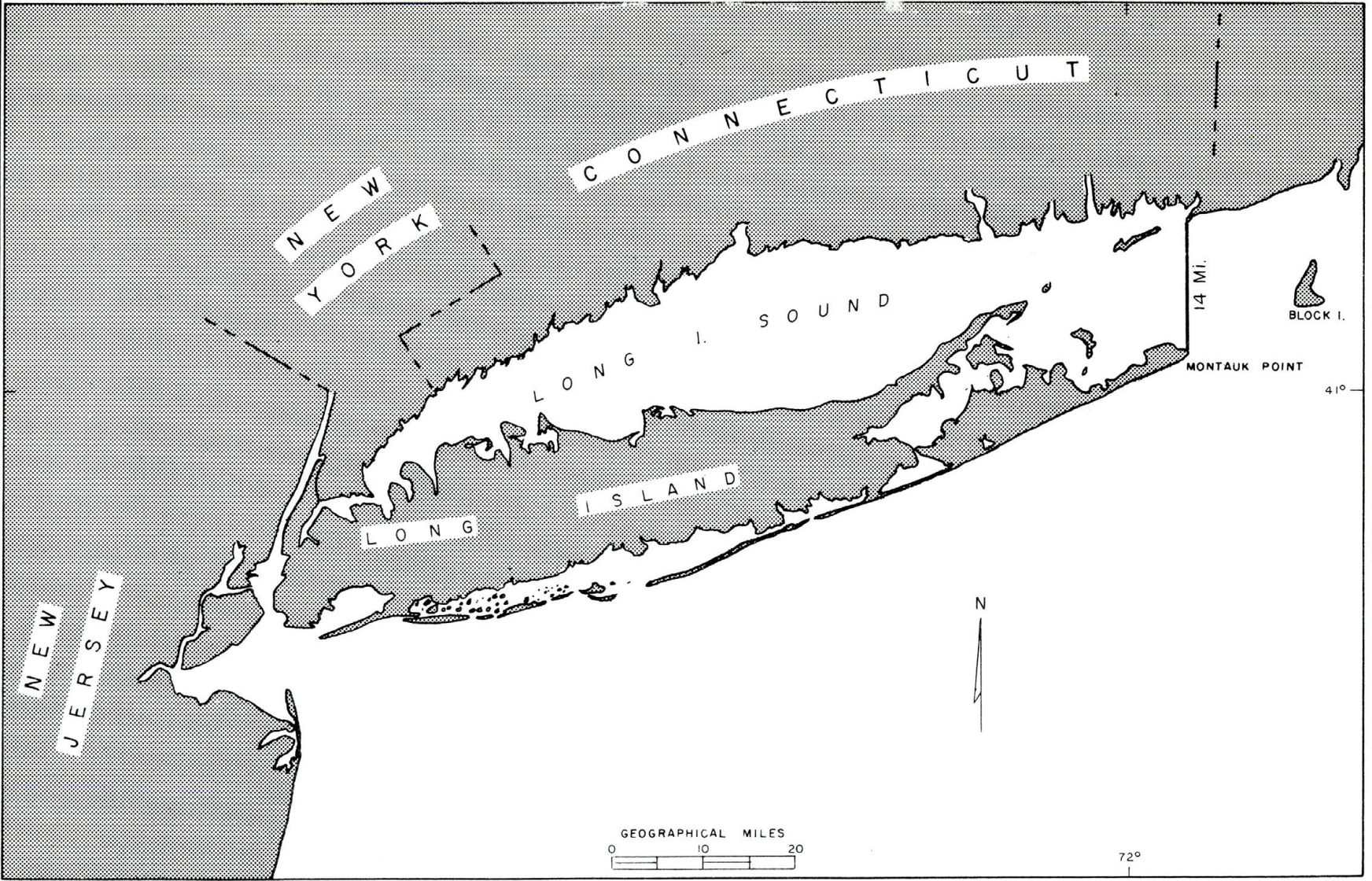
Convention, 1846, United Kingdom and United States (1 Moore, *Digest, supra,* 658-59; division of Juan de Fuca Straits);

Letter from Secretary of State Seward to Spanish Minister, 1863 (1 Moore, *Digest, supra,* 711; Cuban and Florida Keys).

5. *Proceedings of the Alaskan Boundary Tribunal Arbitration, supra,* 15-16; (Marginal belt to be drawn around islands, bays, inlets, straits and channels of the Alaskan Archipelago);

United States v. Louisiana, supra, 363 U.S. at 66, n. 108, 82 n. 135, 139; (Concession by plaintiff as to water areas between mainland and islands in Gulf of Mexico);

Approval by Congress of division of Long Island Sound by New York and Connecticut. (21 Stat. 351 (1881).) (See map opposite p. 108.)


CONNECTICUT
NEW YORK
LONG I. SOUND
LONG ISLAND
NEW JERSEY
14 Mi.
BLOCK I.
MONTAUK POINT
41°
N
GEOGRAPHICAL MILES
0 10 20
72°

recognized that straits may be claimed as historic waters.[63]

In connection with straits it is important to determine whether the strait in question is used for international navigation between two portions of the high seas in which event the right of innocent passage cannot be denied. The leading international authority is the *Corfu Channel Case* [1949], I.C.J. Rep. 4, wherein the International Court of Justice held Albania responsible for damage to a British warship caused by an exploding mine in the Corfu Channel. This holding was based upon the classification of the Corfu Channel as an international highway. In the Court's language: "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." (*Corfu Channel Case, supra,* at 28.) In reaching its conclusion the Court considered three factors:

1. The volume of shipping in the channel.[64]
2. The use of the channel by warships.[65]
3. The fact that the channel was bordered by two countries.[66]

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[63]See Sec. II C 4, *infra.*

[64]2884 ships of seven nationalities passed through the channel and called at the Greek Port of Corfu, and a large number of vessels went through the Strait without calling at Corfu at all during a twenty-one month period. (*Corfu Channel Case, supra,* at 29.)

[65]The British Navy "has regularly used this Channel for eighty years or more," and "it has also been used by the navies of other States." *(Ibid.)*

[66]The court considered as a "fact of particular importance" that "the North Corfu channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Strait is of special importance to Greece by reason of the traffic to and from the Port of Corfu." *(Ibid.)*

Thus, the delimitation of any given strait depends upon the relative importance of that strait to international navigation.[67] International traffic does not include

[67]The *Corfu Channel Case* has received much criticism for the critieria therein utilized and the ultimate conclusion that this particular Channel is an international highway.

Eric Brüel, in his comprehensive study of "International Straits" concluded that the international character of a strait depends on "the degree of importance of the particular strait to the international seacommerce," in particular, "upon such facts as f. i. the number of ships passing through the strait, their total tonnage, the aggregate value of their cargoes, the average size of the ships and especially whether they are distributed among a greater or smaller number of nations." (I Brüel, International Straits [Copenhagen-London, 1947]. p. 42.)

In his critique of the *Corfu Channel Case,* Bruel wrote:

> "The map clearly shows that the Strait of Corfu is a typical détroit latéral', i.e., a water dividing an island from a mainland of which it in geological respect still forms a part. . . . The importance of such straits for the navigation can never be sufficient to qualify them as 'international': . . ." (Brüel, "Some Observations on Two of the Statements Concerning the Legal Positions of International Straits Made by the International Court of Justice in its Judgment of April 9th, 1949, in the Corfu Channel Case"), in Gegenswarts Probleme Des Internationalen Rechtes Und Dir Rechtsphilosophie (Constantapoulos, o.s. and Hans Wehberg, eds., Hamburg, (1953), p. 259 at 272.)
>
> "Great—if not deciding—weight must also be attached to the fact, ascertained by Professor Cot and not contested by the British Agent, that the official Sailing Instructions for the normal route to be followed by passage into and out from the Adriatic recommend, [*sic*], not the strait, but the route west to the island of Corfu. . . ." (*Id.* at 275.)
>
> "As to the position of the strait as connecting two parts of the high seas, this alone cannot qualify it as international." (*Id.* at 276.)
>
> "It is clear that only straits connecting two parts of the open seas, can be qualified as international straits, but it should be just as clear, that not all such straits are worthy to be classified as international, but only straits presenting a certain, not quite inconsiderable importance to the international sea-commerce as passages for international navigation." (*Id.* at 276.)
>
> "The special rules as to international straits are an exemption from the legal rules concerning territorial waters and must, as all exemptions, not be applied beyond what their aim claims. . . ." (*Id.* at 277.)

that leading to the ports of the nation claiming the strait. Hence, all non-Albania bound traffic was counted against Albania by the Court as the coastal State may always control traffic directed to its ports. (Article 16 (2), U.N. Doc. A/Conf. 13/L. 52.) The United States has exercised this control since 1790 (Customs Acts of August 4, 1790, 1 Stat. 145 at 155, 175; and March 2, 1799, 1 Stat. 627, at 648, 700).

To keep the instant suit in perspective, it should be reemphasized that the case involves the status of straits off the California coast within the meaning of the Submerged Lands Act. Ownership of the seabed and subsoil underlying submerged lands is in issue rather than control over the waters themselves. Significantly, section 4 of the Submerged Lands Act authorizes the State of Washington to extend its boundary to the international boundary in the Straits of Juan de Fuca although it is difficult to find a more generally recognized channel of international traffic on the Pacific Coast. This vital strait previously had been divided between the United States and Great Britain. (1 Moore, *Digest,* 658-60.)[68]

Conversely, scrutiny of the Southern California coast shows that none of these straits between the offlying islands and the mainland are of significant international importance. None of these straits are mentioned in any of the lists of important international straits.[69]

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[68]See Sec. IC, *supra.* The Strait of Juan de Fuca is listed as a strait constituting a route for international traffic in Kennedy. "A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic," U.N. Doc. A/Conf. 13/6 114, 122-23.

[69]See Kennedy, *op. cit.* (U.N. Doc. A/Conf. 13/6 and Add. 1). (I. Brüel, *International Straits, supra,* at 45; Union Interparliamentaire, *XVIIIe Conference, Compte Reptu de* (1914), pp. 74-75.) It should be noted that Commander Kennedy

To allege that California's straits connect two areas of open seas, as did the plaintiff and the Special Master (U.S. Brief, 75; Rep. p. 27) does not give such straits the character of international highways. (Brüel, *The Legal Position of International Straits, supra,* at 276.) To the contrary California contends that these straits are themselves inland waters which also lead to inland waters. Both the geography and geology of the area support this conclusion. Factually, the islands off Southern California are a geological extension of the mainland. (Trans. pp. 1059-60, 1062-64.) The recommended route for international shipping not headed for California ports is to the west or seaward of the islands.[70] Most international, as distinguished from coastal or small craft, shipping which traverses these straits is headed for the ports of San Diego, or San Pedro, Long Beach, or the numerous small harbors of the mainland and islands. California's straits are completely within one country which differentiates them from many truly international straits, such as the Straits of Magellan (Argentina and Chile), the "Sound" (Denmark and

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in his article (U.N. Doc. A/Conf. 13/6 and Add. 1) expends considerable time describing two of the straits with which the plaintiff attempted to compare California's straits (U. S. Brief Before the Special Master, 67-70), *i.e.,* the Straits of Magellan (U.N. Doc. A/Conf. 13/6 at 120-21), and the Sound between Denmark and Sweden (U.N. Doc. A/Conf. 13/6 at 142-43). To attempt to compare the international importance of these latter straits, or any straits cited by plaintiff, to that of California's straits, is wholly unwarranted.

[70]See *Sailing Directions for the West Coasts of Mexico and Central America. The United States to Columbia including the Gulfs of California and Panama,* Hydrographic Office Pub. No. 26 (formerly Hydrographic Office Pub. No. 84), p. 16 (9th ed. 1951); and Route Chart Illustrating routes described in Hydrographic Office Pub. No. 84.

Sweden), and the Corfu Channel (Greece and Albania). There is a total dearth of evidence that the nature, volume of shipping, direction and navigation in the Southern California straits are such that these straits, or any of them, must be classified as international highways. Instead, the channels or straits between California's offlying islands and the mainland should be determined to be what they are in fact, inland waters of the State.

f. Article 8 and Harbor Works

California agrees with the Special Master's recommendation that "in front of harbors the outer limit of inland waters should embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port," and California agrees that this line "may be assumed to be the line of the outermost harbor works" [Rep. pp. 4, 46-48]. California does, however, except to that portion of the Special Master's recommendation which implies that contrary evidence might be used to establish a line landward of the outermost harbor works. [Rep. pp. 4, 48; California's Present Exception VIA.] California further excepts to the inference that the Special Master's conclusion regarding harbors determines the extent of inland waters in any area embraced within this reference, for the reason that all the harbors hereunder consideration are either within bays or other larger areas which, of themselves, constitute inland waters. [California's Present Exception VIC.]

Concerning harbor works, Article 8 of the 1958 Geneva Convention recites:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."[71]

Although the Secretary of State's letter of November 13, 1951, is strangely silent on the subject of harbor works, Article 8 of the Geneva Convention was not unprecedented since the principle enunciated therein appears to have had United States support previously. As the Special Master pointed out (Rep. pp. 46-47), at the Hague Conference of 1930 the United States proposed, and the Second Sub-Committee recommended, that this outer line of permanent harbor works should serve as a baseline for the marginal belt. (Basis of Discussion No. 10, League of Nations Document 73 m. 39 1929 V; 24 Am. J. Int'l. L. Supp. 32 (1930); 3 Acts of The Conference for the Codification of International Law, 200, 219 (1930).) In addition, the legislative history of the Submerged Lands Act makes it abundantly clear that Congress intended the "coast line" to begin at the outermost harbor works. (See Sec. IA, *supra.*) Thus there is no merit to the line proposed by plaintiff for delimiting San Pedro Bay, which line falls far within the existing outer breakwater.

g. Article 3 and the Line of Ordinary Low Water

California has excepted to the Special Master's conclusion that the "ordinary low water mark on its coast"

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[71]At the Conference an attempt to change the mandatory "shall be regarded" to a permissive "may" was defeated. (U.N. Conf., Off. Rec. *op. cit.*, Vol. III, pp. 141-42.)

used in the decree of October 27, 1947 is "the intersection with the shore line of the plane of the mean of all low waters" to be established, subject to the approval of the Court, by the United States Coast and Geodetic Survey from observations made over a period of 18.6 years." (Rep. pp. 4-5; California's Present Exceptions VII A.) California agrees that the "ordinary low water mark," is to be established "as it exists at the time of the survey" (Rep. p. 4), including artificial accretions. (Rep. pp. 44-46.)

The Submerged Lands Act uses the term "line of ordinary low water" (Section 2(c), 67 Stats. 29; 43 U.S.C. § 1301(c)) while the phrase "ordinary low water mark" was employed in this Court's 1947 decree. The Act and its legislative history, manifest an intent to restore artificial accretions to the respective states; indeed Congress intended to define the " coast line," in section 2(c) of the Act as including artificial accretions. (See Sec. IA, *supra.*) Thus, the line of ordinary low water is to be measured from the shore, including artificial accretions thereto.

The litigants herein are in disagreement as to which plane should be used in locating the line of ordinary low water on the Pacific Coast. California contends that it should be the plane of the mean of lower low waters [California's Present Exception VII C] rather than the plane of the mean of all low waters as recommended by the Special Master.[72] This contention is

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[72]There are on the waters adjacent to the continental United States three types of tides, the semi-diurnal, the diurnal and the mixed.

a. The semi-diurnal types is one in which two high and two low waters occur each tidal day (24 hours and 50 minutes), and

based on the fact that the plane advocated by California is that recognized by Article 3 of the 1958 Geneva Convention, and is the plane most commonly used in charting the Pacific coast.

Article 3 provides:

> "Except when otherwise provided in this article, the normal boundaries for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

The letter from the U. S. Coast and Geodetic Survey of February 8, 1952 (United States Brief Before the Special Master, pp. 181, at 184, 185-186) reveals that the charts of the Pacific coast prepared by the Coast and

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the two tides are approximately the same height. The tides occurring on the Atlantic coast are of this type.

b. The mixed type is one in which two high and two low waters occur in a tidal day, but with marked differences between the two high waters and between the two low waters of the day. The difference between the corresponding height is called "diurnal inequality." The names assigned to the various heights are "higher high water," "lower high water," "higher low water" and "lower low water." The mixed type tide occurs on the Pacific coast. It is California's contention that the plane comprehended in the terms "ordinary low water mark" and the "line of ordinary low water" refer to the plane of the mean of "lower low water," for the reasons set forth in the text.

c. The diurnal type is one where there is predominantly apparently but one high and one low water in a tidal day, but where in fact there are two highs and two lows each day. The diurnal inequality in the two tides is such that the lower high tide and the higher low tide are at nearly the same level, giving the appearance of being a continuation of but one daily tide. The diurnal type tide appears on the Gulf coast, where the existence of the second tide is, however, measurable at times.

For a technical discussion of the three types of tides see H. A. Marmer, "Chart Datum," U.S. Coast & Geodetic Survey Special Publication No. 170 (1930) and Marmer, "Tidal Datum Planes," U.S. Coast & Geodetic Survey Special Publication No. 135 (1951).

Geodetic Survey designate only the plane of mean lower low water. California maintains that these coastal charts prepared by the United States Coast and Geodetic Survey qualify as "the charts officially recognized by the coastal State" within the meaning of Article 3.

Article 3 of the Geneva Convention was not novel, for at the Hague Conference of 1930 the American delegation, as a basis for discussion, recommended:

> "The term 'low water' and 'low tide', as used in this Convention, mean the low water base-line which is employed by the coastal State for the particular coast, whether it be the line of mean low water, the line of lower low water, the line of mean low-water spring tides, or some other similar line of reference." League of Nations Documents, C 351(b). M145(b), 1930 v.; 3 Acts of Conference 201 (1930).

It must be remembered that "coastal state" as used in international law means the nation and the United States uses the line of lower low water for its coastal charts. As reported by the Second Sub-Committee of the 1930 Hague Conference: "For the purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low water spring tide."[73] (*Id.* at 206.)

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[73]The datum of spring low water, or mean low water springs as it is sometimes called, is defined as the average value of the low waters that occur at spring tides, *i.e.*, the large tides following the new and full moon. (Marmer, "Chart Datums," U.S. Coast & Geodetic Survey Special Publication No. 170 (1930), p. 33.) There is no appreciable difference between the plane of spring low water and the plane of mean lower low water. The actual difference along the coast of California is less than one foot as compared to a mean range of tide or approxi-

Significantly, the United States actually has used the plane of the mean of lower low waters in an application of the Submerged Lands Act to the coast of Louisiana.[74]

Correspondingly, the only reasonable construction of either the "ordinary low water mark" or the "line of ordinary low water," as applied to the Pacific Coast, is to utilize the plane or datum of lower low waters.[75]

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mately four feet and a diurnal range of between five and seven feet. This small difference would cause no discernible change in the shoreline as shown upon the present charts.

[74]In 1957 a cooperative project between the United States Coast and Geodetic Survey, the Federal Bureau of Land Management, and the State Mineral Board of the State of Louisiana was undertaken to survey the line of ordinary low water of the Mississippi Delta area. [Shalowitz, *Shore and Sea Boundaries* 173-180 (1962); Jones and Shofnos, *Mapping the Low Water Line of the Mississippi Delta,* 20 Surveying and Mapping 319 (1960.)

The tides along that coast are predominantly the diurnal type, although occasionally showing characteristics of a semi-diurnal type, that is, having two high and two low waters each day. The plane used on the cooperative project was the mean of lower low water, the higher low waters being completely disregarded even when they were distinguishable. (Shalowitz, *supra,* at 176, n. 158; also see n. 37, p. 97.) The project did not use the mean of all low waters, as advocated by the plaintiff in this case.

[75]The Special Master (Rep. pp. 4-5) was correct in pointing out that 18.6 years is the correct cycle for determining the average or mean tide on a physical basis. Nevertheless, although the United States Coast and Geodetic Survey coastal charts of the Pacific Coast of the United States are based on the plane of mean lower low water, they are not based on an 18.6 year cycle. Since the datum plane changes from one cycle to another, just as it changes from one year to another, the Coast and Geodetic Survey has adopted for its coastal charts of the Pacific Coast of the United States a standard lower low water plane established at its survey station at the Presidio in San Francisco. This plane is based on observations over a ten year period from 1897 to 1907. (Disney and Overshiner, *Tides and Currents in San Francisco Bay,* U. S. Coast & Geodetic Survey Special Publication No. 115 (1925), p. 16; Marmer, *Chart Datums,* United States Coast & Geodetic Survey Special Publication No. 170, p. 32 (1930).) Thus the cycle used in Pacific coastal

h. ARTICLE 5 AND INTERNAL OR INLAND WATERS

Article 5 of the 1958 Geneva Convention, deals with the status of waters lying landward of baselines and provides:

> "1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
>
> "2. Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in Articles 14 to 23, shall exist in those waters." (U.N. Doc. A/Conf. 13/L.52.)

Pursuant to Article 5, if baselines are drawn pursuant to the rules set forth in the Geneva Convention, then waters behind those boundaries are deemed inland waters. Ignoring momentarily the problem of innocent passage, the history of this Article, which is consistent with the Judgment in the *Anglo-Norwegian Fisheries Case* (*United Kingdom v. Norway* [1951], I.C.J. Rep. 116, 132), clearly indicates that the status of waters behind baselines (internal waters) are "inland waters" as used in section 2(c) of the Submerged Lands Act.[76]

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charts is at variance with the cycle recommended by the Special Master. Likewise the use of one station, at San Francisco, rather than several stations along the California coast will cause some distortion as the plane is surveyed on the shore at places distant from San Francisco. California contends, however, that the tidal plane used for such coastal charts *i.e.* the lower low water plane established at San Francisco, is the most logical within the meaning of the Submerged Lands Act, and hence will accept that plane.

[76]See Yearbook of International Law Comm'n, 1952, I, pp. 147-50; Yearbook, 1953, I, pp. 135-36; Yearbook, 1954, I, pp. 117-18; Yearbook, 1955, I, pp. 196-200; Yearbook, 1956, I, pp. 9-11, 184-190, 282.

Although the Special Master determined that California, prior to 1949, had not asserted that the channel water areas between the islands and the mainland constituted inland waters (Rep. pp. 38-39), the State contends that its claim predicated upon its 1849 Constitution describing these waters as embraced within California's boundaries must be considered as equivalent to the establishment of baselines dividing inland waters from the territorial sea. Stated otherwise, the Constitution of California in 1849, in delimiting the maritime boundary of California in accordance with international law then prevailing (and consistent with international law now in force), provided also a clear indication of the combined extent of California's territorial sea and inland waters. When the territorial sea is subtracted from that area, the remainder constitutes the inland waters of California. Once the baselines of the territorial sea are drawn in accordance with that Constitution, the waters behind such baselines are the inland waters of California.

The reservation of the right of innocent passage through inland waters lying behind straight baselines drawn pursuant to Article 4, when such right does exist, removes any foreign policy consideration from the establishment of a straight baseline system off California's coast. If such a right of innocent passage ever existed in any of the areas in dispute in this case, such right still exists because paragraph 2 of Article 5 of the Geneva Convention reserves all rules relating to innocent passage. This provision originated with the United States. (U.N. Conf., Off. Rec., *op. cit.,* Vol. III, pp. 159, 160, 235 at 236.) Consequently, no foreign nation would have any cause to complain if a straight

baseline system around California's islands or the Santa Barbara Channel was recognized. Even more basic, this case involves the division of the seabed and subsoil of the continental shelf underlying the waters off California but does not affect the waters themselves. Control of the water is retained by the United States pursuant to section 6 of the Submerged Lands Act, and constitutionally resides in the Federal Government. *United States v. California,* 332 U.S. at 35-36.

4. Most of the Water Areas in Dispute Before the Special Master Are Historic Inland Waters

a. THE APPLICATION OF THE DOCTRINE OF HISTORIC WATERS TO THIS CASE

The Secretary of State's letter of November 13, 1951 admitted that the criteria therein advocated for delimiting the marginal belt were not applicable to historic bays or waters. (U.S. Brief Before the Special Master, App. 167 at 170, 173.) However, the Special Master concluded that none of the seven segments of coastline considered by him were historic inland waters. (Rep. p. 30.)

California has excepted to that portion of the Special Master's Report dealing with historic waters (California's Present Exceptions VIII) on the ground that he used improper criteria to ascertain whether particular water areas were historic waters, and that even those criteria were erroneously applied to the coastal segments before him. More specifically, California has excepted to the following portions of the Special Master's Report:

(1) The implication that the acts necessary to qualify an area as historic waters must have been acts of

the United States rather than California (Rep. p. 30), together with the Master's later refusal to decide whether specific acts by California were sufficient, to establish the existence of historic waters (Rep. p. 31, California's Present Exception VIII A);

(2) The assertion that California, prior to 1949, failed to exercise exclusive authority over the water areas in dispute (Rep. pp. 3, 38-39, California's Present Exception VIII F);

(3) The conclusion that absence of objection by foreign nations or the United States to any assertion of jurisdiction by California or its predecessors over the waters in question cannot be regarded as acquiescence to California's authority (Rep. p. 35, California's Present Exception VIII E);

(4) The refusal to consider as relevant California's historical boundaries as defined in its 1849 Constitution. (Rep. pp. 37-38, California's Present Exception VIII I.)

The concept of historic waters is separate from the concept of historic boundaries previously discussed. In this case, California claims that all of the coastal segments before the Special Master are inland waters as being:

(1) Within California's historic boundaries within the meaning of the Submerged Lands Act, and

(2) Historic inland waters, under principles of international law (except for the Crescent City Segment).

At this point, we shall discuss the doctrine of historic inland waters, as such doctrine has developed in international law, and especially, as clarified and reanalyzed in United Nations' studies conducted subse-

quent to the filing of the Special Master's Report. It is California's position that even if this case did involve a question of external sovereignty, most of the water areas in dispute would qualify as historic inland waters under accepted doctrines of international law.

Since the Special Master's Report was filed in 1952, there have been two comprehensive studies on the doctrine of historic waters, prepared by the Secretariat of the United Nations.

(1) The first, entitled "Historic Bays" (U.N. Doc. A/Conf. 13/1), dated September 30, 1957 was prepared for use at the 1958 Geneva Conference (hereinafter referred to as "U.N. Study I").

(2) The second, captioned "Juridical Regime of Historic Waters, Including Historic Bays," (U.N. Doc. A/CN. 4/143) dated March 9, 1962 was prepared pursuant to resolution of the Geneva Conference (hereinafter referred to as "U.N. Study II").

The Special Master obviously could not have studied these documents; yet they are extremely valuable in providing a background for determining whether specific waters are inland historic waters. These studies, by collecting and analyzing available international materials on the subject, carefully define the concept of, and the criteria for establishing, historic inland waters.

b. The Doctrine of Historic Inland Waters

Pursuant to the well established international law doctrine of historic waters, certain waters may be claimed by a coastal nation as historic waters based on historic rights exercised by that nation. (See U.N. Study II at 19.) This principle has been recognized by

the United States as applicable to Chesapeake and Delaware Bays. (See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction,* 429-30 (1927).) Although the doctrine is frequently referred to in terms of "historic bays," it is by no means limited to bays and applies equally to other water areas such as straits and archipelagoes. (U.N. Study I, p. 37; U.N. Study II, p. 17.)[77]

(1) *The Outmoded Concept of "Exceptional" or Prescriptive Right*

Some writers, in the past, have spoken of the doctrine of historic waters as constituting an "exception" from or an abrogation of a general rule based upon geographical criteria, and have analogized the adjacent nation's rights to historic waters to a prescriptive right against foreign nations. For example, the doctrine has been referred to as ". . . a validation in the international legal order of a usage which is intrinsically invalid, by the continuance of the usage over a long period of time." (30 *The British Yearbook of International Law,* 27-28 (1953)[78]; Gidel, *The Law of Territorial Waters and Maritime Jurisdiction,* 621-23, 635, 651 (1927).) As pointed out in the United Nations study, the adoption of such a view ". . . is of practical

[77]Of note in this regard is the proposal of the United States delegate to the 1930 Hague Convention which would have amended Basis of Discussion No. 8 (relating to historic bays) to include "waters, whether called bays, sounds, straits, or by some other name. . . . 3 *Acts of Conference for The Codification of International Law* 107 (1930). A similar view was expressed in the Secretary of State's letter of November 13, 1951. (U.S. Brief, etc., *supra,* App. 167 at 173; Special Master's Rep. p. 12.)

[78]In this article, Sir Gerald Fitzmaurice was criticizing the Norwegian position in the *Anglo-Norwegian Fisheries Case* as an attempt to remove the element of prescription from the doctrine of historic waters.

importance with respect to the question of what is needed to establish title to such waters, since if the right to 'historic waters' is an exceptional title which cannot be based on the general rules of international law or which even may be said to abrogate these rules in a particular case, it is obvious that the requirements with respect to proof of such title will be rigorous." (U.N. Study II, p. 21.) Since the entire discussion of historic waters by the Special Master (Rep. pp. 30-39) is predicated upon an assumption of the "exceptional" basis of this doctrine, and an application of rigorous requirements, it is of basic importance to this case to examine the present validity of his approach in light of modern, definitive scholarship.

(2) *The presently accepted concept of historic inland waters*

After careful study, the United Nations Secretariat concluded that the doctrine of historic waters is *not* an exception to any usual or general rules of delimitation, but rather is of equal dignity to any geographic criteria. (U.N. Study II, pp. 21-30.) "When long usage is invoked by a State, it is a ground additional to the other grounds on which its claim is based." (Bourquin, *Les baies historique* in *MéLanges Georges Sauser-Hall* (1952) 37 at 42, quoted in U.N. Study II at 25.) Inherent in this approach is a rejection of the concept that rights in historic waters are "prescriptive" in nature, arising by virtue of acts wrongful at their inception and requiring the acquiescence of foreign states. (U.N. Study II, 31-33.) To the contrary, the modern view is that historic rights may be established and evidenced by provisions of domestic legislation, and by assumptions of jurisdiction under municipal law (national domestic

law), without the necessity of concrete action against foreign nations and citizens. As stated by Bourquin, the important point is whether the foreign actions of foreign states "interfere with the peaceful and continuous exercise of sovereignty [by the State asserting historic rights]," and "the absence of any reaction by foreign States is sufficient [to permit the establishment of historic rights]." Bourquin, *supra,* at 46; see also U.N. Study II, 41-44. See also: Baldoni, *Il Mare Territoriale nel Diritto Internazionale Comune,* 80-82 (1934).

The basic precepts underlying the doctrine of historic waters were not changed by the adoption of specific rules for the delimitation of the marginal sea by the 1958 Geneva Convention. (U.N. Study II, pp. 36-37.) The International Law Commission in its lengthy work of preparation for the Conference insisted that the rules it proposed would not affect any existing historic titles or the concept of historic waters.[79]

c. Criteria for Establishing Historic Waters.

Perhaps the best statement setting forth the criteria for establishing historic waters is contained in the second study of the United Nations Secretariat:

> "185. In determining whether or not a title to 'historic waters' exists, there are three factors which have to be taken into consideration, namely,
>
> (i) the authority exercised over the area by the state claiming it as 'historic waters';
>
> (ii) the continuity of such exercise of authority;
>
> (iii) the attitude of foreign States." (U.N. Study II at 72.)

[79]See, *e.g.,* Yearbook of the International Law Commission, 1954, I, 79; Yearbook, 1955, I, pp. 249-50; Yearbook, 1956, II, p. 26.

(1) *Exercise of Sovereignty*

The sufficiency of the authority which must be exercised over "historic waters" is determined by an examination of the scope of the authority, the acts by which it is exercised and the effectiveness of the acts. U.N. Study II, at 38-39. The authority exercised must constitute a claim of sovereignty. "If therefore, as is the generally accepted view, a claim to 'historic waters' means a claim to a maritime area as part of the national domain, i.e., if the claim to 'historic waters' is a claim to sovereignty over the area, then the authority exercised, which is a basis for the claim, must also be sovereignty." (U.N. Study II, p. 39; see also *Id.* at 40.) This does not mean, however, that all the rights or duties included in the concept of sovereignty must have been exercised. (*Id.* at 40.)

As to the type of acts required for establishing historic waters:

> "It is hard to specify categorically what kinds of acts of appropriation constitute sufficient evidence; the exclusion from these areas of foreign vessels and their subjection to rules imposed by the coastal states which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's interest. It would, however, be too strict to insist that only such acts constitute adequate evidence. . . ." (Gidel, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) 633, quoted in U.N. Study I, at 33; II at 41.)

The prohibition against foreigners fishing in the waters in question is clearly a sufficient act. (Bourquin, *supra,* at 43; U.N. Study II at 41.) Acts under munici-

pal law, regulations, administrative measures, and judicial decisions are also the kinds of acts used to establish the existence of historic waters. (U.N. Study II, pp. 41-43.)

It is generally said that acts of sovereignty must be those of the State or its organs (U.N. Study II, pp. 42-43), and must be public or receive notoriety. (U.N. Study II, p. 43.) This does not mean that all exercise of sovereignty must be by national governments. The acts of a subdivision or local agency of a State or of a component part of a federation are equally as valid as an act by the State or Federal Government (*cf.* U.N. Study II, p. 42) particularly where the State or Federal government does not disavow such act.[80] For example, the United States has on several occasions relied upon acts of the various states to support the Government's assertions of sovereignty against foreign nations.[81] Moreover, the United States has long

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[80]In the *Minquiers* and *Ecrehos* cases between the United Kingdom and France, the International Court of Justice relied heavily on local administrative, legislative and judicial acts. (I.C.J. Reps. [1953] 47 at 65, 69.) (See also: Sorensen, *Les sources du droit international* 90 (1946); and see O'Connell, *Problems of Australian Coastal Jurisdiction*, 34 British Year Book of International Law 199 at 233-43, 251-59 (1958).

[81]As Thomas Jefferson wrote: "For the jurisdiction of the rivers and bays of the United States, the laws of the several States are understood to have made provisions, . . ." Note from Secretary of State Thomas Jefferson to French and British Ministers, November 8, 1793. (1 Moore, Digest, *supra*, 702-03.)

In the *St. Croix River Arbitration*, 1797, the United States relied on various acts of the State of Massachusetts as proof of its claim to the territory in dispute. (1 Moore, *International Adjudications* (Modern Series) 161-62 (1929).)

The opinion of Attorney General Randolph concerning Delaware Bay took into consideration that the bay was included within the jurisdiction of the States of New Jersey and Delaware. (1 Moore, *Digest, supra*, 735 at 736.) In one of the decisions of the *Alabama* claims, in 1885, it was noted that the

recognized that the Federal government is responsible under international law for the acts of subordinate units against foreign nationals.[82]

Clearly then, in determining whether certain waters in California are historic waters, acts of California or its predecessors which meet the international requirements and which have not been timely disavowed by the Federal Government, must be considered as valid acts. Concededly, acts which are relied upon must be effective, and not merely proclamations; but this does not require any concrete enforcement action if no challenge to the authority is made. (U.N. Study II, p. 43.)

(2) *Continuity*

It is also required that the State claiming historic waters has continued its exercise of sovereignty over a considerable period. (U.N. Study II, p. 45.) There is no fixed period of time; rather the test is one of reasonableness, to determine whether, considering all the circumstances, the period is sufficient to give rise to a usage. (U.N. Study II, p. 45; U.N. Study I, pp. 32, 35.) As stated by Bourquin, ". . . the waters in respect

States of Virginia and Maryland have claimed and continued to claim jurisdiction over the waters of Chesapeake Bay. (4 Moore, *History and Digest of the International Arbitration to Which the United States Has Been a Party,* 4332-39 (1898).)

In the *Chamizal Arbitration* with Mexico in 1911 the United States relied on acts of the State of Texas and the County and City of El Paso to support its claim. (See *The Countercase of the United States of America Before the International Boundary Commission* 185-203 (1911).)

[82]6 Moore, *Digest, supra,* 840; 5 Hackworth, *Digest of International Law* 593-95 (1943); see also: Eagleton, *The Responsibility of States in International Law* 32-34 (1928); and see A.L.I. Restatement, *The Foreign Relations Law of the United States* (proposed Official Draft, May 3, 1962) §§ 173, 174.

of which an historic title is claimed are not waters which the coastal State has appropriated at a more or less recent date, but waters which have always formed part of its territory and which have never been a portion of the high seas . . ." (Bourquin, *supra,* at 49, quoted in U.N. Study I, at 36.)

(3) *Attitude of Foreign States*

Although the final requirement for establishing historic waters is often stated in terms of "acquiescence of foreign States," it is perhaps more correct to speak in terms of "toleration" or "absence of objection." (U.N. Study II, p. 48; *United Kingdom v. Norway,* [1951], I.C.J. Reports 116, 138-39.)

The important point is to determine whether the actions of foreign states ". . . interfere with the peaceful and continuous exercise of sovereignty . . ." by the claiming State to the point of preventing the establishment of an historic title. Thus the "absence of any reaction by foreign States is sufficient." (Bourquin, *supra,* at 46, quoted in U.N. Study II at 47.) Any objection by an interested State must be timely; for once an historic right is established, an objection is ineffective. (U.N. Study II at 53.) In addition, the objection to acts of sovereignty must be firm and sustained to prevent the establishment of an historic right. (U.N. Study II, pp. 50-52.)

In the present case, it is significant to note that despite the fact that California's assumptions of jurisdiction were published throughout the world in international law journals (as discussed below), there has been a complete absence of any foreign reaction thereto. It is also noteworthy that prior to the commencement of

the present proceedings, the United States never objected to any claims by California nor denied their international significance. Indeed, when the occasion arose the Federal Government supported California's assertions of sovereignty in *People v. Stralla,* 14 Cal. 2d 617, 96 P.2d 941 (1939). The significance of the United States' attitude is emphasized by the frequency with which it has objected to assumptions of jurisdiction by foreign nations.[83]

d. California's Historic Waters.

California claims under the above criteria that all waters lying between the mainland and the islands lying off the Southern California coast, and all the bays in question, are historic inland waters of California.[84]

Contrary to the Master's conclusion, Article XII of the California Constitution of 1849 was an assumption of jurisdiction over the waters in question. The background and analysis of this boundary description have been heretofore set forth.[85] Briefly, California assumed jurisdiction over all the territory of Upper California ceded to the United States by Mexico (exclud-

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[83]See examples set forth in 4 International Court of Justice *Fisheries Case, Pleadings, Oral Arguments, Documents,* 559-604 (1951). It also should be noted that the United States has manifested objections even if no injury is alleged to be suffered by United States citizens (38 Dept. of State Bull. 461 (1958), or even if the claim of jurisdiction is based on newspaper announcements (37 Dept. of State Bull. 388 (1957.)

[84]California is aware of the Federal District Court decision in *Hooker v. Raytheon Co.,* 212 F.Supp, 687 (S.D. Calif. 1962) wherein the Santa Barbara Channel was held to be high seas for purposes of the Death on the High Seas Act, 46 U.S.C. §§761-768. California was not a party to this case, and there is no indication that the court considered the extensive historical data presented herewith.

[85]See: Sec. IB, *supra.*

ing the eastern portion thereof) but including all the maritime area claimed by Mexico.

The Mexican government, during its rule over Upper California, had claimed and enforced its jurisdiction over the bays off California and the waters between the mainland and the islands. This jurisdiction, in turn, was a continuation of Spanish jurisdiction. (*Ocean Industries, Inc. v. Superior Court, supra,* 200 Cal. at 242; see also: App. B.)

The Special Master categorized the exclusion of foreigners from an area within ten leagues of the Pacific Coast by virtue of the Nootka Sound Convention (Crocker, *supra,* at 54) as a remnant of the *mare clausum* era. (Rep. p. 38.) This overlooks two important factors: (a) The Nootka Sound Convention was executed in 1790, only three years before Jefferson's important notes concerning a three mile limit for the territorial sea (1 Moore, *Digest, supra,* 702-703) and was signed by Great Britain, one of the world's foremost advocates of the concept of freedom of the seas, and later reaffirmed by the British-Spanish Treaty of Friendship and Alliance of August 28, 1814 (Article 1 of the Additional Articles to that Treaty, 1 *British and Foreign State Papers,* Part I, 292 (1841)); and (b) the area involved in that Convention was the Pacific Coast of North America, which was then, as it is now, far less significant in matters of commerce and international navigation than areas of the Atlantic Ocean. The fact that an area under question is of relatively lesser importance to international maritime commerce allows a greater assumption of dominion by a coastal state. Section IIC5, *infra; Church v. Hubbart,* 6 U.S. (2 Cranch) 186 (1804).

Article XII of the 1849 California Constitution was a continued assertion of the claims of Spain and Mexico over the water areas in question. That it is regarded as a claim of jurisdiction in international circles is shown by the reference to California's Constitutional Boundary (Art. XXI, Calif. Const. 1879 and Art. XII, Calif. Const. 1849), in a chapter entitled "Juridical Statutes, Breadth and Delimitation of the Territorial Sea" in *Laws and Regulations on the Regime of the Territorial Sea,* United Nations Legislative Series at 56-57 (1957).

When the boundary provision in the 1849 Constitution was repeated in substantially the same wording in Article XXI of the California Constitution of 1879, this was a reassertion of jurisdiction over the waters in question. Government Code section 170, as amended in 1949 (Chap. 65, California Statutes of 1949) further continued the claim to those areas.

Of paramount importance are judicial decisions relating to three major bays in question: Monterey, Santa Monica and San Pedro.

Each of the three major decisions (*Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 252 Pac. 722 (1927) (Monterey Bay); *People v. Stralla,* 14 Cal. 2d 617, 96 P.2d 941 (1939) (Santa Monica Bay); and *United States v. Carrillo,* 13 F. Supp. 121 (S.D. Calif., 1935) (San Pedro Bay), held not only that each of these bays was within the boundaries of California within the meaning of the State Constitution, but also on historic grounds. Although the Special Master thought otherwise, it is clear on the basis of the foregoing discussion that the acts involved in these proceedings were the type normally used as bases for establish-

ing historic title, *i.e.,* fishing regulations and criminal jurisdiction. Most important, however, is the fact that all of these cases were predicated on the proposition that the water areas in question were within California's territorial boundaries, and were subject to its domestic jurisdiction.

In the *Ocean Industries* cases, California successfully enforced its fishing regulations in Monterey Bay beyond three miles from the shore line. In the *Stralla* case, California successfully enforced its criminal laws in Santa Monica Bay beyond three miles from the shore line.[86] In the *Carrillo* case, the United States failed to obtain a criminal conviction for an act allegedly performed on the "high seas"; this because the Court found that the conduct occurred in San Pedro Bay, within the State of California as distinguished from the "high seas."

As to the Special Master's contention that the acts in these cases did not constitute "an assertion of exclusive authority over these waters such as might be the occasion for objection by foreign governments or action by the United States in our foreign relations," (Rep. p. 35) the world wide notoriety received by the three cases compels an opposite conclusion. For example, all three cases were cited by Professor Hyde in his discussion of "a few conspicuous instances of the assertion of dominion by the United States and certain other States over the waters of particular bays of special prominence." (1 Hyde, *International Law Chiefly as*

[86]California criminal jurisdiction requires the act to be committed within the territory of California. (California Penal Code §§ 27(1), 778a; *People v. Buffum,* 40 Cal.2d 709, 256 P. 2d 317, 320 (1953).

Interpreted and Applied by the United States, supra, 470, 474 (2d ed., 1945).

Hackworth cites the *Ocean Industries* and *Carrillo* cases for the proposition that Monterey and San Pedro Bays are within the jurisdiction of California. (1 Hackworth, *Digest of International Law,* 708-10; 694-95 (1940).)

All three cases have been cited in the *Annual Digest of Public International Law Cases* published in London [*4 Annual Digest,* 135-36 (1937), citing *Ocean Industries, Inc. v. Superior Court, supra; 8 Annual Digest,* 169-70 (1935), citing *United States v. Carrillo, supra,* 9 *Annual Digest* 133-40 (1939), citing *People v. Stralla, supra*]. In addition, *People v. Stralla, supra,* was noted in 34 *American Journal of International Law* 143-53 (1940). Again, this was the case in which the United States supported the position of California that Santa Monica Bay was within California, when the case was pending in the California Supreme Court.

Of even greater significance is the reliance mentioned above by the United States State Department in its memorandum to the United Nations on the *Ocean Industries* and *Carrillo* cases. (Yearbook of the International Law Commission 1950, II, pp. 60, 61 (1957). This memorandum was cited by the Norwegian Government in the *Anglo-Norwegian Fisheries* case before the International Court of Justice, mentioning explicitly the *Ocean Industries* and *Carrillo* cases. (3 International Court of Justice, *Fisheries Case, Pleadings, Oral Arguments, Documents* 336-37, 758 (1951).) Thus the acts in question and the judicial decisions based thereon have been the occasion for action by the United States in its foreign relations.

Finally, Monterey Bay has been frequently cited as an example of an historic bay. (See: Jessup, *The Law of Territorial Waters and Maritime Jurisdiction,* 428-430 (1927); Balladore-Pallieri, *Diritto Internazionale Pubblico,* pp. 377-78 (7th ed., 1956); 3 Gidel, *Le droit international public de la Mer,* 656 (Paris, 1934); U.N. Study I, 8, 20; *Territorial Limits in the Bristol Channel,* 9 British Year Book of International Law 121, 124 (1928).)

Certainly there has been ample opportunity for any nation, or the United States, to object to the recognition of California's assumption of jurisdiction over the three bays as represented by the aforesaid judicial decisions. No such objection has ever been evidenced. It must be concluded that the international community has "tolerated" the claims of California and its predecessors to the area in dispute before the Special Master. As regards the United States, not only has it acquiesced in California's claim, as shown by approval of the 1849 boundary upon admission (9 Stat. 452), but it has on occasion, actively supported California's claims by an amicus curiae brief in the *Stralla* case and by the aforementioned State Department memorandum of 1950 to the United Nations.

e. Conclusions as to Historic Waters.

California contends that the Master's approach to the question of whether any of the seven segments in question are historic inland waters was incorrect, and of necessity his conclusion is wrong. The new studies on the problems of historic waters clarify the criteria to be used, and when applied to the California coast compel a conclusion that the waters of California's major bays and those lying between the Southern California

mainland and the islands are not only within California's historic boundaries, but are also historic inland waters within the applicable rules of international law. The question should be resubmitted to a Special Master to consider California's claims in light of the correct criteria, the aforesaid new materials, and the supervening effect of the Submerged Lands Act.

5. In the Application of International Law Criteria to the Pacific Coast, Its Geography and Usage for International Commerce Must Be Considered in Delineating Inland Waters.

While of commercial and military significance, waters off Pacific Coast are far less extensively used for international commerce than the busy Atlantic seaboard or European waters. Consequently, a relaxation of any strict international rules for delimiting inland waters off the Pacific Coast will be of little international concern. Actually, the idea that different rules should apply in different areas is well recognized in international law.[87]

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[87]This idea has been traced to an Italian author, Paolo Sarpi, who in the early 1600's formulated the opinion that "the extent of territorial sea should not be fixed everywhere in an absolute manner, but should be made proportionate to the requirements of the adjoining state, without violating the just rights of other people. Thus, a country or city which possessed large and fertile territories that provided adequate subsistence for the inhabitants, would have little need of the fisheries in the neighbouring sea, while one with small territories that drew a large part of its subsistence from the sea ought to have a much greater extent of sea for its exclusive use." (Fulton, *The Soverignty of the Sea* p. 547 (1911). See also: A. Pierantoni. *Storia degli Studi del Diritto Internazional* 661-62 (2d ed. 1902).)

More generally, it has been suggested that "a large part of the sea which has commensurable relation to a territory can legally be occupied by a certain state, if only what it leaves can be occupied by other states." Conrigius, *Dissertatio politica de domio maris,* 1676; reprinted in his *Opera* (Brunswick, 1730),

In the United States this doctrine of non-uniformity of rules relating to maritime jurisdiction was advocated by Chief Justice Marshall in *Church v. Hubbart,* 6 U. S. (2 Cranch) 186, 235 (1804) as follows:

> "In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted

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Vol. IV, at 956.) Relying on Conrigius, Wegelin concluded that "The dominium of the sea does not extend equally everywhere. In some places the dominium is more extensive, in other places its boundaries are closer. Therefore, we cannot define a dominium exactly unless we first explore the former customs and the laws of the particular place." (I. C. Wegelin, *Dissertatio inauguralis de dominio Maris Svevici* [Jena, 1742], ch. III, § VI.)

A similar rule was suggested by Lord Hervey in a debate in the House of Lords in 1739 on a convention with Spain settling various disputes between England and Spain. He pointed out that the principal point of one of these disputes was the right of the foreign ships to approach the Spanish coasts of America, and then made the following statement:

> "The Spaniards do not pretend to deny our right to a free navigation upon the open seas of America. They say, that their coasts cannot be called open sea; and that therefore, if any one of our ships come upon their coasts without necessity, they have a right to search her, in order to see whether she has been concerned with any illicit trade with their settlements: They say further, that their coasts in America, as well as their coasts in Europe, are within their own dominions: that they have a power to make what regulations they please within their own dominions; and that therefore, they have a power to regulate what shall be deemed testimonies of a ship's having been concerned in an illicit trade, if such ship be found upon their coast. Now, my Lords, that every nation has a sort of a right to, and a dominion over, what may properly be called their own coasts, is what, I believe, no man that understands any thing of the law of nations will deny; but the question is, how far out at sea these coasts shall extend; and as this is a question that

to very narrow limits, but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions."[88]

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has not yet been determined by any treaty between Spain and us, it must be very particularly enquired into, and before any settlement can be made by a new treaty. *There may be reasons for confining the coast within much narrower bounds in some seas than in others. In those seas, where the common course of navigation lies very near the shore, the coast of the neighboring country must be very much confined; and in those seas, where the common course of navigation never approaches near the shore, the neighbouring country, or state, may be allowed to extend their coasts to a greater distance at sea."* (Hansard, *The Parliamentary History of England,* Vol. X [1737-39], (London, 1812), col. 1202.) (Emphasis added.)

It may be noted that this particular issue was finally solved by the Nootka Sound Convention between Spain and Great Britain of October 28, 1790, which accepted the Spanish contention. (Crocker, *The Extent of the Marginal Sea, supra,* p. 540.) That convention was confirmed by the British-Spanish Treaty of Friendship and Alliance of August 28, 1814. (Article I of Additional Articles to that Treaty; 1 British and Foreign State Papers, Part I, p. 292 (1841).)

A Spanish author, F. J. Abreu y Bertodano, writing at about the same time, contended that the jurisdiction of States fronting on an ocean should extend 100 miles, while that in narrower seas ought to be proportioned to the extent of the coasts and the width of the sea. (F. J. Abreu y Bertodano, *Tratado Juridico-Politico sobre Presas de Mar,* (Cadiz, 1746) ch. v.; cited in W. L. Walker, *Territorial Waters: The Cannon Shot Rule,* 22 British Year Book of International Law 210, 224 (1945).)

[88]This statement by Chief Justice Marshall was quoted approvingly in the dissent of Mr. Justice Douglas in *United States v. Louisiana,* 363 U.S. 1, 112, n. 19 (1960). See also: Chancellor Kent's remark:

"Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive

Hence, in determining whether waters off the California coast are inland waters, unique features which distinguish the western coast of the United States from the Atlantic seaboard and heavily trafficked European sea lanes, must be considered. These factors include: the geography of the area, the comparative remoteness of the Pacific Coast from busy international seaways, and the relative lack of numerous natural harbors and shelter areas available for purposes of international trade.[89] In the application of the baseline criteria established by the 1958 Geneva Convention to define "inland waters," or in applying the standards for ascertaining "historic inland waters," less stringent proof

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regulations a liberal extension of maritime jurisdiction. . . ." (I Kent, *Commentaries, supra,* at 29.)

Recently the eminent Italian jurist Prospero Fedozzi highlighted another aspect of this problem, stating:

> "The need of a State to safeguard its various interests is the fundamental reason for the recognition by international law of the existence of a territorial sea. Is there any basis for a distinction between these interests, and to consider one or more as justification for the delimitation of the territorial sea in the strict sense of the term, and to consider others merely as justification for the delimitation of contiguous zones? As all the power applied by a State in the marginal sea must be juridically conceived as emanations of territorial sovereignty, the application of anyone of these powers must be considered as an exercise of that sovereignty and thus confers on the sea to which it is applied the character of the territorial sea. All distinctions between various powers and legal capacities are therefore arbitrary." Prospero Fedozzi, *Trattato di diritto internazionale: Introduzione el diritto internazionale e parte generale.* (Padova, CEDAM, 3d. ed., 1938), p. 376.

See also: P. Fedozzi, *La condition juridique des navires de commerce,* 10 Academie de Droit International, Recueil des Cours 1, 75 (1925-V).

[89]Trans. pp. 923-24; H.R. Rep. No. 2515, 82d Cong., 1st Sess. (1953), p. 19; See also: App. A.

should be required to establish such status for water areas on the Pacific Coast, as contrasted to other places where such classification might substantially interfere with the rights of the United States or other nations.

CONCLUSION.

In Part I of California's Argument, we have shown that the basic premise on which the entire Report of the Special Master is predicated (*i.e.,* that the question is one of "external sovereignty") is no longer tenable since enactment of the Submerged Lands Act. In Part II we have shown that even if that basic premise were to be accepted, the Report was not only erroneous when made, but has been rendered valueless by significant international law developments and fundamental changes in United States foreign policy which occurred subsequent to its filing. California maintains that its coast line lies along the seaward limit of the water areas in controversy before the Special Master, whether such coast line is delineated in accordance with criteria established at the time of its admission into the Union as required by the Submerged Lands Act or in accordance with the law of nations.

Simply stated, it is California's position that its rights under the Submerged Lands Act should not be determined on the basis of a Report which was filed before that Act was even in existence, and whose author had no opportunity to evaluate his conclusions in light of subsequent developments of pivotal significance.

Therefore, California respectfully requests:

1. That "California's Exceptions to the Report of the Special Master dated October 14, 1952, Pursuant to Court Order of December 2, 1963," be sustained.

2. That the Special Master's Report of October 14, 1952, be rejected by this Court, and the same or another special master be appointed to: (a) consider evidence already presented and to receive additional relevant evidence offered by either party; and (b) render a new report which will determine the rights of the parties under the Submerged Lands Act and which will take into consideration material events, including those specified in this Brief, which have occurred subsequent to the filing of the said October 14, 1952 Report.

3. That, in the alternative, this Court enter its decree declaring that the coast line of the State of California is the line of ordinary low water, defined in accordance with the criteria set forth in this Brief, along that portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of all water areas in controversy before the Special Master; and that the State of California has title to and ownership of, and the right and power to manage, administer, lease, develop, and use all lands beneath navigable waters, and the

natural resources within such lands and waters, lying landward of a line three geographical miles from those portions of the coastline so defined.

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Dated: April 1, 1964.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of March, A. D. 1964.

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