In the Supreme Court of the United States

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October Term, 1977

No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

CALIFORNIA'S OPENING BRIEF IN SUPPORT OF ITS PETITION FOR THE ENTRY OF A THIRD SUPPLEMENTAL DECREE

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Jurisdiction

This action was originally instituted by the United States against the State of California under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States. In supplemental decrees entered by this Court on Jan- January 31, 1966 and June 13, 1977, this Court retained jurisdiction to entertain such further proceedings, to enter such orders, and to issue such writs as were deemed necessary or advisable to give proper force and effect to these decrees or to effectuate the rights of the parties in the premises.

United States v. California, 382 U.S. 448, 453 (1966) (paragraph 14) and ____ U.S. ____, 97 S.Ct. 2915, 2916 (1977) (paragraph 3). Referring to the boundary line between the submerged lands of the United States and the submerged lands of the State of California, paragraph 13 of the 1966 decree provided:

> " . . . As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may have been unable to agree, either party may apply to the Court at any time for the entry of a further supplemental decree."

In urging the entry of a proposed third supplemental decree, the State of California invokes the jurisdiction reserved by this Court in the supplemental decree of January 31, 1966. The parties have been unable to agree as to the extent of each sovereign's jurisdiction over and ownership rights in the areas covered by the proposed supplemental decree. The areas of disagreement involve not only a portion of the boundary line between state and federal submerged lands but also areas claimed by the United States to have been reserved under Section 5 of the Submerged Lands Act, 67 Stat. 32, 43 U.S.C. § 1313.

Questions Presented

1. Did the 1949 Presidential Proclamation which enlarged the Channel Islands National Monument add any tidelands, submerged lands, or waters of the Pacific Ocean to the monument?

2. If the 1949 proclamation did add tidelands, submerged lands or waters of the Pacific Ocean to the monument, were these lands or waters "presently and actually occupied under claim of right" by the federal government on May 22, 1953, and therefore excepted from the operation of the Submerged Lands Act?

Statutes Involved

The statutes involved are set forth in the Appendix to this brief. References to this Appendix in the brief will be referred to by the abbreviation "App."

Additional Proclamations and Executive Orders Involved

The principal Presidential Proclamations involved on this petition for entry of a third supplemental decree are reprinted in the agreed Joint Appendix. Additional proclamations and executive orders cited in the brief are reprinted in the Appendix to this brief.

STATEMENT OF THE CASE

On April 26, 1938, President Franklin Delano Roosevelt established the Channel Islands National Monument by Proclamation No. 2281, 52 Stat. 1541 (1938).[1] Except for several lighthouse reservations and the express exclusion of Cat Rock, the original boundaries of the Channel Islands National Monument included only the land area of Anacapa (actually a group of three islets) and Santa Barbara Islands located off the mainland of southern California. Since California's admission to the Union, these two islands together with the islets and rocks surrounding them have been public lands of the United States located within the political boundaries of both the United States and the State of California.

On October 27, 1947, this Court entered its decree that the United States was possessed of "paramount rights in, and full dominion and power over, the lands, minerals and other

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[1] Proclamation No. 2281 is reprinted in the Joint Appendix (Jt. App. 7-8.) Throughout this brief, reference to the Joint Appendix will be abbreviated "Jt. App." with the specific page numbers set forth in Arabic numerals immediately following this abbreviation.

things" underlying the Pacific Ocean seaward of the ordinary low-water mark on the coast of California to a distance of three nautical miles. *United States v. California,* 332 U.S. 804, 805 (1947). On February 9, 1949, President Harry S Truman enlarged the Channel Islands National Monument to include additional areas. Declaring that "certain islets and rocks situated near Anacapa and Santa Barbara Islands" were required for the proper care, management, and protection of the objects of geological and scientific interest located on lands within the monument, President Truman proclaimed that "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" were added to and reserved as part of the Channel Islands National Monument. Proclamation No. 2825, 63 Stat. 1258 (1949).[2]

On July 27, 1966, then Solicitor General Thurgood Marshall sent a letter to then Attorney General Thomas C. Lynch of California expressing the view that a license recently issued by the California Department of Fish and Game for harvesting kelp at Santa Barbara Island infringed upon the rights of the United States in the Channel Islands National Monument. Referring to the 1949 proclamation, Solicitor General Marshall stated in this letter that:

> " . . . I think there can be no doubt that by thus including the one-mile belt around those islands in the Monument, the United States 'actually occupied' that one-mile belt within the meaning of Section 5 of the Submerged Lands Act, so that it did not pass to the State of California under the Act."

The letter then suggested that, if Attorney General Lynch agreed with this view, they should jointly file a stipulation to that effect with this Court. A proposed stipulation

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[2] Proclamation No. 2825 is reprinted in the Joint Appendix. (Jt. App. 67-68.)

was enclosed with the letter in which California was asked to agree to the following language:

> " . . . the submerged lands and natural resources within one geographical mile from the shore lines of Anacapa and Santa Barbara Islands, as shown on the diagram attached to Presidential Proclamation No. 2825, 63 Stat. 1258, appertain to the United States and are subject to its exclusive jurisdiction and control, and the State of California has no title thereto or property interest therein."

In a reply dated September 19, 1966, Attorney General Lynch stated that " . . . we find that we are unable to agree to this proposed Stipulation." Among the grounds stated for California's inability to concur were the absence of any "present and actual occupation" of the areas in question and the lack of a proper "claim of right" under Section 5 of the Submerged Lands Act of 1953.

Over the years following the proposal of Solicitor General Marshall in 1966, representatives of California and the federal government exchanged further correspondence on the status of the one-mile belt around Anacapa and Santa Barbara Islands. None of this correspondence produced a resolution of the conflicting ownership claims. Therefore, on September 3, 1976, California filed the instant petition for entry of a third supplemental decree. In this petition, California set forth the following basic claim:

> "By virtue of its sovereignty and the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315, the State of California claims title to and ownership of all tidelands, submerged lands and natural resources between the mean high water line and the furthest extent of the territorial sea surrounding the islands, islets, and rocks located within the Channel Islands National Monument. California further claims the right to manage, administer, develop and use these lands and natural resources

> in accordance with state law. California's rights are limited only by the rights reserved to and retained by the United States in the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301-1315." (Pet. 5.)

In response to California's petition, the United States filed its own motion for entry of a supplemental decree, proposed supplemental decree and a memorandum in support of the motion of the United States and an opposition to the motion of the State of California.[3] In its response, the United States admitted that "the parties disagree about the extent (if any) of the interest of the United States in the tidelands, submerged lands and natural resources located within the boundaries of the Channel Islands National Monument." (U.S. Motion 2, para. 5.) The United States also admitted that this case properly came within the continuing jurisdiction reserved within paragraph 13 of the June 31, 1966 supplemental decree previously entered in this case. (*Id.*, para. 6.)

In its proposed supplemental decree, the United States claimed ownership of all islands, islets and rocks located within the Channel Islands National Monument, including the tidelands (defined as the lands between the line of mean high water and the line of mean lower low water) surrounding the islands and islets. The United States also claimed to own the submerged lands and natural resources located within one geographical mile of the coastline of Anacapa and Santa Barbara Islands. The United States admitted that California has an interest superior to that of the United States in the submerged lands and natural resources underlying the waters of the Pacific Ocean more than one nautical mile from the coastline of Anacapa and Santa Barbara Islands seaward to a

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[3] The abbreviated reference "U.S. Motion" refers hereinafter to the "Motion for Entry of a Supplemental Decree (No. 2) [now No. 3] and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of California," filed in December 1976.

distance of three nautical miles from the coastline of these islands. (U.S. Motion 4-5.)

In the concluding paragraph of its motion for entry of a supplemental decree, the United States points out that "[d]evelopment and exploitation of valuable natural resources of the seas and submerged lands adjacent to Anacapa and Santa Barbara Islands make it necessary and appropriate now to identify with particularity the interests reserved to the United States under Section 5 of the Submerged Lands Act in and around those islands." (U.S. Motion 3.) California concurs. By claiming title to and jurisdiction over the lands and natural resources within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands, the United States interferes with California's management and administration of a valuable recreational resource. The clear waters of this one-mile belt lie over a rocky shelf which is one of California's most beautiful areas for scuba diving and sport fishing. The federal government's claims of ownership of the one-mile belt are a source of continual interference with California's enforcement of its fish and game laws in the territorial sea surrounding the Channel Islands National Monument. By pressing its claims, the United States also interferes with California's program of leases for the harvesting of kelp in the one-mile belt. The United States' assertion of the right to regulate commercial and sport fishing within the one-mile belt (*see* 36 C.F.R. § 7.84) is in derogation of California's rights under the Submerged Lands Act to manage, administer, develop and use the natural resources of this area. Unless the rights of the State of California are established and declared by this Court, the State of California will continue to suffer irreparable injury for which there is no adequate remedy other than this petition for supplemental decree.

In answer to the United States' motion, California filed a response arguing that the issues involved in the dispute over the one-mile belt surrounding the Channel Islands National Monument could be resolved without the employment of a special master. Subsequently through correspondence ad-

dressed to this Court, the parties stipulated to the submission of this dispute to the Court upon a record comprised of the document contained in the Joint Appendix, which has now been filed with this Court. Further stipulations are set forth on the first two pages of the agreed Joint Appendix.

SUMMARY OF ARGUMENT

The first issue on this petition for a third supplemental decree involves the interpretation of the phrase the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" as used in the 1949 Presidential proclamation which enlarged the Channel Islands National Monument. The term "areas" is inherently ambiguous but it most often possesses a connotation of an "extent of surface." In the context of the 1949 proclamation, one may draw conflicting inferences as to what "areas" were included in the enlargement. The preamble manifests an intent to add "certain islets and rocks" near the two principal islands of the monument. The intent to add these islets and rocks is the only clearly expressed purpose in the 1949 proclamation. The diagram attached to the proclamation does, however, raise the possibility of an intent to add more than the islets and rocks.

The executive history of the 1949 proclamation tends to show that there was no intent to include tidelands or submerged lands. The executive history effectively begins in 1947 with the proposal of Biologist Lowell Sumner to add Gull Island to the Channel Islands National Monument. As this proposal progresses through channels in the National Park Service, a decision is made to add all the islets and rocks within one nautical mile of Anacapa and Santa Barbara Islands to the monument. The National Park Service draft of a proposed letter from Secretary of the Interior Krug to President Truman expresses an intent to add waters as well as the islets and

rocks. This reference to waters is dropped in the final version of the letter sent to President Truman. The word "area" is substituted in its place. The proclamation is finally revised by an Assistant Solicitor General on behalf of Attorney General Tom C. Clark. At this stage, the revisions strike from the proclamation the purpose of protecting marine life. This deletion tends to negate any intent to include water areas within the one-mile belt surrounding Anacapa and Santa Barbara Islands. The only purpose of adding these areas would have been to protect plant and animal life in these ocean waters.

Significantly, the executive history of the 1949 proclamation contains not a single word about an intent to include tidelands or submerged lands in the 1949 enlargement. Thus, the only real ambiguity is whether the 1949 proclamation gives the National Park Service jurisdiction over the water areas of the one-mile belt in addition to adding the islets and rocks within that belt to the Channel Islands National Monument.

As a matter of law, the 1949 proclamation cannot be interpreted to have added tidelands, submerged lands or waters of the Pacific Ocean to the Channel Islands National Monument. Since both the 1947 decision and the 1966 supplemental decree in this case confirmed California's ownership of the tidelands along its coastline (including the coastline of islands), the tidelands surrounding Anacapa and Santa Barbara Islands were not "lands owned or controlled by the Government of the United States" which could be placed in a national monument. 16 U.S.C. § 431.

The submerged lands surrounding Anacapa and Santa Barbara Islands had already been reserved "pending enactment of legislation" by Executive Order No. 9633 in 1945. A partial revocation of this executive order was necessary to make any submerged lands beneath the one-mile belt available for inclusion in the national monument. The 1949 proclamation did not expressly or impliedly revoke the 1945 executive order with respect to any of these submerged lands. Hence,

submerged lands could not have been included in the 1949 enlargement of Channel Islands National Monument.

Since submerged lands were not added to the monument, the waters of the Pacific Ocean within the one-mile belt, separate and apart from the lands beneath, could not have been included without exceeding the statutory authorization conferred by the Antiquities Act of 1906. That Act only permits the creation of national monuments on "lands owned or controlled by the Government of the United States." It should be obvious that waters by themselves do not constitute "lands." Ocean waters may be added to a national monument only as incident to the addition of underlying submerged land to the same monument. Thus, the 1949 proclamation cannot be interpreted to include waters without exceeding the statutory authority for the enlargement.

The second issue in this case is whether any tidelands, submerged lands, or water areas in the one-mile belt were excepted from the operation of the Submerged Lands Act as lands "presently and actually occupied under claim of right" in 1953. This exception contained in Section 5 of the Submerged Lands Act is merely a savings clause. The legislative history shows that it was intended only to preserve federal claims not based on the "paramount rights" doctrine from being extinguished by the federal quitclaim contained in Section 3 of the Act. This "actual occupancy under claim of right" exception in Section 5 was not intended to resolve any claim of right in favor of the United States; it merely preserved the claim until it could be resolved in other proceedings.

Furthermore, the legislative history of the Submerged Lands Act makes it clear that a claim of right under this exception was not intended to include any claim resting solely upon the doctrine of "paramount rights" enunciated by this Court in 1949. Only by virtue of the "paramount rights" doctrine could the submerged lands and the superjacent waters of the Pacific Ocean within the one-mile belt have constituted "lands owned or controlled by the Government

of the United States" capable of inclusion in a national monument. The federal government's claim to the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands thus rests solely on the doctrine of paramount rights. The reservation for national monument purposes of lands claimed by virtue of the paramount rights doctrine does not transmute a claim so founded into a claim of right which would then fit within the Section 5 exception.

Therefore, California submits that the proper interpretation of President Truman's 1949 proclamation is that it did not add any tidelands, submerged lands or water areas to the Channel Islands National Monument. Properly interpreted, the 1949 proclamation added only the islets and rocks above high water and within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands. Even if this interpretation were not adopted, the federal government's claim to the tidelands, submerged lands and water areas of the one-mile belt must fail. It is a claim resting solely upon the doctrine of "paramount rights" which was specifically excluded from the operation of the "presently and actually occupied under claim of right" exception set forth in Section 5 of the Submerged Lands Act.

ARGUMENT

I

PROPERLY INTERPRETED, THE 1949 PROCLAMATION DID NOT ADD ANY TIDELANDS, SUBMERGED LANDS, OR WATERS OF THE PACIFIC OCEAN TO THE CHANNEL ISLANDS NATIONAL MONUMENT

A. The Principles of Statutory Construction Govern the Interpretation of Presidential Proclamations

The first question for decision by this Court is one of construing the language of Presidential Proclamation No.

2825, 63 Stat. 1258, which extended the boundaries of the Channel Islands National Monument to include "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." (*See* Jt. App. 67.) The problem is to ascertain what President Truman intended by the quoted words. In undertaking this task, it is first necessary to determine what principles should guide the process of interpretation.

There is very little authority dealing with the interpretation of Presidential proclamations and executive orders. When, as here, they are promulgated pursuant to an Act of Congress, they appear to be a species of administrative regulation. *See generally*, Neighbors, *Presidential Legislation by Executive Order*, 37 U. Colo. L. Rev. 105 (1964). The only difference from the more typical administrative regulation is that the President, rather than a department or agency head, issues proclamations and executive orders. *See United States v. Eaton*, 144 U.S. 677, 688 (1892). Although administrative regulations have been frequently used as guides to the meaning of statutory provisions, the courts have seldom considered problems involving the interpretation of regulations themselves. 1A Sutherland, *Statutory Construction* (Sands rev., 4th ed., 1973) § 31.06 at 361-62. Even less frequently have the courts dealt with the interpretation of Presidential proclamations and executive orders.

At least two district courts have concluded that the rules of statutory construction apply to executive orders where those orders have the force and effect of law. *Feliciano v. United States*, 297 F. Supp. 1356, 1358-59 (D. P.R. 1969), *aff'd.*, 422 F.2d 943 (1st Cir.), *cert. denied*, 400 U.S. 823 (1970); *United States v. Angcog*, 190 F. Supp. 696 (D. Guam 1961). If this view is correct, it should be equally applicable to proclamations. "The difference between Executive orders and proclamations is more one of form than of substance since in each instance the effective action sought or directed by the document is an exercise of Executive power under article II of the Constitution and must be based on authority

derived from the Constitution or statute." Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A study of a Use of Presidential Powers* 1 (Comm. Print 1957). (Footnote omitted).

When faced with the problem of interpreting Presidential proclamations and executive orders, this Court has applied appropriately modified principles of statutory construction without expressly holding that those principles were generally applicable to the interpretation of proclamations and executive orders. In *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965), the doctrine of according great weight to the contemporaneous construction by an administrative agency was utilized to interpret an executive order. On another occasion, this Court examined the executive history of a Presidential executive order to ascertain the meaning of words used in the order. *Cole v. Young*, 351 U.S. 536, 555-56 (1956). *Ex parte Endo*, 323 U.S. 283, 298 (1944), held that construction of a wartime executive order was to be approached in the same manner as construction of legislation in the same field. In yet another case, it was held that a construction favoring the validity of an executive order was to be adopted where more than one construction was possible. *United States v. Chemical Foundation*, 272 U.S. 1, 13 (1926).

From the past practice of this Court, it appears that Presidential proclamations should be interpreted in much the same way as statutes, expecially where Congress has expressly authorized the issuance of a proclamation – here the 1949 proclamation was issued pursuant to Section 2 of the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 431. (*See* Jt. App. 67.) Proclamations and executive orders based on authority conferred by statute are said to have the force and effect of law. *See, e.g., United States v. Eaton, supra*, 144 U.S. at 688 (1892); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967). Since they have the force and effect of law, it seems especially fitting to use principles of statutory construction as guides to their interpretation. One must allow, of course, for the fact

that traditional "legislative history" is not available as an extrinsic aid to interpretation and must rely instead upon relevant Executive Branch documents. With this qualification, this brief proceeds on the assumption that the rules of statutory construction are generally applicable to the problem of interpreting the language of the 1949 proclamation which enlarged the Channel Islands National Monument.

B. The Word "Areas" Is a General Word of Uncertain Meaning Apart From Context

In Proclamation No. 2825, 63 Stat. 1258 (1949), President Truman added "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" to the Channel Islands National Monument. (Jt. App. 67-68.) As the Court observed in *Caminetti v. United States*, 242 U.S. 470, 485 (1917), "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Therefore, our initial inquiry must be whether the definition of the word "areas" has a fixed content which may shed light on precisely what President Truman added to the Channel Islands National Monument in 1949.

The Second Edition of the unabridged Webster's New International Dictionary of the English Language (Merriam-Webster, 1961) set forth nine (9) definitions of the word "area." If one discards the obviously inapplicable definitions, there are only four which are potentially relevant here:

> "1. Any plane surface, as of the floor of a room or church, or of the ground within an enclosure; an open space in a building; as the *area* of an amphitheater.
>
> ". . . .
>
> "4. A particular extent of surface; a space on the surface, as of an organism; a region; specif., a tract of the earth's surface; as, vast uncultivated *areas*.

"5. Extent; scope; range; as, a wide *area* of thought.

". . . .

"8. *Geom.* The superficial contents of any figure; the surface included within any given lines; superficial extent. . . ."

The Third Edition of the unabridged Webster's New International Dictionary expands the definition of "area" to include in its fifth definition "any particular extent of *space* or surface." (Emphasis added.) In the second part of this same definition, the Third Edition states that "area" may mean "an expanse or tract of the earth's surface." It illustrates this latter usage by giving an example of "a large *area* outside the marshes is submerged."

Corpus Juris Secundum best sums up the inherent ambiguity of the word "area" by stating that it has "a somewhat elastic meaning." The section dealing with the meaning of "area" then continues:

". . . Originally it meant a broad piece of level ground. In ordinary use today the word 'area' refers to a particular extent of surface, or simply a surface, a territory, a region, tract, space, or a broad part of land.

"The word 'area' can mean any plane surface, the enclosed space on which a building stands, the sunken space or court giving ingress and affording light to the basement of a building, a particular extent of surface, an inclosed yard or opening in a house, an open place adjoining a house.

"Standing alone, the word 'area' implies nothing as to size; it may be of large or small extent." 6 C.J.S. *Area* 522. (Footnotes omitted.)

Of the various meanings which courts have attached to the word "area," there does not appear to be any case in which the word has been used to include space beneath the

surface of land or water. For example, *In re Incorporation of Village of Oconomowoc Lake*, 264 Wis. 540, 59 N.W.2d 662 (1953), involved a dispute over whether the word "area" in a state statute setting forth the minimum size of a municipality included both land areas and water areas. The court held that the town could include its water areas in computing total area. Thus, the town qualified for incorporation. This case illustrates that even when the word "area" encompasses both land and water, it appears to refer only to the surface of both.

In *Atwood v. Humble Oil & Refining Co.*, 338 F.2d 502, 505 (5th Cir. 1964), the Court of Appeals dealt with the construction of the following provision in an oil and gas lease:

> "at the expiration of said twenty years if oil, gas or other mineral is then being produced from said land, the lessee shall promptly designate and define in writing the *area* or *areas* on which oil, gas and/or other minerals are then being produced, it being contemplated that lessee shall have the right to retain under the terms of the lease the *area* or *areas* included within the geologic structures or formations proven to be productive at the end of said twenty year period . . . ." (Emphasis added.)

The plaintiffs contended that the "area" to be retained by Humble could not be designated by a metes and bounds description on the surface, but rather that Humble had to delimit the pools themselves by drawing their horizontal and vertical bounds. (*Id.* at 505.) The court rejected this interpretation, stating:

> " . . . Plaintiff's argument that the lease requires Humble to make a three-dimensional designation calls for a strained and artificial construction more calculated to ascertain the plaintiff's present desires than the actual intent of the parties when they executed this lease. 'Area' was the basic term for that which was to be designated and is clearly more appropriate for surface measurement than three-

dimensional measurements when used in the context of an oil and gas lease." (*Id.* at 506.)

From all of the usages surveyed above, one discerns a connotation of the word "area" distinctly referring to a surface, as opposed to a three-dimensional unit of space. Such a connotation would suggest that the "areas" within the one-mile belt surrounding the islands of the Channel Islands National Monument included the surfaces of the islets and rocks and possibly the waters as well. Only the newer usages found in the Third Edition of Webster's Unabridged Dictionary might include space beneath the surface, such as submerged lands. It is evident, therefore, that the meaning to be ascribed to the word "areas" depends entirely upon the context in which that word is used. Although it usually is synonymous with "surface areas," it appears that the word may be used in particular circumstances to include more than just the surface. An examination of the usage of the word "areas" in the specific context of the 1949 proclamation is necessary to answer the question of whether surface areas alone were intended here.

C. Read as a Whole, the 1949 Proclamation Does Not Clearly Indicate an Intention to Add Anything Other Than the Islets and Rocks Within the One-Mile Belt

Since the term "areas" by itself is a word of uncertain content, we must examine the particular use of that term in the context of the 1949 proclamation. The only statement of purpose found in the 1949 proclamation appears in the first "Whereas" clause of the preamble. That clause states that "certain rocks and islets situated near Anacapa and Santa Barbara Islands" were required for the proper care, space, management, and protection of the objects of geological and scientific interest located on lands within the Channel Islands Monument. The second "Whereas" clause states that it appears to be in the public interest to extend the boundaries of the Monument to include "the hereinafter-described areas

adjacent to the said islands." When this second "Whereas" clause is read in conjunction with the first clause manifesting an intent to add "certain islets and rocks," the possibility arises that "the hereinafter-described areas" might not be the same as the "certain islets and rocks" described in the first "Whereas" clause. The question then becomes: What were "the hereinafter-described areas"?

Since this proclamation was issued pursuant to the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 431, it must be presumed that President Truman had enlarged the Monument to include only "lands owned or controlled by the Government of the United States" for only such lands may be placed within national monuments. The proviso that this proclamation is "subject to valid existing rights" further implies that lands not owned or controlled by the United States were excepted from the operation of the 1949 proclamation.

The "hereinafter-described areas" mentioned in the second clause of the preamble are defined in the body of the proclamation as the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." As used in the body of the proclamation, the phrase "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" has two qualifications. First, these "areas" are supposedly indicated on the diagram attached to the proclamation and incorporated by reference as part of it. (Jt. App. 68.) The diagram shows a boundary line encircling Anacapa and Santa Barbara Islands and roughly following the configuration of their coastlines. The line itself does not clear up the ambiguity as to what constitutes the "areas within one nautical mile." When read in conjunction with the first "Whereas" clause of the preamble, this line could simply be an envelope line whose function is to indicate that no islets or rocks seaward of the line were added to the monument by the 1949 proclamation. Such an envelope line is a distinct possibility because it would be more convenient to mark off a one-mile boundary than to identify each and every islet and rock now intended for addi-

tion to the monument. Envelope lines have been used to include only rocks and islands in several Presidential executive orders. *See, e.g.*, Exec. Order No. 779 (1908) and Exec. Order No. 5318 (1930), *reprinted in* the Appendix to this brief. In each of these reservations where an envelope line was intended a dotted or dashed boundary line was used on the diagram attached to the 1949 proclamation.

An envelope line was utilized in the diagram accompanying the proclamation which created the Fort Jefferson National Monument. (Jt. App. 5.) Since the 1949 proclamation enlarging the Channel Islands National Monument purportedly was modeled on the proclamation creating the Fort Jefferson National Monument (Jt. App. 51), then the boundary line shown in the diagram attached to the 1949 proclamation should be given the same interpretation given to the line shown in the diagram attached to the proclamation creating Fort Jefferson National Monument. If the line used in the Fort Jefferson proclamation was merely an envelope line, then that fact would be similarly probative of an intent to establish an envelope line in the 1949 proclamation too.

The diagram attached to the 1949 proclamation does not, however, clear up the ambiguity as to what "areas" were added to the Channel Islands National Monument. The parties have stipulated that the acreage figures shown on the diagram are figures which approximate the total surface area of Anacapa and Santa Barbara Islands and one nautical mile of waters surrounding those islands. (Jt. App. 2.) The fact that these acreage figures appear on the diagram raises the possibility that the "areas" within the one-mile belt may include jurisdiction over the waters within the new boundaries and perhaps the submerged lands beneath.

Any possible intention to include submerged lands or water areas within the monument appears to be negated by the second qualification which states that the "areas" added to the monument were "withdrawn from all forms of appropriation under the public-land laws . . . ." As this Court

observed in *Udall v. Tallman*, 380 U.S. 1, 19 (1965), "the term 'public-land laws' is ordinarily used to refer to statutes governing the alienation of public land." The words "public lands" are habitually used in federal legislation to describe lands which are subject to sale or other disposal under general laws. *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935). In 1949, none of the federally controlled submerged lands of the Continental Shelf seaward of the low water line on the coast were subject to "appropriation under the public-land laws." In 1945, all of these lands had been placed under the jurisdiction and control of the Secretary of the Interior "for administrative purposes, pending the enactment of legislation in regard thereto." Exec. Order 9633, 10 Fed. Reg. 12305 (1945), *reprinted in* the Appendix to this brief. Congress had passed no such legislation as of the date of the 1949 enlargement of the Channel Islands National Monument. Since the submerged lands underlying the one-mile belt had already been reserved for other purposes, they were not appropriable public lands in 1949. There is a fuller discussion of the effect of the 1945 executive order below.

Thus, the wording of the 1949 proclamation when read as a whole does not remove the ambiguity surrounding what was meant by the use of the phrase "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." The preamble identifies only one clear purpose for the enlargement of the Channel Islands National Monument—to extend the boundaries of the monument to include "certain islets and rocks situated near Anacapa and Santa Barbara Islands." This statement of purpose is the only express indication of what the President had in mind when he proclaimed the 1949 enlargement of the monument. The use of the phrases "the hereinafter-described areas adjacent to the said islands" and "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" do not, in and of themselves, suggest an addition of anything other than the islets and rocks situated near the two principal islands. It is only when the attached diagram is taken into account that

there is an ambiguity as to what is intended to be included within the one-mile belt marked off on the map. The acreage figures noted on the diagram may suggest an intent to assert jurisdiction over more than the islets and rocks located within the one-mile belt. In addition to including the surface areas of the islets and rocks, the acreage figures may indicate an intent to add jurisdiction over the water areas (at the very least) or perhaps both the water areas and the submerged lands beneath them. As will be presently shown, however, the executive history of the proclamation shows no intent to add any tidelands or submerged lands to the Channel Islands National Monument. As a matter of law, it will also be demonstrated that neither the submerged lands nor the waters of the Pacific Ocean within the one-mile belt could properly have been added to the monument in 1949 by this Presidential act.

D. The Executive History of the 1949 Proclamation Indicates No Intent to Add Tidelands or Submerged Lands to the Monument and Is Ambiguous as to Water Areas

1. The Original Purpose of the Monument

Since the 1949 proclamation merely enlarged an existing national monument, the executive history of the 1949 action must begin with the 1938 Presidential Proclamation creating the Channel Islands National Monument. (Jt. App. 7-8.) It is reasonable to assume that the enlargement was intended to further the purpose of the existing national monument, a purpose which could not be fulfilled without the addition of more territory.

The preamble to the 1938 proclamation is quite specific in delineating a purpose to protect fossils and geologic features. The first "Whereas" clause of the proclamation notes that

> "... certain public islands lying off the coast of Southern California contain fossils of Pleistocene elephants and ancient trees, and furnish note-

> worthy examples of ancient volcanism, deposition, and active sea erosion, and have situated thereon various other objects of geological and scientific interest . . . ." (Jt. App. 7.)

The second "Whereas" clause states that "it appears that it would be in the public interest to reserve *such lands* as a national monument." (*Id.*) (Emphasis added.)

Thus, the 1938 proclamation manifested a purpose to reserve only lands containing fossils or furnishing "noteworthy examples of ancient volcanism, deposition, and active sea erosion." Other objects of geological and scientific interest were also protected if they were located on these lands.

The addition in 1949 of the islets and rocks located in the one-mile belt around Anacapa and Santa Barbara Islands was clearly consistent with the purpose of protecting geologic features similar to those located on the two principal islands. Inclusion of submerged lands would have been inconsistent with this purpose since any fossils and geological features under the water could not really be protected from the natural forces of the sea. Nor should one impute the intentions of King Canute to either President Truman or the National Park Service. Likewise, an intent in 1949 to add the waters of the Pacific Ocean within the one-mile belt would have been inconsistent with the original purpose of the Channel Islands National Monument. Obviously no fossils or geological features are found in the waters themselves.

Therefore, it appears that only the addition in 1949 of the islets and rocks located within the one-mile belt and overlooked in 1938 was consistent with the original purpose of the monument. Inclusion of tidelands would have been consistent with the original purpose, but it will be shown in a later section of this brief that they were expressly excepted from both the 1938 and 1949 proclamations. If the original purpose was preserved in 1949, then logically submerged lands and water areas were not added to the monument. But the executive history between 1938 and 1949 must be carefully examined to see if there was a change of purpose which would support the inclusion of submerged lands or ocean

waters within the phrase "areas within one nautical mile of Anacapa and Santa Barbara Islands" as used in the 1949 proclamation.

2. Early Proposals for Enlargement

Correspondence as early as January 30, 1941, proposed that "outlying rocks and islets in the neighborhood of the main islands" be added to the monument to afford protection to important wildlife species, such as the sea otter, sea elephants, and fur seals, which preferred these places to the shores of the larger islands. (Jt. App. 10.) This first memorandum noted in closing that "the monument can not be extended to cover the actual surface of the surrounding ocean, although this too would be desirable for protection of these marine mammals." (*Id.*)

In a letter dated April 1, 1941, Superintendent E. T. Scoyen of Sequoia National Park (who then had jurisdiction over the Channel Islands National Monument) informed the Executive Secretary of the Council for Conservation of Whales that "at the present time no funds are allotted for patrol or protection of these islands . . . ." (Jt. App. 12.) His letter continued:

> "Our principal difficulty from a protection standpoint arises in the situation that we are able to give protection to these animals [elephant and fur seals] only as long as they are on our beaches; the moment they slip off into the water we lose control over them. We have had, and probably will continue to have, close cooperation with the State of California in protecting these rare species after they enter the sea." (*Id.*)

3. The First Reference to Fort Jefferson National Monument as an Analogy

In a memorandum dated November 15, 1941, Victor H. Cahalane of the Section on National Park Wildlife made the following observation:

> " . . . From a perusal of the files it is not apparent that the possibility extending the boundaries of the National Monument to include the surface of the adjacent ocean has ever been considered. It would seem that the boundaries of the Fort Jefferson National Monument which extend a considerable distance from the high and low tide marks of the Dry Tortugas Islands would be a precedent." (Jt. App. 13.)

4. The Legal Opinion That the National Park Service Had No Jurisdiction Below the High Water Mark

A May 31, 1946 memorandum written by Chief Counsel Jackson E. Price of the National Park Service noted that the high water mark was the limit of the administrative jurisdiction conferred on the National Park Service by the 1938 proclamation which established the Channel Islands National Monument. Mr. Price concluded that the Service had no jurisdiction over the waters adjacent to the Channel Islands National Monument. He also indicated that federal jurisdiction over the waters apart from National Park Service jurisdiction pursuant to the 1938 proclamation, depended upon the outcome of the then pending litigation in this Court over federal ownership of submerged coastal lands. (Jt. App. 16-17.)

5. Addition of Gull Island and Other Offshore Rocks—The Reason for Seeking the 1949 Enlargement

The genesis of the 1949 proclamation appears to have been the proposal of Biologist Lowell Sumner to add Gull Island, now Sutil Island, to the Channel Islands National Monument. His March 24, 1947 memorandum notes that Gull Island is about 2,000 feet from Santa Barbara Island and is a detached fragment of that island. His memorandum states that "[i]ts exclusion from the proclamation describing the boundaries of Channel Islands National Monument appears to have been wholly unintentional, and a result of the wording

of the proclamation, rather than the original intent of the investigators of the area, or those who framed the proclamation." (Jt. App. 18-19.)

Sumner's proposal to add Gull Island to the Channel Islands National Monument was approved by his superiors and ultimately by the Director of the National Park Service. (Jt. App. 20-24.) In a memorandum to the Director of the National Park Service dated June 6, 1947, Acting Chief of Lands Richey mentions adding not only Gull Island to the Channel Islands National Monument but also "the off-shore rocks around it and other islands." (Jt. App. 25.) This document also quotes a prior memorandum by a Mr. Vint in which Vint expressed the following view:

> "I think the Channel Island boundaries are inadequate. Some islands should be acquired in their entirety and jurisdiction over the water for some distance (say 1 mile) from shore." (*Id.*)

After this quotation, Mr. Richey has placed the marginal notation, "I doubt if the latter is possible. C.A.R." (*Id.*)

On June 12, 1949, Director Newton B. Drury of the National Park Service informed the Regional Director of Region Four that approval of the Boundary Status Report for Channel Islands National Monument was being withheld "pending further study and a determination of the ownership status of Gull Island and other off-shore rocks and islets within one mile from Santa Barbara and Anacapa Islands." (Jt. App. 27.) In a second memorandum also dated June 12, 1947, Director Drury wrote to the Director of the Bureau of Land Management, inquiring as to the present ownership and jurisdictional status of Gull Island. To determine the feasibility of its addition to the existing monument by a Presidential proclamation under the Antiquities Act of 1906. The memorandum also inquires:

> "In this connection, it is equally desirable that this Service have control of the various off-shore rocks and unnamed islets above the surface

> and within one-mile radii of both Santa Barbara and Anacapa Islands. Are these regarded as public domain? (Jt. App. 28-29.)

The two memoranda of Director Drury on June 12, 1947, show an intent as of that date to add only the various islets and rocks located above the surface and within the one-mile belt surrounding the two principal islands of the Channel Islands National Monument. At this stage, there was manifestly no intent to add tidelands, submerged lands or water areas. Further memoranda of June 27 and July 7, 1947, also substantiate the limited intent to add only the islets and rocks of the one-mile belt. (Jt. App. 30-32.)

On July 11, 1947, Director Fred W. Johnson of the Bureau of Land Management replied to Director Drury indicating that Gull Island and the other "off-shore rocks and islets above ordinary high tide and within one mile of Santa Barbara and Anacapa Islands" could be added to the Monument. (Jt. App. 32-34.) This memorandum concluded:

> "The reservation for national monument purposes of all rocks and islands within one mile of Santa Barbara and Anacapa Islands would include the rocks and islets mentioned, and Gull Island, and no specific reference to the latter island would be necessary.
>
> "If you wish to have these islands added to the Channel Islands National Monument, the bureau will be glad to prepare an appropriate proclamation. In the event you desire at this time to have the islands withdrawn for national monument classification, a public land order to accomplish this purpose will be prepared." (*Id.*)

It should be noted here that no public land order was ever issued withdrawing these "islands" for national monument classification or any other purpose. *See, passim*, Appendix to 43 C.F.R., covering Public Land Orders issued

between 1947 and 1949. On April 14, 1930, President Herbert Hoover had withdrawn "all unreserved islands, rocks, and pinnacles situated in the Pacific Ocean off the coast of California" for classification and in aid of legislation. Exec. Order 5326, *reprinted in* the Appendix to this brief. This order was in full force and effect with respect to the islets and rocks of the one-mile belt until the 1949 proclamation impliedly effected a partial revocation. *See* discussion, *infra.*

A July 17, 1947 memorandum from J. D. Coffman, Acting Director of the National Park Service, to the Regional Director of Region Four asks for information on the current status of U.S. Coast Guard lighthouse reservations on Anacapa and Santa Barbara Islands. (Jt. App. 35-36.) The memorandum states that "[w]e will be in a position to submit a form of proclamation to add Gull Island and other off-shore rocks and islets to the monument as soon as this information is at hand." (*Id.* at 36.)

In another memorandum to the Regional Director, Region Four, dated November 10, 1947, Director Drury expresses his concern that Navy missile experiments will seriously affect Channel Islands National Monument and states that "I am inclined to believe that there might be some advantage to be gained if we were to proceed at once with the addition to the monument of Gull Island and other off-shore rocks within one mile from Santa Barbara and Anacapa Islands." Director Drury concludes this memorandum by asking, "Would you object if we proceeded to submit a form of proclamation as contemplated originally?" (Jt. App. 37.)

The Regional Director's reply of November 18, 1947, states that "[w]e see no objection to immediate preparation of a proclamation which would enlarge the Monument so as to include Gull Island and other off-shore rocks within one mile of Santa Barbara and Anacapa Islands." The Regional Director also expresses the view that ". . . it is only by such status that there will be recognized authority to protect the wildlife and other values." (Jt. App. 38-39.) Attached to the Regional

Director's November 18 reply is another memorandum from Biologist Lowell Sumner. The Sumner memorandum urges the Service to proceed with the submission of a proclamation adding Gull Island and other off-shore rocks to the monument. It also urges that the Service secure a cooperative agreement from the Navy for protection of the Channel Islands National Monument, apparently because the National Park Service still lacks funds for patrol or protection of these islands. (Jt. App. 40-41; *cf.* Jt. App. 12.)

To this point in 1947, the purpose for seeking a supplemental proclamation is still limited exclusively to adding the islets and rocks overlooked in 1938. In light of the confessed inability of the National Park Service to patrol and protect the islands already under its jurisdiction (*see also* Jt. App. 11-12), it would indeed appear anomalous to ask for jurisdiction over expanses of the Pacific Ocean as well. Yet that is apparently what happened.

6. The Park Service Seeks Waters as Well as Islets and Rocks

On June 16, 1947, Director Drury of the National Park Service informed the Regional Director of Region Four that the National Park Service was proceeding with the preparation of a proclamation to add to the monument "all islets, rocks, and waters within one nautical mile of Santa Barbara and Anacapa Islands excepting, of course, the lighthouse reservations." (Jt. App. 42.) This reference to "waters" is the first time in the executive history of the 1949 proclamation that any mention is made of an intent to include anything other than the offshore islets and rocks within one nautical mile of Santa Barbara and Anacapa Islands.

Apparently the Regional Director of Region Four did not place any significance upon Director Drury's use of the word "waters" in the December 16 memorandum. In his own memorandum to the Superintendent of Sequoia National Park dated December 31, 1947, the Regional Director still

assumes that only Gull Island and the other offshore rocks and islets within one mile are all that the proclamation will add to the monument. (Jt. App. 43-44.)

On January 13, 1948, the Regional Director of Region Four sent a copy of a proposed letter to the President from the Secretary of the Interior suggesting that the President sign a proclamation which would add "Gull Island, and other off-shore islets within one nautical mile, to the Channel Islands National Monument." The Regional Director cautioned the Superintendent that "the enclosed communication is for 'information only' since it has not yet been signed by the Secretary." (Jt. App. 45.)

a. The Draft of Secretary Krug's Request for a New Proclamation

The draft of the letter from Secretary of the Interior Krug to President Truman points out that the 1938 proclamation creating the Channel Islands National Monument did not include " . . . several small islets and rocks, the control of which is essential to the proper protection of the objects of geological and scientific interest, including marine life, for the preservation of which the monument was established." The draft of the letter states that it " . . . would place under administrative control of the National Park Service the islets, rocks, and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands." (Jt. App. 46-47.) The use of the word "water" in this draft of the Secretary of the Interior's letter suggests that the Regional Director may have misinterpreted the proposed scope of the new proclamation.

b. The Boundary Status Report for 1947

The Boundary Status Report For Channel Islands National Monument, approved July 1, 1948, notes that "It is now proposed to revise the boundaries of the Monument in order to place Gull Island and all islets, rocks and waters within a distance of one nautical mile from Santa Barbara and Anacapa Islands under the administrative control of the National Park Service." (Jt. App. 48.)

7. The Final Draft of Secretary Krug's Letter Substitutes the Word "Area" for "Islets, Rocks, and Waters"—No Mention Is Made of Waters at All

On July 2, 1948, Secretary of the Interior J. A. Krug wrote to President Truman recommending the enlargement of Channel Islands National Monument. As in the draft sent by the Regional Director of Region Four to the Superintendent of Sequoia National Park, the final draft of the Secretary's letter notes that the 1938 proclamation did not include "several small islets and rocks," whose control is important for monument purposes. Importantly, however, there is a revision of the paragraph dealing with the purpose of the proclamation. There is no mention of "waters." This deletion appears to be a significant change from the draft of this letter. Instead, the final draft of Secretary Krug's letter states:

> "I recommend that you sign the attached form of proclamation, which would place under administrative control of the National Park Service the *area within a distance of one nautical mile from the shoreline of Anacapa and Santa Barbara Islands*. This will afford proper protection to the seals, sea lions and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters." (Jt. App. 51.) (Emphasis added.)

The substitution of the word "area" for the particularized identification of "the islets, rocks, and waters" may indicate an intent to include only the islets and rocks even though the word "area" is susceptible of a broader interpretation. It should be noted that in earlier correspondence the outlying rocks and islets were thought to be important because wildlife species, such as sea otters, sea elephants and fur seals, preferred to rest on these bits of rocks rather than the shores of larger islands. (*See* Jt. App. 10.) The marine life on these rocks and islets could be protected without general jurisdiction over the one-mile belt.

8. The Analogy to Fort Jefferson National Monument Does Not Support Jurisdiction Over Water Areas or Submerged Lands

Secretary Krug's letter to President Truman also contains another paragraph which was not in the National Park Service Draft. This paragraph reads:

> "Similar protection [for seals, sea lions, and sea elephants] was given to the extraordinary marine life in the immediate vicinity of the Dry Tortugas group of islands off Key West, Florida, when that area was established as Fort Jefferson National Monument by Proclamation No. 2112 of January 4, 1935 (49 Stat. 3430)." (Jt. App. 51.) (Brackets added.)

If Fort Jefferson National Monument was indeed the model for the 1949 proclamation enlarging the Channel Islands National Monument, then use of this model can only support an intent to add only the surface areas of the islets and rocks within the one-mile belt to the Channel Islands National Monument.

The Dry Tortugas Islands, which comprise Fort Jefferson National Monument, were acquired by the United States from the State of Florida by a deed of cession dated September 17, 1846. (Jt. App. 93-94.) Neither the deed of cession nor the acts of the Florida Legislature authorizing this deed[4] contain any cession of jurisdiction over the waters and submerged lands surrounding the Dry Tortugas Islands.

On April 6, 1908, President Theodore Roosevelt placed the Dry Tortugas Islands in the Tortugas Keys Bird Reservation. Exec. Order No. 799 (April 6, 1908), *reprinted in* the Appendix to this brief. Executive Order No. 779 makes it clear that it only reserved "all islands embraced within the

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[4] These Florida statutes are set forth in the Appendix to this brief.

group known as the Dry Tortugas . . . and situated within the areas segregated by a broken line upon the diagram hereto attached and made part of this order . . . ." The elliptical broken line on the diagram attached to Executive Order No. 779 is identical to the elliptical line shown on the diagram attached to Proclamation No. 2112, which created the Fort Jefferson National Monument in 1935. (*Compare* Exec. Order No. 779 *with* Jt. App. 3-5.) The language of the 1908 Tortugas Keys Bird Reservation reserving only islands together with the attached diagram demonstrate that no water areas or submerged lands were included within that reservation.

The preamble of the 1935 proclamation creating the Fort Jefferson National Monument states that the public interest would be promoted by revoking the Tortugas Keys Bird Reservation and two military executive orders and "by including the Dry Tortugas group of islands within a national monument for the preservation of Fort Jefferson and the historic and educational interest contained in such area . . . ." (Jt. App. 3.) President Franklin D. Roosevelt then proclaimed that " . . . the area indicated on the diagram hereto attached and forming a part hereof is reserved from all forms of appropriation under the public-land laws and set apart as the Fort Jefferson National Monument." Since the diagram marking the boundaries of Fort Jefferson National Monument is identical to the diagram attached to the 1906 bird reservation which included only the islands surrounded by the broken line, the identity of the two diagrams strongly suggests an intent to include only the islands shown on the map and not any of the water areas or submerged lands between the islands. This conclusion is fortified by the preamble which manifests only an intent to include "the Dry Tortugas group of islands" within the new Fort Jefferson National Monument.

Since the Fort Jefferson National Monument was the model for the 1949 enlargement of the Channel Islands National Monument, a reasonable inference may be drawn that the broken one-mile line shown on the diagram attached

to the 1949 Channel Islands National Monument Proclamation was only intended to enclose all of the islets and rocks being added to the monument. That interpretation must follow if the one-mile line is to be treated like the similar line in the 1935 Fort Jefferson National Monument proclamation.

If, on the other hand, Secretary Krug's reference to the 1935 proclamation creating the Fort Jefferson National Monument somehow was intended as a citation of precedent for an assertion of jurisdiction over areas of ocean water and submerged land, then his interpretation of the 1935 proclamation was clearly erroneous. The history of the Fort Jefferson proclamation does not show that anything other than the land areas of the Dry Tortugas Islands were ever "lands owned or controlled by the Government of the United States" capable of being placed in a national monument pursuant to 16 U.S.C. § 431. (*See* Jt. App. 95-100.)

9. Secretary Krug's Draft of the 1949 Proclamation Mentions Only the Islets and Rocks

The draft of the 1949 proclamation submitted to the President as an attachment to Secretary Krug's letter is also significant. The second "Whereas" clause of this draft specifically noted that the purpose of the proclamation was to include "several small islets and rocks in the vicinity of Anacapa and Santa Barbara Islands" which the 1935 proclamation did not include. (Jt. App. 53.) The second "Whereas" clause stated that it would be in the public interest to extend the boundaries of the Channel Islands National Monument to include "the areas adjacent to Anacapa and Santa Barbara Islands." This clause differs from the second "Whereas" clause of the 1949 proclamation in that the phrase "hereinafter-described" does not precede the word "areas." This nuance of phraseology suggests an identity between the "areas" mentioned in this clause and the "several small islets and rocks" mentioned in the preceding clause. From the language of the draft proposed by the Secretary of the Interior, one may infer that the islets and rocks were the sum total of what was being added to the monument.

10. The Request for Revisions From the Attorney General

On December 16, 1948, the Assistant Director of the Bureau of the Budget forwarded the proposed proclamation enlarging the Channel Islands National Monument to the Attorney General for such revision as he considered appropriate. (Jt. App. 57-59.) This letter emphasizes the Bureau of the Budget's understanding that the proclamation was adding the "several small islets and rocks" in the vicinity of Anacapa and Santa Barbara Islands to the Channel Islands National Monument. (Jt. App. 57.) As used in the second paragraph of the Bureau of the Budget letter, the word "areas" indicates the understanding that only the "small islets and rocks" omitted from the 1938 proclamation were being added to the Channel Islands National Monument by the proposed proclamation.

11. The Regional Director's Letter

Less than a month before the promulgation of the 1949 proclamation, the Acting Regional Director of Region Four of the National Park Service wrote to the President of the J. W. Sefton Foundation suggesting that " . . . there is some possibility that the monument boundary may be extended to include adjacent waters in order to eliminate the destructive activities of persons who have been shooting from boats." (Jt. App. 60-61.) This letter was probably written without knowledge of the changes made in the final draft of Secretary Krug's letter. No correspondence was found for inclusion in Joint Appendix showing that those changes had been communicated to the Regional Director of Region Four.

12. The Department of Justice Revisions Eliminate Protection of Marine Life as a Purpose of the 1949 Enlargement

In a memorandum dated January 28, 1949, Assistant Solicitor General George T. Washington recommended that then Attorney General Tom C. Clark approve the proposed proclamation as to form and legality. (Jt. App. 62-64.) An

important change was made in the proposed proclamation for enlarging the Channel Islands National Monument. The memorandum of the Assistant Solicitor General states:

> "The proposed proclamation originally stated, in addition to the justifiable grounds for enlarging the monument under the above Act [the Antiquities Act of 1906], a purpose to protect marine life. It has been the opinion of this office that it is doubtful whether the Antiquities Act permits the establishment or enlargement of a national monument to protect plant and animal life (see Department of Justice File 90-1-04-317 and 90-1-04-367.) Hence the language relating to this purpose has been eliminated from the proclamation." (Jt. App. 63.) (Brackets added.)

Any other differences between the draft of the proclamation submitted by Secretary of the Interior Krug to President Truman (Jt. App. 53-55) and the proclamation as issued (Jt. App. 67-68) also appear to have been the result of revisions made by Assistant Solicitor General Washington.

The deletion of any purpose to protect marine life in the waters around the monument has great significance in this case. It tends to negate the possibility that the President intended to add the water areas within the one-mile belt to the Channel Islands National Monument in 1949. The only purpose which would justify the addition of these water areas would have been to protect plant and animal life. Unlike the rocks and islets, the water areas within the one-mile belt were not, in and of themselves, objects of scientific interest situated on federal lands. *See* 16 U.S.C. § 431. Hence the elimination of any purpose to protect plant and animal life strongly suggests that, in the final draft of the 1949 proclamation, there was no intent to add water areas to the Channel Islands National Monument.

Although Assistant Solicitor General Washington's memorandum disavows any change in substance by virtue of

his revision (Jt. App. 63), it is entirely possible that he reached this conclusion by interpreting the proposed proclamation in light of the only expressed purpose in the preamble—to add "several small islets and rocks in the vicinity of Santa Barbara and Anacapa Islands" which were not included in the 1938 proclamation. The disavowal of any change in substance is wholly consistent with that purpose.

The substitution of the word "areas" in the published proclamation for the single "area" contained in the original draft also suggests a possible reference to the multiple surface areas of the "several islets and rocks" rather than to the total surface "area" of the entire one-mile belt.

On January 7, 1949, Attorney General Tom C. Clark transmitted the proposed proclamation as revised by his department to President Truman with his approval as to form and legality. (Jt. App. 65.) On February 9, 1949, President Truman issued Proclamation No. 2825 enlarging the Channel Islands National Monument. (Jt. App. 67-68.)

13. The Absence of Any Reference to Tidelands or Submerged Lands in the Executive History

The most striking fact about the executive history of the 1949 proclamation is that none of the documents expressly mentioned either tidelands or submerged lands as being part of "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." In all of the documents from the beginning of 1947 until the promulgation of the proclamations on February 9, 1949, there is not a single reference to the first *United States v. California* decision, 332 U.S. 19 (1947). If the President truly intended to add submerged lands to the Channel Islands National Monument in 1949, one would have expected a reference to that decision as a basis for the proclamation. Only by virtue of the paramount rights doctrine enunciated in the 1947 decision would submerged lands have been lands "controlled by the Government of the United States" and thus susceptible of placement

in a national monument. 16 U.S.C. § 431.

14. The Ambiguity of the Word "Areas" Should Be Resolved by Limiting its Scope to the Islets and Rocks in the One-Mile Belt

Most certainly, the islets and rocks within one nautical mile of the two principal islands were added to the Channel Islands National Monument. The executive history of the 1949 proclamation does not, however, satisfactorily answer the question of whether "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" included anything else. While the acreage figures on the diagram attached to the 1949 proclamation might tend to suggest that jurisdiction over water areas was included, the only purpose for including water areas in the monument would have been the protection of plant and animal life. That purpose was expressly eliminated in the Attorney General's final revisions of the proclamation. Thus, there is not only an ambiguity as to what President Truman intended by use of the phrase "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands," but there are also conflicting inferences which may be drawn from the language of the 1949 proclamation and the executive history as to whether water areas were included.

Cole v. Young, 351 U.S. 536 (1956), involved interpretation of a similarly ambiguous executive order. There the Court stated:

> " . . . whatever the practical reasons that may have dictated the awkward form of the Order, its failure to state explicitly what was meant is the fault of the Government. Any ambiguities should therefore be resolved against the Government . . . ." (*Id.* at 556.)

Although the principle enunciated in *Cole v. Young* was set in the context of a job dismissal in the interest of national

security, it should also apply in this case. The United States could have avoided any controversy by the use of explicit language. If it had used explicit language, Congress might well have provided a legislative solution to this controversy when it passed the Submerged Lands Act in 1953.

Construing the ambiguity against the federal government is also consistent with the legislative intent of the Antiquities Act of 1906. Section 2 of that Act provides that the limits of national monuments " . . . in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. It must be presumed that the President complied with this legislative mandate. Accordingly, any ambiguity in a national monument proclamation must be resolved in favor of narrowing rather than expanding the jurisdiction of the National Park Service unless, of course, it can be shown that "proper care and management of the objects to be protected" by monument status requires an interpretation in favor of additional territory. Since the Channel Islands National Monument was created to protect fossils and unique geological features (*see* Jt. App. 7) and since there was no intent to enlarge the monument for protection of marine life, the exceptional situation is just not present here.

E. The Tidelands Within The Channel Islands National Monument Are Not Part Of The Monument

1. The Past Decisions Have Settled California's Title to the Tidelands

In its proposed supplemental decree, the United States has claimed ownership of the tidelands surrounding the islands and islets located within the Channel Islands National Monument. (U.S. Motion 4.) This claim is surprising since California's ownership of the tidelands surrounding the islands within its political boundaries have already been settled. In the 1966 supplemental decree, this Court adjudged California

to have "the title to and ownership of the tidelands along its coast (*defined as the shore* of the mainland and *of islands,* between the line of mean high water and the line of mean lower low water) . . . ." *United States v. California,* 382 U.S. 448, 452 (1966). (Emphasis added.) Even the 1947 decision favorable to the United States recognized California's ownership of " . . . tidelands down to the low water mark." *United States v. California,* 332 U.S. 19, 30 (1947).

2. Federal Title Is Not Traceable to a Mexican Land Grant

In the memorandum accompanying its proposed supplemental decree, the United States asserted that "There is evidence to suggest that the Channel Islands, possibly including those reserved in the Channel Islands National Monument, were the subject of Mexican land grants." The United States suggested that it might be able to establish its title to the tidelands surrounding the islands of the monument "through these and other routes." (U.S. Motion 10-11.) No such evidence has been placed in the agreed Joint Appendix, which constitutes the record in this proceeding.

Furthermore, there was never any possibility that the United States would be able to establish its ownership of the tidelands around the islands of the Channel Islands National Monument through Mexican land grants. All of the ungranted tidelands in California were ceded by Mexico to the United States pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). These tidelands were held in trust by the United States for the creation of future states and passed to California in fee simple when it was admitted to the Union in 1850. *Borax Consol. Ltd. v. Los Angeles,* 296 U.S. 10, 15 (1935). The only tidelands whose ownership did not vest in California upon statehood were those tidelands granted by the Mexican government to private parties before the Treaty of Guadalupe Hidalgo and confirmed by federal patents issued pursuant to the statutory procedure for settling private land claims in the

State of California. *See* 9 Stat. 631 (1851) and successor statutes. No Mexican land grants were ever confirmed as to the islands located within the Channel Islands National Monument. The only federal patents confirming Mexican land grants on California islands were for the islands of San Diego (at San Diego Bay), Santa Catalina, Santa Cruz, Santa Rosa, and Mare Island (in San Francisco Bay). Bowman, *The Question of Sovereignty over California's Off-Shore Islands,* 31 Pac. Historical Rev. 298 (1962).

Since there were never any Mexican land grants on Anacapa or Santa Barbara Islands, there was no way that the United States could have obtained title to the tidelands surrounding these two islands. The United States would have had to acquire the title to tidelands held by a Mexican grantee (or a successor-in-interest) by purchase or condemnation. These possibilities were precluded by the absence of any Mexican land grants whatsoever on the two islands. Furthermore, the 1938 proclamation creating the Channel Islands National Monument clearly recognized the absence of title to the tidelands – the calls for the exceptions on Santa Barbara Island begin and end at the high water line. (Jt. App. 7-8.) The 1938 proclamation also refers throughout to the reservation of "land" for national monument purposes. (*Id.*) In a memorandum dated May 31, 1946, the Chief Counsel of the National Park Service concluded that "While the proclamation is not entirely specific on the point, I believe that it should be construed to grant administrative jurisdiction to the National Park Service with respect to the lands described therein *only to the high water mark.*" (Jt. App. 16.) (Emphasis added.)

3. The Tidelands Were Not "Owned or Controlled" by the United States and Were Expressly Excepted From the 1938 and 1949 Proclamations

Since the United States has never owned the tidelands

located within the Channel Islands National Monument, there was no statutory authority for their inclusion within the monument. The Antiquities Act of 1906 only authorizes the creation of national monuments on "lands owned or controlled by the Government of the United States." 16 U.S.C. § 431. Also the 1938 and 1949 proclamations were both expressly made subject to all "valid existing rights." (Jt. App. 7, 67.) California's ownership of the tidelands around the islands, islets and rocks of the Channel Islands National Monument unquestionably was such "a valid existing right," excepted from the operation of these two proclamations.

4. The Federal Position Produces an Anomaly of Concentric Rings

California's ownership of the tidelands within the Channel Islands National Monument presents an anomaly on the California coastline. Everywhere else along the California coast, California owns both the tide and submerged lands with its jurisdiction extending from the mean high water line to three nautical miles from the line of mean lower low water. If there is federal ownership of the water areas or submerged lands within the one-mile belt surrounding Anacapa and Santa Barbara Islands, then the title situation becomes a bizarre complex of concentric rings. The federal government clearly owns the center rings—all lands above the high water mark on the islands, islets, and rocks. California then owns the second ring, the tidelands surrounding the islands, islets and rocks.[5] Further out, the federal government would have jurisdiction over the third ring from the mean lower low water line to one nautical mile. California would then own and have jurisdiction over the fourth ring from one nautical

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[5] California owns all low-tide elevations since these rocks are tidelands being under water at high tide but above water at low tide. *See United States v. California*, 382 U.S. 448, 450 (1966).

mile to three nautical miles. And finally, the federal government would have jurisdiction over all submerged lands beyond the three-mile limit to the edge of the Outer Continental Shelf. 43 U.S.C. § 1332 (1953).

The upshot is that the federal position would make California's tidelands a virtually useless strip surrounded entirely by areas of federal jurisdiction. On the other hand, California's position would reduce the number of rings and would follow the pattern of state-federal jurisdiction which obtains along the rest of the coast.

F. As a Matter of Law, the Areas Within the One-Mile Belt Could Not Have Included Submerged Lands

1. President Truman Had Already Reserved the Submerged Lands in Executive Order No. 9633

On September 28, 1945, President Harry S Truman proclaimed that " . . . the Government of the United States regards the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Pres. Proc. No. 2667, 59 Stat. 884 (1945).

In an accompanying executive order, President Truman ordered that

> " . . . the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside, and placed under the jurisdiction and control of the Secretary of the Interior for adminis-

trative purposes, pending the enactment of legislation in regard thereto." Exec. Order No. 9633, 3 C.F.R., 1943-48 Comp., 437 (1945), *reprinted in* Appendix to this brief.

While neither the proclamation nor the executive order defined the Continental Shelf, the White House press release issued on the same day described it as "submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water . . . . " 4 M. Whiteman, *Digest of International Law,* 758 (1965); 13 Dept. State Bull. 484-85 (1945).

a. The High Seas Contiguous to the Coasts of the United States Include All Submerged Lands of the Territorial Sea

Thus, it is clear that although President Truman refers to the subsoil and sea bed of the Continental Shelf "beneath the high seas," he was using the term high seas in a broad sense to include all ocean waters above the Continental Shelf and not just those waters beyond the three-mile limit. Otherwise, the adjective "contiguous" would make little sense since, under its usually understood definition, the high seas in question would have to touch or be in contact with the coasts of the United States. Webster's New International Dictionary of the English Language (2d ed., unabridged, 1961). Often when the admiralty, maritime or territorial jurisdiction of the United States is at issue the high seas extend outward from the ordinary low water mark. *See, e.g., Murray v. Hildreth,* 61 F.2d 483, 484 (5th Cir. 1932).

In his 1945 annual report, Secretary of the Interior Harold L. Ickes interpreted Executive Order No. 9633 as having placed the entire Continental Shelf under the jurisdiction of his department. His Letter of Transmittal to the President stated that "We have acquired jurisdiction over the Contin-

ental Shelf, which is about 760,000 square miles of underwater land from which we may replenish some of our depleted mineral reserves." 1945 Ann. Rep. Sec'y Int. vi. His letter describes the Continental Shelf in terms which obviously include the three miles closest to the shore:

> "Approximately described, the Continental Shelf is all of the ocean floor around the United States and its Territories that is covered by no more than 600 feet of water. The whole area is almost as large as the area embraced in the Louisiana Purchase, which was 827,000 square miles, and almost twice as large as the original 13 colonies, which was 400,000 square miles. Along the Alaska coastline the shelf extends several hundred miles under the Bering Sea. On the Eastern coast of the United States the width of the shelf varies from 20 miles to 250 miles, and along the Pacific coast it is from 1 to 50 miles wide." (*Id.* at ix-x.)

Secretary Ickes' construction of the 1945 Proclamation and Executive Order is entitled to controlling weight. *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

It should also be noted that the last sentence of Executive Order No. 9633 would not make any sense unless the Order were construed to include all of the Continental Shelf and not just the part of it beyond the three-mile limit. The last sentence of the Executive Order expresses an intent not

> " . . . to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." Exec. Order No. 9633.

If the 1945 Truman Proclamation and Executive Order No. 9633 did not include the subsoil and sea bed within the three-mile limit, the foregoing language would have been unneces-

sary. There would have been no way in which either the proclamation or the executive order could have affected litigation relating to ownership of the subsoil and sea bed "within" the three-mile limit. This last proviso of the 1945 executive order simply made it clear that the federal government was placing all of the land which it owned on the Continental Shelf under the jurisdiction of the Secretary of the Interior.

When the 1947 *United States v. California* decision confirmed federal dominion over the subsoil and sea bed of the three-mile belt, the submerged land within that belt had already been reserved by this executive order and was under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation dealing with these lands. The 1952 Annual Report of the Secretary of the Interior bears out this interpretation.

> "The fiscal year 1952 ended without any specific guidance having been provided by the Congress for the executive branch with respect to the administration of the oil and gas deposits contained in the Continental Shelf of the United States. In the absence of such specific guidance, the executive branch has not deemed it feasible during the several years that have elapsed since the rights of the Federal Government in the Continental Shelf were upheld by the Supreme Court in the cases of *United States v. California*, 332 U.S. 19 (1947)), the *United States v. Louisiana* (339 U.S. 669 (1950)), and *United States v. Texas* (339 U.S. 707 (1950)), to do anything more than (1) stipulate with California regarding the continuation of oil and gas operations in the submerged areas along the California coast . . . ; and continuation of oil and gas operations which were in progress off the coasts of Louisiana and Texas at the time when the Supreme Court entered its decree . . . . " 1952 Ann. Rep. Sec'y Int. 431-32.

b. Reservation of the Natural Resources Was the Same as Reserving the Subsoil and Sea Bed in its Entirety

In addition, one should also note that the reservation of "the natural resources of the subsoil and sea bed of the Continental Shelf" was tantamount to reserving the subsoil and sea bed. The subsoil and sea bed have no identity apart from the natural resources of which they are composed; indeed, the subsoil and sea bed are nothing more than a bundle of natural resources.

In testimony before a Senate Committee in 1949, Solicitor General Philip B. Perlman was asked what effect the Continental Shelf proclamation had on the outward boundary of the United States. He replied:

> "That proclamation did not fix any boundary. It, I think, had the effect of notifying the rest of the world that to the edge of the Continental Shelf, the Government of the United States was prepared to claim, did claim, the mineral resources of that area, *from its coast* to the edge of the Continental Shelf." *Hearings Before the Senate Committee on Interior and Insular Affairs on S. 155, S. 1545, S. 1700, and S. 2153,* 81st Cong., 1st Sess. 40 (1949).

In the hearings on the bill which became the Outer Continental Shelf Lands Act, Jack B. Tate, Deputy Legal Advisor of the Department of State, took this same view. The following exchange took place between Mr. Tate and Senator Price Daniel of Texas:

"**Senator Daniel.** I thank you. That is exactly what I was trying to bring out. For all practical purposes, our Nation has the same rights as if we had used the word 'sovereignty.'

"Now, in the interpretation of the President's proclamation, which is limited to mineral resources of the ground, it seems that both the Secretary of State in the concurrent press release, the Attorney General of the United States in his lawsuits against Texas and Louisiana, and the Supreme Court in its decrees, have treated the proclamation as though it covered the land itself, all of the area of the seabed and subsoil of the Continental Shelf. Is that correct?

"**Mr. Tate.** That is correct.

"**Senator Daniel.** And for all practical purposes, when we claim exclusive jurisdiction and control over the natural resources of the seabed and subsoil, have we not asserted exclusive jurisdiction over the seabed and subsoil itself?

"**Mr. Tate.** For all practical purposes that I can think of, sir.

"**Senator Daniel.** We have?

"**Mr. Tate.** Yes, sir."

Hearings Before Senate Interior and Insular Affairs Committee on S. 1901, 83d Cong., 1st Sess. 586 (1953).

Executive Order No. 9633 itself appears to equate the natural resources" with the "subsoil and sea bed" of the Continental Shelf when it expressly disavows any intent to affect the outcome of litigation "between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the Continental Shelf within or outside the three-mile limit."

c. In its 1947 Brief, the United States Interpreted the 1945 Executive Order This Same Way

Lastly, and perhaps most importantly, the original brief of the United States filed in this litigation also interpreted the 1945 Truman Proclamation as covering the natural resources of the submerged lands within the three-mile limit. The brief for the United States filed in January of 1947 stated that:

> "This proclamation, in asserting rights in the sea bed of the Continental Shelf, lays claim to natural resources for many miles beyond the three-mile limit." Brief for the United States in Support of Motions for Judgment at 43, *United States v. California,* 332 U.S. 19 (1947).

This language claiming "rights in the sea bed" recognizes the identity between the "natural resources" reserved in 1945 and the entirety of the sea bed itself. This language also shows that the claim was not only to the three-mile belt but also to submerged lands "many miles beyond."

2. Since the 1949 Channel Islands Proclamation Did Not Expressly Revoke Executive Order No. 9633, No Submerged Lands Were Added to the Monument

As shown in the preceding section, Executive Order No. 9633 reserved all the submerged lands of the Continental Shelf in aid of future legislation and placed them under jurisdiction of the Secretary of the Interior for administrative purposes. The submerged lands within the one-mile belt around Anacapa and Santa Barbara Islands were part of the Continental Shelf included within the 1945 reservation. Thus, these submerged lands were not part of the "areas" added to the Channel Islands National Monument in 1949 unless it can be shown that the 1949 proclamation effected a partial revocation of Executive Order No. 9633 as regards the submerged lands in the one-mile belt.

The 1949 proclamation nowhere mentions Executive Order No. 9633. (*See* Jt. App. 67.) Hence, there was no express revocation of the 1945 reservation. If the submerged lands within the one-mile belt were part of the "areas" added to the monument in 1949, then language of the 1945 proclamation had to effect a partial revocation by implication.

It is a cardinal principle of statutory construction that repeals by implication are not favored. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). When executive orders are involved, revocations by implication should likewise be disfavored. This rule should obtain especially where, as here, this Court must infer a partial revocation from use of the ambiguous word "areas" which might or might not include submerged lands. The principle disfavoring repeals by implication carries special weight when this Court is urged to find a specific statute has been repealed by a more general one. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1876). An analogous principle should apply when an executive order covering submerged lands must be found to have been partially revoked by general language in a later proclamation adding the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" to the Channel Islands National Monument.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57 (1945). Two statutory provisions cannot be said to be in "irreconcilable conflict" unless there is a positive repugnancy between them or they cannot mutually coexist. *Radzanower v. Touche Ross & Co., supra*, 426 U.S. at 155.

Here Executive Order No. 9633 and the 1949 proclamation enlarging the Channel Islands National Monument can mutually coexist without any repugnancy if one merely interprets the word "areas" in the latter not to include sub-

merged lands. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . " *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. *Morton v. Mancari,* 417 U.S. 535, 552 (1974). In this case, there is absolutely nothing in the executive history of the 1949 proclamation to suggest any Presidential intent to add submerged lands to the Channel Islands National Monument. As the earlier review of the executive history pointed out, the relevant documents do not contain a single reference to submerged lands as being part of the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands."

By way of contrast, the 1949 proclamation did operate to revoke by implication a prior executive order which had similarly reserved all the islands and rocks off the coast of California in aid of legislation. When California was admitted to the Union in 1850, all the islands, islets and rocks above high water and situated in the Pacific Ocean along the California coast became part of the federal public domain. On August 14, 1930, President Herbert Hoover issued Executive Order No. 5326, which provided that "all unreserved islands, rocks and pinnacles situated in the Pacific Ocean off the coast of California" were temporarily withdrawn from settlement, location, sale, or entries pending classification and in aid of legislation. President Hoover specified that this order was to continue "in full force and effect unless and until revoked by the President or by act of Congress."

The preamble of the 1949 proclamation is quite clear that "certain islets and rocks situated near Anacapa and Santa Barbara Islands" were to be included within the 1949 enlargement of the Channel Islands National Monument. (Jt. App. 67.) In this situation, the provisions of the 1949 proclamation and the 1930 executive order are in irreconcilable conflict. The islets and rocks within the one-mile belt cannot be the subject of both reservations. Therefore, the later proc-

lamation to the extent of the conflict operates as an implied repeal of the former executive order. Also the executive history of the 1949 proclamation is replete with evidence showing an intention to add Gull Island and other islets and rocks to the Channel Islands National Monument. A partial revocation by implication, therefore, squares with a Presidential intention to revoke, which intention cannot be found with respect to submerged lands reserved in Executive Order 9633.

For the foregoing reasons, the "areas within one nautical mile of Anacapa and Santa Barbara Islands cannot be interpreted to have added any submerged lands to the Channel Islands National Monument.

3. Having Been Already Reserved, the Submerged Lands of the One-Mile Belt Were Impliedly Excepted From the 1949 Proclamation

Although the language of the 1949 proclamation will not support an implied revocation of Executive Order No. 9633, one can make a case in the opposite direction that the submerged lands of the one-mile belt were impliedly excepted from the 1949 proclamation. The familiar rule is that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specifically disclose a purpose to include them. *United States v. Minnesota*, 270 U.S. 175, 206 (1926). In relation to the 1945 executive order, the 1949 proclamation was a "subsequent disposal" of the areas within the one-mile belt. Here again, however, neither the language of the 1949 proclamation nor its executive history discloses any purpose to include submerged lands. The submerged lands were thus impliedly excepted from the 1949 proclamation. Therefore, as a matter of law, the phrase "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" must be interpreted as excluding the submerged lands under the one-mile belt.

G. The Water Areas of the One-Mile Belt Were Not "Lands" Which Could Be Placed Within A National Monument

The executive history of the 1949 proclamation contains no indication that anyone intended to add the submerged lands of the one-mile belt to the Channel Islands National Monument. Indeed, the preceding section of this brief has shown that the submerged lands had already been reserved and set aside in Executive Order No. 9633 in 1945. Since the 1949 proclamation did not expressly or impliedly revoke this prior 1945 executive order with respect to the submerged lands around Anacapa and Santa Barbara Islands, the 1949 enlargement could not have included these lands.

If the "areas" added to the monument in 1949 included more than the islets and rocks within the one-mile belt, then one must read the 1949 proclamation as reserving for national monument purposes a one-mile belt of Pacific Ocean waters. It must be emphasized that, so read, the 1949 proclamation adds ocean waters to the Channel Islands National Monument while leaving the submerged lands beneath reserved for future legislation enacted by Congress.

Although there are portions of the executive history of the 1949 proclamation which support an intent to add jurisdiction over the waters within one nautical mile of Anacapa and Santa Barbara Islands, California submits that any interpretation which would add the water areas, as separate and distinct from the submerged lands would exceed the statutory authority conferred by the Antiquities Act of 1906. If the inclusion of water areas would have exceeded the statutory authority conferred by the 1906 Act, then this Court must adopt a construction which would limit the 1949 proclamation to areas within the valid scope of statutory authority. *Cf. United States v. Chemical Foundation,* 272 U.S. 1, 12 (1926). Such a limiting construction would require a holding that water areas were not included in the 1949 enlargement.

The express language of the Antiquities Act of 1906

permits the creation of national monuments only upon "lands owned or controlled by the Government of the United States." 16 U.S.C. § 431 (emphasis added). In the ordinary sense, lands do not include waters. The two are wholly separate and distinct concepts. There are, however, certain occasions when the term lands may include rights to water. For example, the reservation of land in Death Valley National Monument has been held to include certain reserved water rights as well. *Cappaert v. United States,* 426 U.S. 128, 138-42 (1976). It would also appear that a reservation including a non-navigable lake situated on public lands would necessarily reserve federal ownership rights in the waters of the lake as well as in the federally-owned lands beneath those waters. *See United States v. Oregon,* 295 U.S. 1, 14 (1935). In both of these cases, waters are included within the reservation only because they are inextricably connected with lands also reserved.

No such connection exists in the reservation made by the 1949 proclamation. If water areas were added to the Channel Islands National Monument in 1949, the waters so added were divorced and severed from the underlying submerged lands. The sparse legislative history of the Antiquities Act does not show any congressional intent to permit the addition of waters alone to a national monument. The one page reporting the debates in the House of Representatives deals with only how much land in the Western States was to be taken off the market. 40 Cong. Rec. 7888 (1906). A National Park Service historian has done the only thorough research regarding the background of the 1906 Act. R. Lee, *The Antiquities Act of 1906*, 44-77 (Nat'l Park Serv., 1970).[6] The Lee study contains no evidence to suggest that there was

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[6] This study by Ronald F. Lee was apparently published for official use only in the National Park Service. It was, however, listed in the Monthly Catalog of United States Government Publications for July 1971, item 11622. The Monthly Catalog gives this publication a Library of Congress card number of 78-612257, meaning that a copy was placed on file with the Library of Congress but that copies were not distributed to the various federal depository libraries.

any congressional intent to authorize the inclusion of water areas in national monuments separate and apart from the land on which those waters were situated. This study observes that in the final version of the bill which became the Antiquities Act of 1906

> " . . . the provisions were made applicable to antiquities situated on any 'lands owned or controlled by the Government of the United States.' Previous bills applied only to the public lands, leaving their applicability to forest reserves, Indian lands, and military reservations uncertain." (*Id.* at 74.)

In summary, California's contention is that the federal government might have been able to include the water areas in the 1949 proclamation if it had included the submerged lands. Since it did not include the submerged lands, the Antiquities Act of 1906 did not authorize the addition of the water areas by themselves. Those national monuments in which water areas have been included support the thesis advanced in this brief.

For example, Glacier Bay National Monument includes inland waters of the State of Alaska. Pres. Proc. of February 26, 1925, 43 Stat. 1988 (1925). This proclamation clearly includes the submerged lands of Glacier Bay which were owned by the federal government in 1925 since Alaska was then a territory. In *Shively v. Bowlby,* 152 U.S. 1, 48 (1894), the Court held that Congress had the power to make grants of land below the high water mark of navigable waters in any territory of the United States. Presumably, the greater power to make grants included the lesser power to reserve these lands for national monument purposes.[7]

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[7] An argument could be made by the State of Alaska that the submerged lands underlying Glacier Bay passed to that State under the Equal Footing Doctrine when it became a state in 1959. By virtue of that doctrine, new states become vested with absolute title to the beds of navigable waterways within their boundaries upon admission to the

Similarly the inclusion of undersea coral reef formations within Buck Island Reef National Monument in the Virgin Islands also involves an exercise of federal power over lands located in territories. Buck Island Reef is located in the Virgin Islands, and its boundaries embrace both the submerged lands and superjacent waters. Indeed, federal jurisdiction over a coral reef is predicated on the fact that the reef is an accretion to the federally-owned bed of the ocean. *United States v. Ray*, 423 F.2d 16, 20-21 (5th Cir. 1970).

Biscayne National Monument includes inland waters and submerged lands of the State of Florida. This monument was created by a special act of Congress, 82 Stat. 1188 (1968) which authorized the Secretary of the Interior to acquire " . . . lands, waters, or interests therein by donation, purchase with donated or appropriated funds, or exchange." If waters are included within this national monument without federal ownership of underlying submerged lands, then the authority for this exceptional situation lies in the special act of Congress authorizing this result. It does not appear, however, that waters were included within this monument separate from the submerged lands beneath them. In any event, the manner in which Biscayne was created suggests that special statutory authority is needed to include waters alone in a national monument. This monument is hardly precedent for interpre-

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Union. *See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-78 (1977). Unless Alaska expressly relinquished jurisdiction over the submerged lands of Glacier Bay at the time it was admitted to the Union or thereafter, these lands may have passed to the State of Alaska by operation of the Equal Footing Doctrine. That doctrine is more comprehensive than a grant. And lands reserved by the United States have been held to pass by a statute which discloses a purpose to include the reservation within a grant. *See United States v. Minnesota*, 270 U.S. 181, 206 (1926). An Act of Congress admitting a new State to the Union on an equal footing would appear to manifest a specific purpose to include all lands beneath navigable waters, including those previously reserved by the federal government during the period of territorial stewardship.

tating the Antiquities Act in such a way as to achieve the same result by the process of construction.

The only other national monument which might arguably include waters is Fort Jefferson National Monument. As discussed earlier in this brief, the history of Fort Jefferson National Monument discloses no authority for including either waters or submerged lands within that monument. *See* discussion, *supra.*

Thus, there is no instance of national monument jurisdiction over ocean waters without that jurisdiction being exercised as an incident of exercising similar jurisdiction over submerged lands beneath. In other words, jurisdiction over superjacent waters is inextricably connected with jurisdiction over submerged lands beneath. Unless the lands are included within the national monument, the waters are not part of the "lands owned or controlled by the Government of the United States." For this reason, waters alone cannot be added to a national monument.

It might be argued on the basis of two Alaska cases that the word "lands" may also include waters. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). These cases turn on the peculiar history of the word "lands" as used in federal statutes pertaining to the Territory of Alaska. This point is clearly made in the following quotation from the *Hynes* opinion:

> "... We are convinced that § 2 of the Act of May 1, 1936, authorizes the Secretary of the Interior to include in the Karluk Reservation the waters described in § 2 of Public Land Order No. 128. To interpret the clause 'or any other public lands which are actually occupied by Indians or Eskimos within said Territory' to describe only land above mean low tide is too restrictive in view of the history and habits of Alaska natives in the course of administration of Indian affairs in that territory." 337 U.S. at 111.

Thus, the *Hynes* case makes it clear that both submerged lands and superjacent waters under the Pacific Ocean were included within the Indian reservation boundaries that were the subject of that litigation. This case then supports California's thesis that reservation of submerged lands is essential to the reservation of superjacent ocean waters. The *Alaska Pacific Fisheries* decision also lends support to this proposition. In that case, the Court stated:

> "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority." 152 U.S. at 87.

In conclusion, the peculiar use of the word "lands" in the Antiquities Act of 1906 does not permit the reservation of waters of the Pacific Ocean by themselves without concurrent reservation of the submerged lands beneath. The two necessarily must go hand in hand. Otherwise a Presidential proclamation including only waters without lands would exceed the legislative authority conferred on the President by the 1906 Act. To avoid such a result in this case, California submits that only one interpretation of the "areas within one nautical mile of Anacapa and Santa Barbara Islands" is permissible. That interpretation is that only the islets and rocks within the one-mile belt and above high water were added to the Channel Islands National Monument in 1949.

II

NONE OF THE TIDELANDS, SUBMERGED LANDS OR OCEAN WATERS WITHIN THE ONE-MILE BELT WERE EXCEPTED FROM THE OPERATION OF THE SUBMERGED LANDS ACT

A. The Submerged Lands Act Returned Everything Other than the Islets and Rocks Above High Water to California's Ownership and Control

Even if the 1949 proclamation were interpreted to include tidelands, submerged lands or ocean waters within the "areas" added to the Channel Islands National Monument, those lands and waters were returned to California when the Submerged Lands Act was enacted in 1953. The language of the Act makes it clear that Congress intended to relinquish all federal interests in the three geographical mile belt of territorial sea along the California coast, with the coast including the shoreline of California islands as well as that of the mainland. This relinquishment was, of course, subject to the exceptions and reservations set forth in Sections 5 and 6 of the Act, but it is important to observe that none of the tidelands, submerged lands or water areas purportedly added to the Channel Islands National Monument in 1949 were excluded from the general coverage of the Act.

The definition of "lands beneath navigable waters" contained in Section 2 of the Act included all tidelands and all submerged lands located between the mean high water line and a line three geographical miles seaward from the "coast line." 67 Stat. 29, 43 Stat. 29, 43 U.S.C. § 1301(a)(2). The 1966 supplemental decree in this case established that the "coast line" described in the Submerged Lands Act included the line of mean lower low water in California islands. *United States v. California*, 382 U.S. 448, 449, para. 2 (1966). Thus, all of the tidelands and submerged lands which may have been included within the one-mile belt surrounding Anacapa and Santa Barbara Islands were definitely included within the

phrase "lands beneath navigable waters" as used in the Submerged Lands Act.

The waters of the Pacific Ocean within the one-mile belt were also included within the coverage of the Submerged Lands Act. Section 2 of the Act provided:

> "(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power. . . ." 67 Stat. 29, 43 U.S.C. § 1301(e).

As thus defined, the term "natural resources" manifestly includes the waters of the oceans themselves. The phrase "without limiting the generality thereof," which precedes the enumeration of specific types of natural resources, reflects a congressional intent that the doctrine of *ejusdem generis* not apply. The exception of "water power, or the use of water for the production of power" also strongly indicates that the general term "natural resources" included the water itself as a component part.

The federal quitclaim contained in Section 3 of the Act did not exempt areas within the one-mile belt around Anacapa and Santa Barbara Islands from its plain language. Section 3 provided in its first subsection:

> "(a) 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 respective 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 of interest thereof . . . ." 67 Stat. 30, 43 U.S.C. § 1311(a).

The second subsection of section 3 of the Submerged Lands Act further provided:

> "(b)(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, *all* right, title and interest of the United States, if any it has, in and to *all* said lands, improvements, and natural resources . . . ." 67 Stat. 30, 43 U.S.C. § 1311(b)(1). (Emphasis added.)

By its general terms, the Submerged Lands Act thus relinquished to California all federal jurisdiction and ownership rights over the tidelands, submerged lands and waters of the Pacific Ocean within the one-mile belt around Anacapa and Santa Barbara Islands. In at least two prior decisions, this Court has held that the Submerged Lands Act effectively confirmed to the States the ownership of all submerged lands within three miles of their coastlines. *United States v. Alaska*, 442 U.S. 184, 187 (1975); *United States v. California*, 381 U.S. 139, 148 (1965). From the statutory language highlighted above, it should be equally apparent that the Act also effectively confirmed State ownership of all tidelands landward of the coastline up to the high water mark. The Act further confirmed or granted to the States whatever rights the federal government possessed in the ocean waters of the three-mile belt.

Because of the sweeping and comprehensive effect of the Submerged Lands Act, the United States must demonstrate that any areas added to the Channel Islands National Monument in 1949 (other than the islets and rocks above high water) were excepted from the coverage of the Act. In

this effort, the federal government has the burden of proof for, as a general rule, one who claims the benefit of statutory exception has the burden of proving that he falls within the exception. *United States v. Morton Salt Co.*, 386 U.S. 361, 366 (1967). California will devote the remainder of this section to showing why the United States cannot sustain this burden.

B. The Claim of Right Exception Did Not Establish Federal Title Since It Was Only a Savings Clause

In the memorandum accompanying its proposed supplemental decree, the United States contends that any tidelands and submerged lands added to the Channel Islands National Monument in 1949 were excepted from the interests transferred to California by the Submerged Lands Act. The United States bases its contention on the language of Section 5(a) which excepted "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 67 Stat. 32, 43 U.S.C. § 1313. For convenience, California will refer to this language as the"claim of right" exception.

In examining this exception, it is important to note how the claim of right exception differs from all the preceding clauses of the first subsection of Section 5. All of the preceding clauses except from the operation of the Section 3 quitclaim either "tracts or parcels of land" or "lands" of various descriptions. This last clause – the claim of right exception – excepts only "rights." This distinction is important because the "lands" mentioned in the preceding clauses did not pass to the States upon the enactment of the Submerged Lands Act. The claim of right clause, however, did not except "lands presently and actually occupied under claim of right" from transfer to the States. It preserved to the federal government only such rights as it had in these lands. One may infer that even lands actually occupied in 1953 could pass to the States if it were concluded in subsequent litigation that the federal government had no rights to the

lands in question. The legislative history of the claim of right exception supports this inference.

The language of the claim of right exception was added to the Senate bill which became the Submerged Lands Act "at the request of the Department of Justice." Remarks of Senator Cordon, 99 Cong. Rec. 2619 (1953). During committee hearings in the Senate, Attorney General Brownell had advised that "Provision should be made in the statute to make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; also that all installations and acquisitions of the Federal Government within such area belong to it." *Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment and S.J. Res. 18*, 83d Cong., 1st Sess. 926 (1953) (hereinafter *Senate Hearings*). Attorney General Brownell submitted the language of Section 5 in response to a question from Senator Anderson requesting language to cover this point. The following exchange took place:

> "**Attorney General Brownell.** I would be glad to submit some. I haven't it with me.
>
> "**Senator Anderson.** Do you believe the language in the existing bills is satisfactory on that point?
>
> "**Attorney General Brownell.** I would like to check that point.
>
> "**Senator Anderson.** Again I recognize that you might want to submit the language. I think it would be better if you did submit the language that you thought clearly protected any installations the Federal Government might have, such as the ones that were mentioned the other day by the Secretary of the Navy.
>
> "**Attorney General Brownell.** Is that the wish of the entire committee? Should I take that as a request from the committee?

"**Senator Cordon.** It is entirely proper. If a Senator makes a request, the committee joins in it.

"**Attorney General Brownell.** We will be very glad to do that.

"(The language suggested by the Department of Justice, in response to the foregoing request, reads as follows:)

"**Sec. 5. Exceptions from Operation of Section 3 of S.J. Res. 13.** – There is excepted from the operation of section 3 of this Joint Resolution:

"(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by the United States when the State entered the Union; all lands acquired by the United States by eminent domain proceedings; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and all lands presently occupied by the United States under claim of right;

"(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

"(c) all structures and improvement constructed by the United States in the exercise of its navigational servitude."

Senate Hearings at 935.

Since Attorney General Brownell apparently submitted his proposed wording of Section 5 to the Senate Committee after he had completed his testimony, there is no

direct commentary by him on the specific language of the claim of right clause. In response to a question posed by Senator Kuchel of California, the Attorney General did have this to say about the general purpose of the language he would later submit:

> "**Senator Kuchel.** The only other question I have is with respect to your recommendation No. 4, in which you suggest that provision be made to make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; further, that all installations and acquisitions of the Federal Government, without any legal title or right whatsoever, were to occupy land located within inland waters so that under the State law which everyone would concede would be applicable, the Federal Government was trespassing on the property. It would, I take it, be impossible for Congress by this statute to declare the Federal Government to be owner of that property, since the Federal Government would have no right by a self-serving declaration in a statute to acquire property. Is that not correct?
>
> "**Attorney General Brownell.** On that statement of facts I should think you would be correct. I think we could make it quite clear in the language which we have been asked to submit now on this fourth point as to just what we mean there.
>
> "**Senator Kuchel.** In other words, I do not think anyone desires to have legislation adopted which would cast any doubt whatsoever upon property legally held in a bona fide manner by the Federal Government, but by the same token I think that we should confine the No. 4 suggestion you make to instances where title has been legally vested in Federal installations located within inland waters.
>
> "**Attorney General Brownell.** *The true purpose of*

this is to preserve the rights of the Federal Government that they legally possess."

Senate Hearings at 948.

In the executive session which followed the conclusion of public hearings, the committee members provided further clarification of what Congress intended the claim of right exception to mean. The following colloquy took place on the second day of the executive session:

"**Senator Cordon.** Well, I call attention to the fact again that there is excepted under this section all lands presently occupied by the United States under claim of right.

"**Senator Kuchel.** What does "claim of right" mean?

"**Senator Cordon.** Well, it means that the United States is in actual occupancy and claims it has a right to the occupancy.

"**Senator Kuchel.** And it permits the United States to keep the property in the absence of a title?

"**Senator Cordon.** No; it does not. It leaves the question of whether it is a good claim or not a good claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it.

"**Senator Kuchel.** Why should we recognize it, Senator, any more than any other so-called color or title or claim, as we avoided with respect to claimants that the Senator from Nevada talked about?

"**Senator Cordon.** For the reason that in my opinion, Senator, this land now is not land to which the State has title and we are conveying title. We may except what we will.

"**Senator Kuchel.** In other words, we talk here only

about exceptions from that 3-mile belt outside of the inland waters which we are assigning to, or otherwise, disposing of, to the States?

"**Senator Daniel.** No; this covers all of it, everything.

"**Senator Kuchel.** If it covers everything, Senator, then I would say that we do recognize, by this language, something less than a claim of title.

"**Senator Cordon.** We simply recognize that a claim on the part of the United States exists, and we leave it for the same determination that would be made had no decision of any kind ever been made.

"**Senator Long.** This is to say, as I understand, Mr. Chairman, that wherever any State law has conveyed any land to the United States, that the United States retains that land. And likewise, that where the United States holds lands within the State by law of the United States, the United States retains that land.

"**Senator Cordon.** Yes. And any land occupied by the United States under claim by the United States that it has a right there, is excluded from this conveyance or quitclaim or assignment. That neither validates the claim nor prejudices it. It leaves it where we found it. It is general language that has been suggested by the Department of Justice, and I think it is good.

"**Senator Cordon.** And protects every installation of every kind.

"**Senator Long.** That, in effect, says that this act does not at all affect any land which the United States is actually occupying. And that means that a representative of the United States Government in one capacity or another is occupying that land.

"**Senator Cordon.** That is right.

"**Senator Kuchel.** It will be susceptible to a motion to strike later on.

"**Senator Cordon.** Yes.

"**Senator Daniel.** Are Federal officials now occupying the marginal belt land of Texas and Louisiana under a claim of right?

"**Senator Cordon.** It is not intended that this language shall do that, that it recognizes that as being within the classification. I cannot answer whether someone may believe it is occupancy or not. In my opinion, it is not occupancy, but then I can only give you my opinion. Occupancy to me is some type of actual either continuous possession or possession in such way as to indicate that the individual claims some special right there different from a vast unoccupied area.

"**Senator Long.** I am a little bit afraid of that last clause myself, just on the theory that the clause might be susceptible of interpretation that would complete [sic] negate this entire bill. Where it says "and all lands presently occupied by the United States under a claim of right." That is on the theory that it might be urged that the United States Navy, for example, might be occupying this land under a claim of right.

"**Senator Daniel.** Of course, it is not intended, but let's be sure that nobody else could contend.

"**Senator Cordon.** All right. We can make it more specific by indicating that the claim of right is other than the claim arising by virtue of the decision in the cases of – and put in the citations – and then we will have excluded any claim by virtue of the decisions.

"**Senator Long.** As a matter of fact, as long as it is made clear that this means uplands rather than submerged lands, I would be satisfied, "that all lands occupied by the United States under a claim of right."

"**Senator Cordon.** We will see. We have a note of it. All right."

Senate Hearings, Pt. II, at 1321-22.

Senator Kuchel expressed concern that the claim of right exception might somehow be interpreted as an expression of congressional recognition of the validity of the claims excepted from the operation of the Submerged Lands Act. (*Id.* at 1395.) To this concern, Senator Cordon replied:

> "**Senator Cordon.** What I had in mind is that I believe the Senator, if he will pardon me, is almost exactly wrong as a matter of law. If the Senator will follow me, please. Let us have in mind that this resolution is a transfer by the Federal Government to the States. Of necessity, the Federal Government can, if it so desires, transfer everything it owns in the area – installations and all – or it may except the installations to which it has a perfect title and transfer one where it only claims a title.
>
> "But if we do make the transfer where the Government claims a title, we will have completely taken from the Government any basis upon which it could exert the claim.
>
> "**Senator Kuchel.** Would you contend that if the claim on behalf of the Government was against property in inland waters?
>
> "**Senator Cordon.** Any claim that it had anywhere would pass to the States if it comes within lands under navigable waters, unless the exception were made. It would have no right to urge whatever claim it has.
>
> "Whereas here we have almost exactly the opposite position. Here the Government is transferring its interest in the area, and conceivably such conveyance might include rights the Government does not have as against the other instance where it simply would be transferring the right it claims, and it wants to adjudicate the claim, so it reserves the area which it claims under right, and that claim, of course, is subject to litigation if it is reserved. If it is not reserved, it is not subject to

litigation."

(*Id.* at 1396.)

Toward the end of the executive session, Senator Cordon further explained that the claim of right clause was necessary to give the federal government an opportunity to identify the lands to which it had a legitimate claim. He stated:

> "Now, we have nothing left at the moment unless some other matters are to be presented, except that of the Senator from California. The information I have from the Department is that without a most careful check, one that would be somewhat tedious and long drawn out, inasmuch as it might well not only be a check of the records of what is held under claim of right by the United States, but a check perhaps that would possibly go into the field and possibly have to be identified by survey on the ground, that is impossible without that type of full investigation to know that there is not an area or are not areas here and there, either below the inland waters, below low tide, or without inland waters, or in navigable waters that are wholly inland, that there are not areas where the United States is in actual occupancy, and may have expended millions or tens of millions of dollars, but the exact title to which and to all of which is certainly in the United States, with an express showing. They cannot know exactly in other words whether what they occupy is lands to which they have wholly recorded lawful title.
>
> "The purpose of the language was to save for them an opportunity to determine their rights if they are questioned. That of course was my original view of it."
>
> (*Id.* at 1419-20.)

After these remarks by Senator Cordon, it was suggested that the bill be amended to require "actual" as well as "present occupancy." (*Id.* at 1420.) Senator Kuchel

thereafter pointed out that the Navy then occupied without right valuable acreage within the inland waters of the City of Long Beach and that ". . . the question of whether there is an occupancy with right or without right is entirely a matter to be determined under the law of the State of California." (*Id.*) He expressed the view that "There is nothing that we can do by way of language which will assist the Federal Government in perfecting its right or its title if it has one." (*Id.*) This exchange followed:

> "**Senator Cordon.** If the Senator will just understand that if we do not have language of this character then we have extinguished any right it may have had or right to claim it.
>
> "**Senator Kuchel.** Why do you say that, sir, when we are dealing with inland waters?
>
> "**Senator Cordon.** Because we are conveying all interest of the United States in these areas, and unless it is expected it all goes. Therefore, if there is not this sort of an exception we have taken away from the Government its opportunity whether its right is real or fancied, good or bogus, legal or illegal. That is the thing that bothers me.
>
> "I am afraid that I have not yet gotten over the thing I want the Senator to fully understand: The bill is a conveyance. Unless we except from the conveyance a tract of ground, the title of which is in dispute, and unless we except that we end the dispute, but we end it adversely to the United States. We have taken away from the United States any chance to make good on its claim to prevail in court if it voluntarily surreunders [sic] that claim of right."
>
> (*Id.* at 1421.)

Senator Kuchel remained unconvinced that the language of the exception might not be interpreted as validating federal title rather than just preserving the right to litigate claims. He restated his position, and Senator Cordon replied:

"**Senator Kuchel.** I recognize that we are dealing here with the Federal Government as well as we are with the States, and I don't want any State to be able to impose upon the Federal Government nor do I want the reverse.

"If there is occupancy by the Federal Government rightfully on State property, I want the Federal Government to be able to keep it. If it is there without right, I want it to be in a position so that it will be subjected to the State law in question. I am just afraid that that phrase "claim of right," is loose. I wish there were some other way to permit the protection, and that was the reason that other language was suggested in the other approach.

"**Senator Cordon.** Would the Senator feel better if we left the language as it is, and added after the words "and actually," and then the Senator would have a full opportunity by the time this resolution comes up on the floor to fully go into the matter, particularly as to the legal effect of it, and I assure him for one that I would be glad to go with him in any language that is needed to protect the State that does not cut off an opportunity for the Government to at least litigate whatever claim it has."

(*Id.*)

Further discussion ensued in which Senator Cordon remarked that the Government have never claimed the right to put a military installation in inland waters "until it had title to what it was using." (*Id.* at 1422.) Senator Kuchel asked why the claim of right language was needed if that was a fact, and Senator Cordon answered:

"**Senator Cordon.** Because of the human frailty involved and the negligence of certain agencies of the Government. There are matters such as building up filled-in lands and constructing facilities on them that have gone on and on for many years, and seemingly

without objection, but as a result of which they now have valuable works, with respect to which they would like at least an opportunity to determine whether there has been any legal right that has ripened as a result of long possession.

"That is as near as I could explain to you what we are up against."

(*Id.*)

The final exchange of remarks at the end of the executive session makes clear that the claim of right exception was only a savings clause, which was not intended to be a congressional validation of federal claims in any way. The exchange was:

"**Senator Kuchel.** Mr. Chairman, would you consider informally first such language as this, and I refer now to a suggested substitute for the last phrase of section 5: "and any rights the United States may have on lands presently occupied by the United States under claim of right.

"Which means that we are saving from assignment or gift as the case may be the rights of the United States which it has occupied under claim of right.

"**Senator Cordon.** Read it again.

"**Senator Kuchel.** "And any rights the United States may have on lands presently occupied by the United States under claim of right." That means that we are preserving to the United States any rights.

"**Senator Cordon.** So far as the Chair is concerned, I will take that language.

"**Senator Kuchel.** I so move.

"**Senator Malone.** That is just like preserving anyone else's rights.

"**Senator Daniel.** How is that?

"**Senator Kuchel.** It is to strike out, on page 12 of the Confidential Committee Print No. 4 –

"**Senator Cordon.** I think we can take care of that, and say "and there is reserved any rights the United States has in lands presently and actually occupied by the United States under claim of right;" The United States cannot ask for more than that.

"**Senator Anderson.** Second the motion.

"**Senator Cordon.** That takes care of its complete right in the coast line outside of the low water, and it saves the right it has in others, and I think it will completely answer your problem.

"Now, if there are no other amendments, the Chair will entertain a motion to favorably report the bill." (*Id.* at 1424.)

The Committee on Interior and Insular Affairs then voted to report Senate Joint Resolution 13 favorably to the full Senate. (*Senate Hearings*, Pt. II, at 1424-25.) In the committee report which accompanied the resolution to the floor, there was but a single paragraph explaining the amendments to Section 5 made in committee. That paragraph stated:

> "[61] The language that is substituted for that stricken in the original bill is genèrally similar in purpose, but spells out in greater detail the classes of land exempted from the operation of section 3 of the Joint Resolution. It is believed that, with this explanation, the language is otherwise self-explanatory. *However, the committee wishes to emphasize that the exceptions spelled out in this amendment do not in anywise include any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide."* S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953). (Emphasis added.)

In the Senate debates on Senate Joint Resolution 13 (which ultimately became the Submerged Lands Act), there are only two brief discussions of the claim of right exception. Senator Cordon of Oregon was the floor manager for the resolution as reported out of the Interior and Insular Affairs Committee. *See* 99 Cong. Rec. 2612-13 (1953). During his initial presentation of the resolution, Senator Cordon yielded to questions from Senator Holland of Florida. Referring to the language of the claim of right exception added in committee, Senator Holland expressed satisfaction with the explanation set out in the committee report. Then Senator Holland asked the following question which initiated an exchange of remarks:

> "Am I correct in understanding that under that particular provision the mere fact that the Supreme Court might have held that the United States has paramount rights in submerged lands beyond mean low water, and within State boundaries, would not in any way give the United States the right to claim exceptions of such lands from the joint resolution, in view of the fact that such lands would not be "presently and actually occupied by the United States"? Am I correct in that understanding?
>
> "Mr. Cordon. The Senator from Florida is correct in his understanding. I should like to add that the last language quoted, namely, "any rights the United States has in lands presently and actually occupied by the United States under claim of right," came into the bill at the request of the Department of Justice. It was presented to the committee and explained by the Department of Justice as being for the purpose of reserving to the Federal Government the area of any installation, or part of an installation – and I use the term "installation" to distinguish a specific area, used for a specific purpose, from any vast area that might be claimed under the paramount right doctrine – actually occupied by the Government under a claim of right. There must be a

right in the Government to it. The Government will have an opportunity, a day in court, to determine the correctness of its claim. There was no other purpose in the language.

"**Mr. Holland.** I thank the distinguished Senator from Oregon. If he will permit me to ask another question, I should like to inquire if it was the purpose of this particular exception to leave the Federal Government exactly in the position it now occupies, with such rights as it may have, and with such obligations or responsibilities as it may have, with reference to any lands which it presently and actually occupies by reason of building and maintaining on such lands, installations and the like, under claim of right. There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provision?

"**Mr. Cordon.** The Senator is exactly correct."

99 Cong. Rec. 2619 (1953).

The second reference to the claim of right exception occurred when Senator Cordon read the complete text of Section 5 to the assembled Senators, and then added:

"The provisions of this section were, I believe, discussed somewhat at length yesterday, so the Senator from Oregon will not again go over them unless there is some question with respect to any one of them specifically. The Senator from Oregon only wants to say with reference to the exceptions set forth in the section that they were to a great extent urged and recommended by the Department of Justice, and approved by it, as affording ample protection for properties of the United States which should not be affected by this joint resolution."

99 Cong. Rec. 2699 (1953).

There was no further mention of the claim of right exception in the Senate debates. The particular language of

exception, added in the Senate, was not discussed at all in the House debates which preceded final passage of the Submerged Lands Act in the House of Representatives. *See* 99 Cong. Rec. 4877-98 *passim*. There was no conference report since the House passed the Senate version of the bill without change.

In summary, the legislative history of the claim of right exception clearly shows that this language was added to preserve federal claims to submerged lands which would have otherwise been extinguished if this proviso had not been included. Thus, the claim of right exception was simply a savings clause. As such, it did not validate any federal claims to lands seaward of the line of mean lower low water. It just kept those claims alive until they could be adjudicated or otherwise resolved. This point was made best by Senator Holland in the Senate debates when he queried that "There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provision?", and Senator Cordon answered: "The Senator is exactly correct." 99 Cong. Rec. 2619 (1953).

The Senate Report, however, specifically eliminates one species of claim from those preserved by the proviso excepting any rights the United States has in lands presently or actually occupied by the United States under claim of right." The report does not except "any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953). As will be presently shown, the only claim the federal government has to submerged lands in the one-mile belt around Anacapa and Santa Barbara Islands is of this variety. This type of claim was not preserved for future adjudication; it was extinguished totally and completely.

C. The United States Does Not Possess a Claim of Rights of the Type Preserved by the Last Clause of Section 5(a)

The United States contends that any tidelands or submerged lands added to the Channel Islands National Monument are still owned by it by virtue of the Section 5 exception for "any rights the United States has in lands presently and actually occupied under claim of right." (U.S. Motion 13-15.) The memorandum for the United States focuses completely on "actual occupation" and completely ignores the need for a claim of right.

Perhaps California could have challenged the sufficiency of federal occupation of the "areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands." In the discussions which took place in the executive session of the Senate Interior and Insular Affairs Committee, it was the understanding of Senators Daniel and Cordon that the last clause of Section 5(a) referred to "parcels that are actually occupied and not to parcels of land over which there may be some theory of constructive occupancy, such as all of the unoccupied submerged lands below low tide which it is intended by this bill to actually restore to the States out to their historic boundaries." *Senate Hearings*, 1422-23. To obviate the need for a Special Master to resolve factual issues about the nature of federal occupation, if any, between 1949 and 1953, California joined the United States in stipulating for purposes of this request for a decree that the federal government "presently and actually occupied" the areas within the one-mile belt. The full text of this stipulation is set forth in the Joint Appendix. (Jt. App. 1.) California was willing to concede "actual occupation" because it should be obvious that the United States had no claim of right in 1953, and has none now, which gives it any right to assert federal ownership and jurisdiction over any tidelands, submerged lands, or water areas in the one-mile belt set aside for national monument purposes in 1949.

The United States apparently treats the claim of right exception as if it were a federal statute providing for acquisition of title by adverse possession or prescription. The response to California's petition seems to assume that "actual occupation" not only prevents a transfer to the States by operation of the Submerged Lands Act but also establishes undisputed federal title to the lands so occupied. (*See* U.S. Motion 13-15.) But the exception does not work that way.

There are two criteria which must be met for the exception to come into play. First, the federal government must have "presently and actually occupied" the lands in question as of the date the Submerged Lands Act became law in 1953. Secondly, the federal government must have had a "claim of right" to the lands in question on that date. Then and only then were any rights possessed by the United States excepted from the Submerged Lands Act. But the exception was not tantamount to a congressional declaration that the federal claim was a valid one or that the State no longer had an interest in the lands claimed. It merely saved existing claims from being extinguished – the Submerged Lands Act relinquished all right, title and interest of the federal government and might otherwise have transferred submerged lands owned by virtue of title unrelated to the "paramount rights" doctrine. (*Compare* California's interpretation *with* Senator Cordon's remarks at the executive session, *Senate Hearings*, Pt. II, at 1396.) To use Senator Holland's phraseology, "There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provision." 99 Cong. Rec. 2619 (1953). Attorney General Brownell told the Senate Committee that the true purpose of the language he proposed was "to preserve the rights of the Federal Government that they legally possess." *Senate Hearings* at 948. Any federal claim preserved by the claim of right exception was to be left in precisely the same condition it would have had if the Submerged Lands Act had never passed. As Senator Cordon put the matter,

> "It leaves the question of whether it is a good claim or a bad claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it." *Senate Hearings*, Pt. II, at 1321.

What then is the nature of the federal "claim of right" as regards the areas surrounding Anacapa and Santa Barbara Islands? The 1949 proclamation, enlarging the Channel Islands National Monument in and of itself, is not a claim of right. This Presidential act was a reservation of "lands owned or controlled by the Government of the United States" pursuant to Section 2 of the Antiquities Act of 1906, 16 U.S.C. § 431. The claim of right is source of federal title to these lands prior to their reservation for national monument purposes. The federal government must claim these lands because it owns or controls them, not just because it reserved them. If this were not so, the federal government could reserve any property owned by another and have a claim of right.

On what basis can the federal government claim that it "owned or controlled" any lands within the one-mile belt prior to their reservation for national monument purposes? With respect to the tidelands, the United States had no claim whatsoever in 1949 because California has always owned them. This was demonstrated at length in the first section of this brief. Even the 1947 decision which established the "paramount rights" doctrine reconfirmed the principle settled in a long line of prior cases that California owned its "tidelands down to the low water mark." *United States v. California*, 332 U.S. 19, 30 (1947). The 1966 supplemental decree further emphasized the point when it adjudged California to have "the title to and ownership of the tidelands along its coast (*defined as the shore* of the mainland and *of islands*, between the line of mean high water and the line of mean low water) . . . ." *United States v. California*, 382 U.S. 448, 452 (1966.) (Emphasis added.)

When subjected to critical scrutiny, the claim to the submerged lands of the one-mile belt also evaporates. *But for* the 1947 decision in this case, the federal government would have had no rights to the submerged lands between the line of mean lower low water on the coast and the current federal-state boundary line three nautical miles seaward. The 1947 decree stated that the United States was possessed of "paramount rights in and full dominion and power over, the lands, minerals and other things" underlying the Pacific Ocean seaward of the ordinary low-water mark on the coast of California to a distance of three nautical miles. *United States v. California*, 332 U.S. 804, 805 (1947). Prior to this decision, the federal government had never had an adjudication in its favor respecting the submerged lands of the three-mile marginal belt. Only by virtue of the "paramount rights" doctrine has the federal government had any claim before or since to these lands.

Yet the 1947 "paramount rights" decision did not establish that the United States "owned" the submerged lands underlying the territorial sea off the California coast. The Court carefully abstained from recognizing such a claim of ownership by the Untied States, striking out the proprietary claim of the United States from the terms of the decree proposed by the United States in 1947. *See United States v. Texas*, 339 U.S. 707, 724 (1950) (Frankfurter, J., dissenting). Thus, the submerged lands of the one-mile belt were not "owned" by the federal government in 1949 when they were supposedly reserved for national monument purposes. They may not even have been "controlled" by the United States if that language in the Antiquities Act is read in light of its orignal intent to cover military reservations, Indian lands, and national forest lands. *See* R. Lee, *op. cit. supra* at 53.

Be that as it may, it is indisputable that any and all federal rights to submerged lands added to the Channel Islands National Monument in 1949 had their source in the "paramount rights" doctrine enunciated by the Court in 1947. But for that doctrine, the federal government could point to no

source of rights whatsoever. It is equally incontestable that the Senate Report expressly excluded any claim based on the "paramount rights" doctrine from the coverage of the claim of right exception enacted in Section 5 of the Submerged Lands Act. To reiterate the committee's language, " . . . the committee wishes to emphasize that the exceptions spelled out in this amendment do not in anywise include any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess. 20 (1953). This same point was made at the executive session of the Interior and Insular Affairs Committee (*Senate Hearings*, Pt. II, at 1322) and again on the Senate floor (99 Cong. Rec. 2619). Since there was an express legislative intent to exclude this type of claim from the class of federal claims sought to be preserved, it follows that no federal rights in the submerged lands underlying the one-mile belt survived the enactment of the Submerged Lands Act. No federal rights having been preserved by the claim of right exception, the Act effectively reconfirmed California's ownership of the lands in question. It follows by inexorable logic that a claim founded on the "paramount rights" doctrine alone could not survive the passage of the Submerged Lands Act. If such a claim were preserved, the United States would have a claim of right to the entire three-mile belt which the Act was designed to relinquish to the States. Senator Long made this point at the executive session (*Senate Hearings* at 1322), and it obviously carried over into the explanation which appeared in the Senate Report.

This leaves the water areas themselves. If jurisdiction over the waters of the Pacific Ocean within one mile of the shoreline of Anacapa and Santa Barbara Islands were all that was added to the national monument by the 1949 enlargement, were the federal rights in those water areas preserved by the claim of right exception? The answer has to be, No. The claim of right exception only preserved rights in land,

not water. The precise language of the exception is "and any rights the United States has in *lands* presently and actually occupied by the United States under claim of right." Section 5, 67 Stat. 32, 43 U.S.C. § 1313. (Emphasis added.)

D. The Submerged Lands Act Revoked the 1949 Proclamation Reserving the One-Mile Belt for National Monument Purposes

Since the 1949 proclamation did not constitute a claim of right, one must inquire if the areas added to the Channel Islands National Monument by that proclamation were excepted from the operation of the Submerged Lands Act for yet another reason. It is a settled rule that lands reserved for a public purpose are to be regarded as impliedly excepted from subsequent laws, grants and disposals unless the subsequent act discloses a specific intent to include them. *United States v. Minnesota*, 270 U.S. 181, 206 (1926), and cases cited. Every act of Congress making a grant or otherwise disposing of federal land must be treated as both a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law. *Wisconsin Cent. R.R. Co. v. Forsythe*, 159 U.S. 46, 55 (1895).

Here the lands reserved by the 1949 proclamation were reserved for a public purpose, but the Submerged Lands Act discloses a clear legislative intent to include them in the scope of its disposal in favor of coastal States. The language of the Act itself expresses this intent. It finds it to be in the public interest to return all "lands beneath navigable waters" to the States. Sections 2 and 3(a), 67 Stat. 29-30, 43 U.S.C. §§ 1301, 1311(a). In the Act, the United States releases and relinquishes to the States all right, title, and interest it has in or to all lands, improvements and natural resources covered by the Act. Section 3(b), 67 Stat. 30, 43 U.S.C. § 1311(b). This Court has construed the Act on two occasions at least effectively to confirm or grant to the States *all* submerged lands within three miles of their coastlines. *United States v. Alaska, supra*, 422 U.S. at 185; *United States v. California, supra*,

381 U.S. at 148. As explained by Senator Holland, who introduced Senate Joint Resolution 13, the object of the bill was to restore "to the States their plenary rights, property, jurisdiction and control which they exercised for 150 years over the areas lying within State boundaries." *Senate Hearings* 49. On the Senate floor, Senator Cordon explained that the purpose of the release and relinquishment of all federal right, title and interest was "to make the States whole and put them in the position in which they would have been in the absence of any of the three decisions [invoking the paramount rights doctrine]." 99 Cong. Rec. 2693 (1953). The legislative history of the Submerged Lands Act is replete with other statements to the same effect. Mr. Justice Black has noted that, in the reported deliberations on that bill, the term "historic state boundaries" was used 813 times, "original boundaries" 121 times, and "traditional" boundaries 114 times. *United States v. California, supra*, 381 U.S. at 188 (Black, J., dissenting). This wealth of legislative material demonstrating an intent to dispose of all federal lands held by virtue of the paramount rights doctrine and to restore the States to their pre-1947 positions also shows an intent to include all tidelands, submerged lands, and waters areas reserved by the 1949 proclamation in the scope of the statute subsequently enacted in 1953.

It also refutes the claim of the United States that by expressly revoking Executive Order No. 10426, setting aside the submerged lands of the Continental Shelf as a naval petroleum reserve, Congress somehow manifested a corresponding intent not to revoke any other reservations. (*See* U.S. Motion 15 *and* Section 10, 67 Stat. 33.) This suggestion merely invokes the canon of statutory construction, *expressio unius est exclusio alterius*. As one recent treatise has observed,

> "Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means. The best

> example is probably *expressio unius est exclusio alterius*, which is a rather elaborate, mysterious sounding, and anachronistic way of describing the negative implication. Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here. Accordingly, this maxim is at best a description, after the fact, of what the court has discovered from context."
>
> R. Dickerson, *The Interpretation and Application of Statutes* 234-35 (1975). (Footnotes omitted.)

In other words, sometimes the expression of one thing excludes something else, and other times it does not. The overwhelming evidence contained in the language of the Submerged Lands Act and its legislative history indicates an undeniable intent to revoke the 1949 reservation for national monument purpose. Otherwise California could not be returned to its pre-1947 position. Here *expressio unius non est exclusio alterius* despite the express revocation of Executive Order No. 10456.

III

THE THREE NAUTICAL MILE BOUNDARY BETWEEN STATE AND FEDERAL SUBMERGED LANDS IS MEASURED FROM THE COASTLINE OF NOT ONLY ANACAPA AND SANTA BARBARA ISLANDS BUT ALSO THE OTHER ISLETS AND ROCKS WITHIN THE ONE-MILE BELT

The 1966 supplemental decree of this Court defines "coastline" in part as "the line of mean lower low water on the mainland, on islands, and on low-tide elevations lying wholly or partly within three geographical miles from the line of mean lower low water on the mainland or on an island . . . ." *United States v. California*, 382 U.S. 448. 449 (1966) (para. 2). The supplemental decree proposed by the United States would measure the three-mile boundary only from the coastlines of Anacapa and Santa Barbara Islands. (U.S. Motion, 4-5, para. 3.) California seeks a decree which specifies that the relevant coastline includes the coastline not only of these two islands but also of every other island and low-tide elevation within three geographical miles of the coastline of Anacapa and Santa Barbara Islands.

California admits that the 1966 supplemental decree requires the use of these additional geographic features as base points for measuring the breadth of the three-mile belt. The 1966 decree defined an island to include any "naturally-formed area of land surrounded by water, which is above the level of mean high water." (382 U.S. at 449, para. 3.) This definition would include all of the islets and rocks added to the Channel Islands National Monument in 1949.

The 1966 decree also defined a low-tide elevation as any "naturally-formed area of land surrounded by water at mean lower low water, which is above the level of mean lower low water but not above the level of mean high water." (382 U.S. at 450.) All low-tide elevations lying wholly or partly within

three geographical miles from the line of mean lower low water on an island are part of the "coast line" defined in the 1966 decree. (*Id.* at 449.) Under this rule, any low-tide elevations within three miles of Anacapa and Santa Barbara Islands constitute part of the coastline for purposes of measuring the three mile territorial boundary between state and federal submerged lands.

If the decree proposed by the United States were adopted, it would only use the coastline of Anacapa and Santa Barbara Islands for purposes of measuring the three-mile boundary. On the other hand, California's proposed supplemental decree properly reflects the influence of the offshore rocks located within three geographical miles from the coastlines of Anacapa and Santa Barbara Islands. California's proposed language on this point reads as follows:

> "1. As against the United States, the State of California has title to and is the owner of all tidelands, submerged lands and natural resources (as defined in subsection (e) of 43 U.S.C. § 1301) between the mean high water line and the furthest extent of the territorial sea surrounding all islands *and low-tide elevations* located within the Channel Islands National Monument, established by Presidential Proclamation No. 2281, 52 Stat. 1541 (April 26, 1938) and extended by Presidential Proclamation No. 2825, 63 Stat. 1258 (February 9, 1949), *and any additional low-tide elevations located within three geographical miles from any of the islands of the monument.*
>
> "With respect to the foregoing land and natural resources, California's rights include the right and power to manage, administer, lease, develop and use these lands and natural resources all in accordance with applicable State law."

With the foregoing italicized corrections, California submits that its proposed supplemental decree correctly

reflects the coastline for purposes of identifying the boundary line between the submerged lands of the United States and the submerged lands of the State of California. For this reason, the above language should be adopted in preference to that set forth in paragraph 3 of the supplemental decree proposed by the United States.

CONCLUSION

Based on the foregoing argument, California urges this Court to enter a third supplemental decree in the form proposed in its petition with the slight modifications set forth in Section III of this brief.

Respectfully submitted,

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Appendix

STATUTES INVOLVED

Federal

The Antiquities Act of 1906

Section 2 of this Act, 34 Stat. 225, 16 U.S.C. § 431, provides:

> "The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States."

The Submerged Lands Act of 1953

Section 2 of this Act, 67 Stat. 29, 43 U.S.C. § 1301, provides in relevant part:

"When used in this Act–

"(a) The term 'lands 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 . . . ;

" . . .

"(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;

" . . .

"(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power . . . ."

Section 3 of this Act, 67 Stat. 30, 43 U.S.C. § 1311, provides in relevant part:

"(a) 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 respective 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;

"(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all

said lands, improvements, and natural resources . . . ."

Section 5 of this Act, 67 Stat. 32, 43 U.S.C. § 1313, provides:

"There is excepted from the operation of section 3 of this Act—

"(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

"(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

"(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude."

Section 6 of this Act, 67 Stat. 32, 43 U.S.C. § 1314, provides:

"(a) 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.

"(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor."

Section 8 of this Act, 67 Stat., 32, 43 U.S.C. § 1316, provides:

"Nothing contained in this Act shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this Act and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this Act, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this Act."

Section 10 of this Act, 67 Stat. 32-33, 18 Fed. Reg. 405, provides:

"Executive Order Numbered 10426, dated January 16, 1953, entitled 'Setting Aside Submerged Lands of the Continental Shelf as a Naval Petroleum Reserve', is hereby revoked insofar as it applies to any lands beneath navigable waters as defined in section 2 hereof."

State

The following Florida statutes authorized the deed of cession by which the United States acquired the Dry Tortugas Islands, which were later placed in Fort Jefferson National Monument:

Florida Statutes, 1845

CHAP. 24. [No. xxiv.] An ACT assenting to the purchase, by the United States of certain land on the Island of Key West, for the purpose of erecting fortifications thereon, and ceding to the United States jurisdiction over said land for the purpose aforesaid.

WHEREAS, in pursuance of the authority of an Act of Congress, approved June 17, 1844, the Executive of the United States have entered into negotiations for the purchase of a tract of land consisting of several parcels, situated on the Island of Key West in Monroe county, between Light House Point and the City of Key West, for the purpose of erecting and constructing on said land certain fortifications and the improvements therewith connected, as contemplated by said Act; and it is requisite and proper that the assent of the State of Florida to said purchase shall be given, and the cession to the United States of jurisdiction over said land shall be made, for the purposes aforesaid.

SECTION 1. *Be it therefore enacted by the Senate and House of Representatives of the State of Florida, in General Assembly convened,* That the United States be, and they are hereby authorized and empowered to purchase, hold, occupy and possess the tract of land in the preamble above referred to, as the same, or the extent and limits thereof shall be ascertained, described and conveyed in the instrument, or instruments, which shall be executed for the conveyance of the same in pursuance of said negotiations. And the United States may and shall have and exercise exclusive jurisdiction over said

tract of land within the extent and limits to be ascertained and described as aforesaid, as well as over any land or site that may be formed or constructed in the contiguous sea, and used and occupied by the United States for said purposes in connection with the tract above mentioned, so long as they shall deem it proper to hold and occupy the same for the porposes [sic] aforesaid: Provided, that nothing herein contained shall be so construed as to prevent or debar the proper officers of the State of Florida from executing any process, civil or criminal, within the limits and extent of said land or lands when ascertained, described, and occupied as aforesaid.

[Passed the Senate. Passed the House of Representatives. – Approved by the Governor. July 8th, 1845.]

CHAP. 25. [No. xxv.] An ACT supplementary to, and extending the provisions of an act assenting to the purchase by the United States, and ceding to the same jurisdiction of certain lands on the Island of Key West, for the purposes designated in said act, Approved July 8th, 1845.

WHEREAS, a communication has been received from the Executive Department of the U.S. since the approval of the above recited act, requesting of this present Gen'l Assembly the passage of a law enlarging the provisions of said act so as to facilitate the purchases contemplated thereby, and extending said provisions thus enlarged, to all cases in which the United States shall deem it expedient, and shall seek to purchase, and obtain jurisdiction over sites for forts, magazines &c., within the limits of this State, as authorized and provided in the Constitution of the United States; and whereas this General Assembly approve the purport and objects of said request as set forth in said communication;

SECTION 1. *Be it therefore enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened,* That the United States be, and they are hereby authorized and empowered to purchase, acquire, hold, own, occupy and possess such land or lands within the limits of this State as they shall adjudge it expedient, and shall seek to occupy and hold as sites on which to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings, or any of them, as contemplated and provided in the Constitution of the United States, said purchases to be effected either by contract with the owner or owners of said land or lands, or in the manner hereinafter provided.

§ 2. *Be it further enacted,* That if the executive officer or other authorized agent, employed by the U.S. to make said purchase or purchases, and the owner or owners of the land or lands mentioned in said above recited act, or of any other land or lands contemplated to be purchased as aforesaid, cannot contract, or agree for the sale and purchase thereof, it shall be lawful for such officer, or other agent to apply to the Judge of the Circuit Court of the County in which said land or lands, or the greater portion thereof, may be situated, respectively, to estimate the value of such land or lands in manner hereinafter mentioned, and to order a conveyance of the same to the United States for the purposes aforesaid: Whereupon it shall be the duty of said Judge, and he is hereby authorized and empowered, after reasonable notice given to said owner or owners, their legal representatives or guardians, to hear and finally determine the value of the land or lands in question by a competent jury under oath, to be summoned by the Sheriff or other proper officer of said Court for that purpose, or by a Committee of three persons, such as shall be agreed upon and appointed by the parties aforesaid, such Committee if agreed on, and appointed as

aforesaid, to be also duly sworn faithfully and impartialy [sic] to value the land or lands last aforesaid; and the value thereof being thus ascertained to the satisfaction of said Judge, after survey thereof duly made under the direction of himself, or by consent of said parties, and after such other proceedings in the premises as he shall deem right and proper, he shall order and decree the same to be conveyed in due form to the United States, to be held, owned, and possessed by them for the purposes aforesaid, and none other: *Provided,* that the amount of such valuation, with the reasonable costs of such owner or owners attending said proceedings, shall be paid to him, her or them, or into said Court for his, her or their use, before execution or record of said conveyance; *And provided, moreover,* that if it shall appear to said Judge, upon objection made by said owner or owners, their representatives or guardians, that the quantity of any given tract, parcel or extent of land sought to be purchased as aforesaid, is greater than is reasonable, he may in his discretion refer the matter of such objection to the Governor of this state for his determination.

§ 3. *Be it further enacted,* That whenever the United States shall contract for, purchase or acquire any land or lands within the limits of this State for the purposes aforesaid, in either of the modes above mentioned and provided, and shall desire to acquire constitutional jurisdiction over such land or lands for said purposes, it shall and may be lawful for the Governor of this State, upon application made to him in writing, on behalf of the United States, for that purpose, accompanied by the proper evidence of said purchase, contract or acquisition of record, describing the land or lands sought to be ceded by convenient metes and bounds, and the said Governor shall be, and he is hereby authorized and empowered, thereupon, in the name and on behalf of this State, to cede to the United States exclusive juris-

diction over the land or lands so purchased or acquired and sought to be ceded; the United States to hold, use, occupy, own, possess, and exercise said jurisdiction over the same for the purposes aforesaid, and none other whatsoever: *Provided always,* that the consent aforesaid is hereby given, and the cession aforesaid is to be granted and made as aforesaid, upon the express condition that this State shall retain a concurrent jurisdiction with the United States in and over the land or lands so to be ceded, and every portion thereof so far that all process civil or criminal, issuing under the authority of this State, or of any of the Courts, or judicial officers thereof, may be executed by the proper officers thereof, upon any person or persons amenable to the same, within the limits and extent of the land or lands so ceded, in like manner and to like effect, as if this act had never been passed; saving, however, to the United States security to their property within said limits and extent, an exemption of the same, and of said land or lands, from any taxation under the authority of this State, whilst the same shall continue to be owned, held[,] used and occupied by the United States for the purposes above expressed and intended, and not otherwise.

[Passed the Senate July 17th, 1845. Passed the House of Representatives July 21st, 1845. Approved by the Governor July 24th, 1845.]

ADDITIONAL PROCLAMATIONS AND EXECUTIVE ORDERS INVOLVED

Proclamation No. 2667, 59 Stat. 884, 3 C.F.R., 1943-48 Comp., 67-68

POLICY OF THE UNITED STATES WITH RESPECT TO THE NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth.

[SEAL]

HARRY S TRUMAN

By the President:
DEAN ACHESON,
Acting Secretary of State.

Executive Order

No. 779

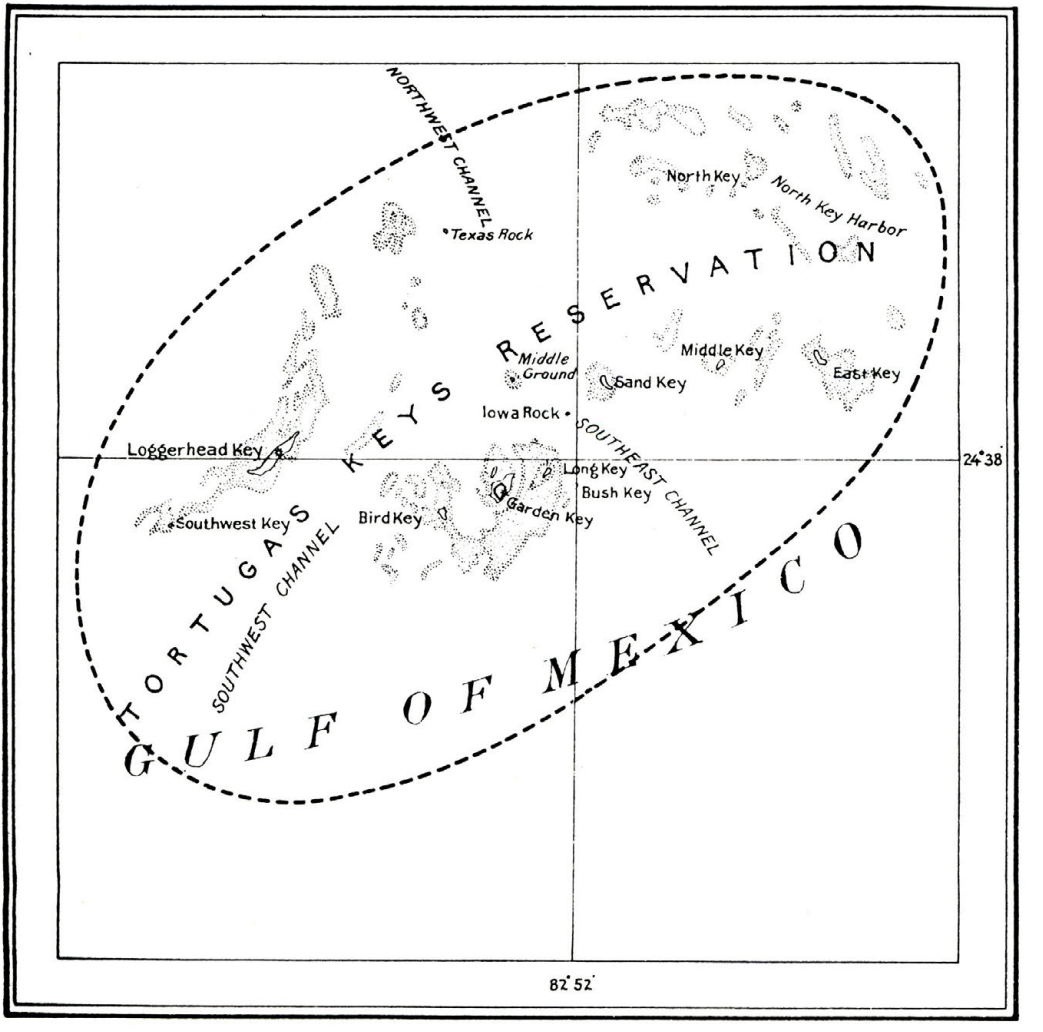
It is hereby ordered that all islands embraced within the group known as the Dry Tortugas, located in the Gulf of Mexico near the western extremity of the Florida Keys, approximately in latitude twenty-four degrees thirty-eight minutes north, longitude eighty-two degrees fifty-two minutes west from Greenwich, and situated within the area segregated by a broken line upon the diagram hereto attached and made a part of this order, are hereby reserved and set aside for the use of the Department of Agriculture as a preserve and breeding ground for native birds; but the reservation made by this order is not intended to interfere with the use of these islands for necessary military purposes under the Executive Order of September 17, 1845, creating the Dry Tortugas Military Reservation, nor to in any manner vacate such order, except that such military use shall not extend to the occupation of the islet known as Bird Key. This reservation to be known as Tortugas Keys Reservation.

THEODORE ROOSEVELT

THE WHITE HOUSE,
April 6, 1908.

TORTUGAS KEYS RESERVATION
For Protection of Native Birds
FLORIDA

Embracing all islands of the Dry Tortugas Group, Florida segregated by the broken line and designated "Tortugas Keys Reservation"



DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Fred Dennett, Commissioner.

Executive Order

No. 1613

It is hereby ordered that the following named harbors, viz:

Tortugas, Florida;
Great Harbor, Culebra;
Guantanamo Naval Station, Cuba;
Pearl Harbor, Hawaii;
Guam;
Subig Bay, Philippine Islands;
Kiska, Aleutian Islands;

are not, and that they shall not be made, sub-ports of entry for foreign vessels of commerce, and that said harbors shall not be visited by any commercial or privately owned vessel of foreign registry, nor by any foreign national vessel, except by special authority of the United States Navy Department in each case.

THE WHITE HOUSE,
September 23, 1912.

Wm H TAFT

Executive Order

No. 5281

To Establish Air-Space Reservations over Certain Harbors as Prohibited Areas for Civil Aircraft

Pursuant to the authority contained in section 4 of the Air Commerce Act of 1926, approved May 20, 1926 (44 Stat. 568; title 49, sec. 174, Supp. III, U.S. Code), the air space over each of the hereinafter named harbors that are declared closed ports by Executive Order No. 1613, dated September 23, 1912, is hereby designated, reserved, and set aside for governmental purposes as a prohibited area within which civil aircraft are not authorized to be navigated:

Tortugas, Florida;
Great Harbor, Culebra;
Guantanamo Naval Station, Cuba;
Pearl Harbor, Hawaii;
Guam;
Subic Bay, Philippine Islands;
Kiska, Aleutian Islands.

At no time shall civil aircraft of any kind be navigated within the air-space reservations above defined except by special authority of the United States Navy Department in each case. Navigation of aircraft within such air-space reservations otherwise than in conformity with this order shall be subject to the penalties provided by section 11 of the said Air Commerce Act of 1926.

HERBERT HOOVER

THE WHITE HOUSE
February 17, 1930.

Executive Order

No. 5318

Aleutian Islands Reservation Enlarged
Alaska

It is hereby ordered that Amak Island, the Sealion Rocks, and a small unnamed island lying southeast of Amak Island, all being situated north of the Alaska Peninsula in Bering Sea and lying approximately in latitude 55° 25' N., longitude 163° 10' W., within the boundary indicated by the broken line upon the diagram hereto attached and made a part of this order, and as shown on United States Coast and Geodetic Survey Chart No. 8802, published in Washington, D.C., March, 1928, be, and the same are hereby, reserved and set apart for the use of the Department of Agriculture as a refuge and breeding ground for birds and wild animals, subject to existing valid rights.

These islands and rocks are hereby added to and made part of the Aleutian Islands Reservation, Alaska, and shall be subject to all provisions of law, regulations, and orders governing said reservation.

HERBERT HOOVER

THE WHITE HOUSE,
April 7, 1930.

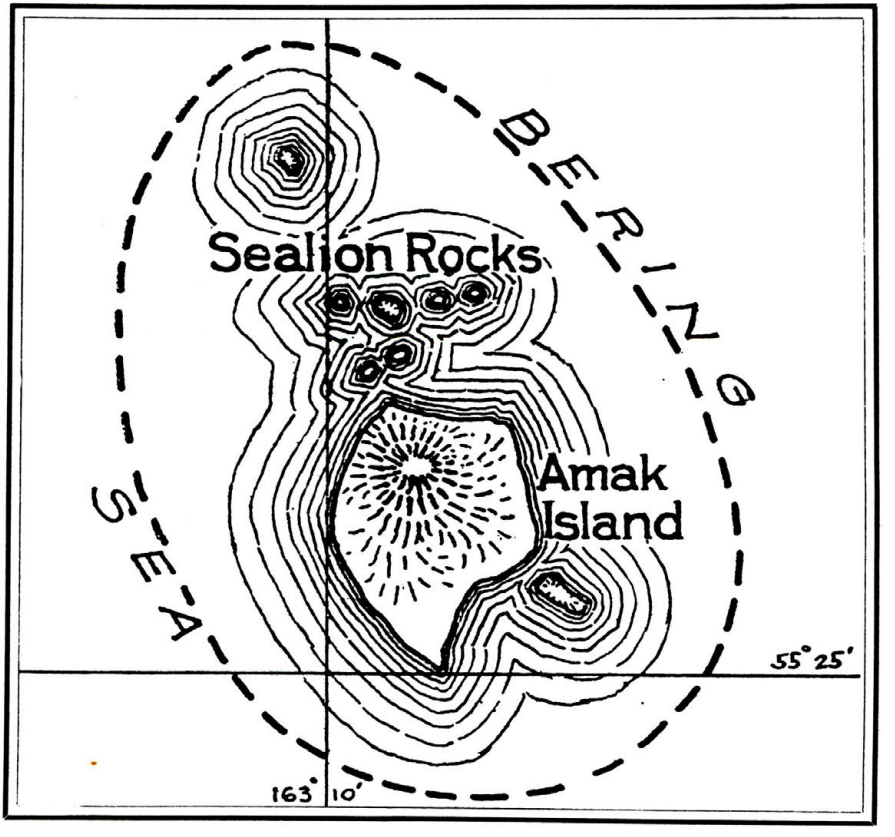
EXECUTIVE ORDER

ALEUTIAN ISLANDS RESERVATION ENLARGED

For Protection of Native Birds, the Propagation of Reindeer and Fur Bearing Animals and the Development of Fisheries.

ALASKA

Embracing Amak Island, the Sealion Rocks, and a small unnamed island lying southeast of Amak Island, as segregated by broken line and designated Aleutian Islands Reservation Enlarged



DEPARTMENT OF THE INTERIOR
RAY LYMAN WILBUR. SECRETARY

GENERAL LAND OFFICE
C.C. MOORE, COMMISSIONER

Executive Order

No. 5326

Withdrawal of Islands, Rocks, and Pinnacles
California

Under authority of the act of Congress approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), it is hereby ordered that all unreserved islands, rocks, and pinnacles situated in the Pacific Ocean off the coast of California be, and the same are hereby, temporarily withdrawn from settlement, location, sale, or entry, subject to the conditions and limitations of said acts, for classification and in aid of legislation, and subject to valid, existing rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

HERBERT HOOVER

THE WHITE HOUSE,
April 14, 1930.

Executive Order

No. 9633

3 C.F.R., 1943-48 Comp., 437

RESERVING AND PLACING CERTAIN RESOURCES OF THE CONTINENTAL SHELF UNDER THE CONTROL AND JURISDICTION OF THE SECRETARY OF THE INTERIOR

By virtue of and pursuant to the authority vested in me as President of the United States, it is ordered that the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside, and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto. Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit.

HARRY S TRUMAN

THE WHITE HOUSE,
September 28, 1945.

Executive Order

No. 10426

3 C.F.R. 1949-53 Comp., 925-26

SETTING ASIDE SUBMERGED LANDS OF THE CONTINENTAL SHELF AS A NAVAL PETROLEUM RESERVE

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. (a) Subject to valid existing rights, if any, and to the provisions of this order, the lands of the continental shelf of the United States and Alaska lying seaward of the line of mean low tide and outside the inland waters and extending to the furthermost limits of the paramount rights, full dominion, and power of the United States over lands of the continental shelf are hereby set aside as a naval petroleum reserve and shall be administered by the Secretary of the Navy.

(b) The reservation established by this section shall be for oil and gas only, and shall not interfere with the use of the lands or waters within the reserved area for any lawful purpose not inconsistent with the reservation.

SEC. 2. The provisions of this order shall not affect the operating stipulation which was entered into on July 26, 1947, by the Attorney General of the United States and the Attorney General of California in the case of *United States of America v. State of California* (in the Supreme Court of the United States, October Term, 1947, No. 12, Original), as thereafter extended and modified.

SEC. 3. (a) The functions of the Secretary of the Interior under Parts II and III of

the notice issued by the Secretary of the Interior on December 11, 1950, and entitled "Oil and Gas Operations in the Submerged Coastal Lands of the Gulf of Mexico" (15 F.R. 8835), as supplemented and amended, are transferred to the Secretary of the Navy; and the term "Secretary of the Navy" shall be substituted for the term "Secretary of the Interior" wherever the latter term occurs in the said Parts II and III.

(b) Paragraph (c) of Part III of the aforesaid notice dated December 11, 1950, as amended, is amended to read as follows:

"(c) The remittance shall be deposited in a suspense account within the Treasury of the United States, subject to the control of the Secretary of the Navy, the proceeds to be expended in such manner as may hereafter be directed by an act of Congress or, in the absence of such direction, refunded (which may include a refund of the money for reasons other than those hereinafter set forth) or deposited into the general fund of the Treasury, as the Secretary of the Navy may deem to be proper."

(c) The provisions of Parts II and III of the aforesaid notice dated December 11, 1950, as supplemented and amended, including the amendments made by this order, shall continue in effect until changed by the Secretary of the Navy.

SEC. 4. Executive Order No. 9633 of September 28, 1945, entitled "Reserving and Placing Certain Resources of the Continental

Shelf under the Control and Jurisdiction of the Secretary of the Interior" (10 F.R. 12305), is hereby revoked.

HARRY S TRUMAN

THE WHITE HOUSE,
January 16, 1953.