IN THE

Supreme Court of the United States

October Term, 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

Closing Brief of the State of California in Support of Exceptions to the Report of the Special Master.

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Introduction and Summary of Argument.

In California's Brief in Support of Exceptions (filed April 1, 1964) the State argued: that the Submerged Lands Act, including the term "inland waters" used therein, can and should be construed so as to effectuate the fundamental Congressional purpose to do equity by restoring to the states the submerged lands underlying waters within their historic boundaries; that California's claims are in accordance with these boundaries as set forth in our 1849 Constitution, as approved by Congress; and that California has established its seaward boundaries "within what are generally recognized as the

territorial limits of States by the law of nations" as permitted by this Court's decision in *Manchester v. Massachusetts,* 139 U.S. 240, 264 (1890).

The Government predicates its Answering Brief almost entirely upon the assumption that the sole determinative criterion as to whether water areas are or are not "inland waters" within the meaning of the Submerged Lands Act is United States foreign policy as it existed upon the effective date of the Act, and because of this assumption, has largely failed to meet the State's basic contentions. Since the legal and factual assertions of both parties are thus based upon conflicting theories as to the applicable yardstick for measuring the State's rights, it is essential that this Court, at the very outset and before examining the details of these assertions, determine whether California is correct in its position that State ownership under the Submerged Lands Act must be defined with due regard to its historic expectations. California believes that this Court has heretofore, in *United States v. Louisiana,* 363 U.S. 1, 35 (1960), clearly determined the premise upon which a decision herein must be based, namely, that the delineation of California's seaward boundary is purely a domestic matter predicated upon the State's historic boundaries, as approved by Congress pursuant to its power to admit new States. California submits that, as a corollary, the executive policy of the United States in its international relations cannot be the determinant in the resolution of this wholly domestic matter.

Because the Government's Answering Brief rests upon the claim that the foreign policy of the United States is controlling, in this closing brief we shall re-emphasize the authorities and legislative history demonstrating that there is absolutely no question as to the correctness of the State's assertions that the Congressional intent was to restore the historical expectations of the states. We shall also show that the term "inland waters" can and must be interpreted so as to carry out this basic intention. Moreover, we shall demonstrate that private property concepts, urged by the Government, are completely inappropriate in determining the location of the line of ordinary low water and for determining the State's external boundaries under the Submerged Lands Act.

Although we strenuously deny that the foreign policy of the United States, as it may have existed at any particular time, is the decisive factor in establishing "inland waters," nevertheless the State will show: (1) that the State Department letters of 1951 and 1952, heavily relied upon by the United States, are not conclusive upon this Court on the question as to what the foreign policy of the United States on the delimitation of inland waters may have been; and (2) that these letters are inaccurate insofar as they purport to depict a well established or consistent policy in this regard.

ARGUMENT.

I

THE SEAWARD BOUNDARIES OF CALIFORNIA UNDER THE SUBMERGED LANDS ACT MUST BE ASCERTAINED BY REFERENCE TO THE PURPOSE OF THAT ACT, NAMELY, TO DO EQUITY BETWEEN THE NATION AND THE STATES IN THE DIVISION OF THE SEABED AND SUBSOIL OF THE CONTINENTAL SHELF.

We are not now before this Court to implement the decree in *United States v. California,* 332 U.S. 804, 805 (1947). Rather, this Court is called upon to do equity to the states in conformity with the spirit and intent of the Submerged Lands Act. (67 Stat. 29; 43 U.S.C. §§1301-15.) The equitable nature of the Act, was summarized by Senator Cordon, as follows:

> "I desire to suggest that the proper approach to the proposed legislation is to have in mind that in our system of Government there are three coequal and wholly separate departments. One department deals wholly with the interpretation and determination of laws. Another department, of which the United States Senate is a part, deals with the making of laws. When equities arise as between the United States and its citizens or member States, the equities of such are not determinable by any court. When a court decides a question with respect to the United States Government, it can only enunciate what it conceives to be and declares to be the law. When our courts determine matters between citizens, they may then go into the field of equity. The courts then are clothed

with the chancellor's conscience. But that is not an attribute of a court when one of the parties before it is the United States of America.

"So, when the Supreme Court had before it a case involving rights to submerged lands, while it recognized the equities and recognized also the vast expenditures, it could do nothing about them but could only enunciate what it took to be the law, and then do as it did, namely, suggest that, so far as equities were concerned, they could be handled by the Congress of the United States. Congress now, in Senate Joint Resolution No. 13, has an opportunity to deal with the equities. That is the position which the senior Senator from Oregon takes on the basic proposition involved in the proposed legislation." (99 Cong. Rec. 2615.)

This basic premise was clearly recognized by Mr. Justice Black in his dissent to the Louisiana, Mississippi and Alabama decisions, when he declared:

"It is therefore my view that since we cannot look to the legalistic tests of title, we must look to the claims, understandings, expectations and uses of the States throughout their history. . . . Nor can I accept the Government's argument that these States' interests in the marginal seas must be determined in accord with the national policy of foreign relations. Everything in the very extended congressional hearings and reports refutes such an idea. Instead, these sources indicate that Congress passed the Act to apply broad principles of equity—not as we see it but as Congress saw it." *United States v. Louisiana, supra,* 363 U.S. at 90-91.

A. The Basic Congressional Intent Underlying the Submerged Lands Act Was to Allow the States to Realize Their Historic Expectations by Restoring to Them the Submerged Lands Within Their Historic Boundaries.

The arguments propounded by the United States are totally dependent upon the validity of one proposition urged by the Government, namely, that the baseline adopted by Congress in the Submerged Lands Act is "the same baseline that the Court had used in its decree" herein (U. S. Answering Brief, p. 19).[1] Consequently, the plaintiff insists that ". . . the problem is now, as it was before the Special Master, to identify the waters that would have been considered inland waters in relations between the United States and foreign nations." (U. S. Answering Brief, p. 34.)

California denies that the baseline fixed by the Submerged Lands Act is identical with that decreed by this Court in this case. Specifically, the Government concedes that Congress could have selected criteria for determining this baseline independent of the criteria used by this Court. (U. S. Answering Brief, p. 19.) California contends that Congress did exactly that.

The parties agree that the Submerged Lands Act effectuated a division of the seabed and subsoil of the continental shelf between the Nation and the States. (U. S. Answering Brief, p. 19.) The litigants further agree that the extent of such apportionment is dependent upon the intention of Congress in enacting that statute. Again, the parties seem to be in accord that

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[1]"Brief for the United States in Answer to California's Exceptions to the Report of The Special Master" dated June 1964; hereinafter referred to as "U. S. Answering Brief."

the purpose of the Submerged Lands Act was to restore to the states the submerged lands which were denied to them by decrees in this and related cases. (U. S. Answering Brief, pp. 19-20.) At this point the United States and California part company. The United States asserts that Congress elected to use the same baseline that the Court mentioned in its October 27, 1947 decree in *United States v. California* (332 U.S. 804, 805). California maintains that the basic Congressional intent underlying the Submerged Lands Act was to allow the states to realize their historic expectations by restoring to them the submerged lands within their historic boundaries, as though there had been no decisions in *United States v. California* and related cases. (99 Cong. Rec. 2634.) We concede that Congress placed a maximum limitation on this restoration, to wit: three geographical miles from the coastline of California. However, California contends that Congress intended that such coastline should be fixed so as to include a state's historic boundaries, as approved by Congress, whether or not such coastline would coincide with the baseline located pursuant to this Court's decree herein.

There can be no doubt but that the primary purpose of the Submerged Lands Act was to uphold the historical expectations and usage of the various states, and to confirm or restore state title to and ownership of the submerged lands within their historic boundaries. The objective of that Act was described by its author, Senator Holland, as follows:

> "This joint resolution will confirm to the maritime States—of which there are 20—the rights which they had respectively enjoyed since the founding of our Nation and up to the date of the decision

> in the California case, in their offshore lands and waters which lie within their constitutional boundaries. * * *"[2] (Hearings Before the Committee on Interior and Insular Affairs, United States Senate, 83d Cong., 1st Sess., on S.J. Res. 13 p. 32.)[3]

Similarly, the Senate Committee Report on the Submerged Lands Act, recites:

> "The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution." Senate Report No. 133, 83d Cong. 1st Sess., p. 8.

Because the parties apparently agree that the intent of Congress in passing the Submerged Lands Act was to restore the submerged lands denied to the states by the decree in this and related cases, we shall not at this point reiterate, but respectfully direct the Court's

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[2]On other occasions Senator Holland spoke of the restoration of submerged lands within the States' "historic boundaries." For example, Senator Holland stated:

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

and

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

[3]Hereinafter referred to as "1953 Senate Hearings."

attention to, those evidences of Congressional intent appearing in Vol. II, pages 2-11 of California's Brief (filed April 1, 1964) in Support of the State's Exceptions.[4] What the United States and California dispute, is the scope of the restoration to state ownership effectuated by the Act.

In the Government's own words "The very purpose of the Act was to give the States the submerged lands that were denied to them by the decree." (U. S. Answering Brief, p. 19.) Essentially, the claimants differ sharply as to the extent of the area of submerged lands which were denied to California pursuant to this decree. The United States limits the area denied to California, to those submerged lands ". . . lying seaward of the ordinary low water mark on the coast of

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[4]In addition to the Legislative history previously cited, the following statements by named Senators are highly relevant:

1. "Senator Cordon . . .

"In short, Mr. President, the purpose of the joint resolution is to create by law a status and a condition which existed, in fact, up to the time of the California decision. What had been done was done under a belief that the law was as the law will be if Senate Joint Resolution 13 is adopted . . ." 99 Cong. Rec. 2618.

2. "Mr. Long. In regard to the language used in the resolution, however, it is clear to the Senator from Louisiana as it was clear to the committee that although there are questions which the resolution does not attempt to answer—and there are a considerable number of them—*the proposed legislation does settle the fundamental question that the States have title to the lands they always thought they owned prior to the decisions.*

"Mr. Cordon: *Of course, this is its major purpose.* It has a second purpose, and that, of course, has to do with the outer Continental Shelf." 99 Cong. Rec. 2634. (Emphasis added.)

3. "Mr. Maybank. I am one of the sponsors of the pending measure. *I wish to make it clear that the boundaries contemplated by the bill are the boundaries which the States say are their boundaries.* I have always thought that when the Constitution and Bill of Rights were written, the boundaries of the Thirteen Original States were considered to be what the States said they were." 99 Cong. Rec. 3549. (Emphasis added.)

California and outside of the inland waters, extending seaward three nautical miles . . ." 332 U.S. 804, 805. However, California insists that the submerged lands actually denied to it by *United States v. California,* 332 U.S. 19, was the entire area lying seaward of the baseline described in the decree, 332 U.S. 804, 805, and extending to the historic or constitutional boundary of California, wherever that boundary is located. Whereas, the historic seaward boundaries of California were deemed irrelevant by this Court in 1947 (332 U.S. 19, 36), and by the Special Master in 1952, (Rep. p. 39) these boundaries became highly material with the enactment of the Submerged Lands Act in 1953. Therein Congress clearly contemplated fulfilling the expectations of the states concerning their ownership of submerged lands within their historic boundaries.

In an effort to establish that California's historic boundaries were accorded no new significance under the Submerged Lands Act, the Government places great emphasis on an amendment made on the floor of the Senate to section 2(b) of the Act. Such amendment added the following language to this section:

> ". . . but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Coast or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico; . . ."

The quoted terminology, the plaintiff asserts, renders questions of California's historic boundaries immaterial under the Act. (U. S. Answering Brief, p. 26.) This conclusion is completely unjustified for two reasons.

First, the Submerged Lands Act as reported to the Senate and as adopted by Congress, already contained a limitation on the extent of the submerged lands restored to California in that section 2(a)(2) thereof defined "land beneath navigable waters" as:

> "(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, . . ."

Thus it is clear, that even prior to the amendment to section 2(b) relied upon by plaintiff, section 2(a)(2) restricted the maximum area of submerged lands restored to this State to those situated "three geographic miles distant from the coastline." Nor has California ever claimed that its boundary extended more than three miles seaward from its coastline. The location of that coastline is the crucial issue in this case.

Moreover, the legislative history pertaining to the amendment of section 2(b) invoked by the Government, discloses that it was a change devoid of significance. Senator Holland, the author of the Submerged Lands Act and also the author of the amendment in question, clearly indicated that the proposed amendment added nothing new to the Act and in no wise changed the basic philosophy of the bill:

> ". . . They [the proposed amendments] do not depart in the slightest from the intention of the

sponsors of the joint resolution." (99 Cong. Rec. 4114.)

". . . This is just a minor change in verbiage, to make very clear that Congress at this time is seeking to do only those things which the authors and supporters of the joint resolution have so very fully, and rather repeatedly, stated for the *Record* heretofore during the course of the debate." (99 Cong. Rec. 4115.)

"I doubt very seriously if that result would occur, because I think the amendment has very little effect. But I am perfectly willing to meet the suggestions of my friends, some of whom have been opponents, and some of whom have been supporters of the joint resolution, to the effect that they would like to have the language more clearly spelled out than it was in the original measure, to the effect that there is no intention whatsoever to grant boundaries beyond 3 geographical miles in either the Atlantic or the Pacific, and that this Congress knows of no possible situation under which greater boundaries are claimed or could be granted in the Gulf of Mexico than 3 leagues; . . .". (99 Cong. Rec. 4116.)

The amendment to section 2(b) did not in the slightest affect what a fair examination of the legislative history of the Submerged Lands Act establishes was a basic Congressional intent to restore to the states those submerged lands lying within their historic boundaries. Indeed, the State of Texas in its brief filed August 1958, page 50, in the case of *United States v. Louisiana,* 363 U.S. 1 (1960), pointed out that throughout the legislative history of the Submerged Lands Act,

the term "historic State boundaries" was used 813 times, the term "original boundaries" was used 121 times, and the term "traditional" State boundaries was used 114 times. Despite an unmistakable intent of Congress to effectuate a restoration of submerged lands within state historic boundaries which appears from all of the debates, committee studies and reports, the Government unjustifiably asks this Court to conclude that the adoption of one insignificant amendment to section 2(b) rendered the concept of state historic boundaries immaterial under the Submerged Lands Act. Such a result cannot be attributed to an amendment which was expressly described by its author as making no substantive change and as not departing in the slightest from the intention of the sponsors of the joint resolution.

B. "Inland Waters" as Used in the Act Identified Those Areas Which the States Always Thought Were Inland Waters.

Of pivotal significance herein, is the resolution of the question: What did Congress mean when it used the term "inland waters" in the Submerged Lands Act?

Two things are certain. Congress chose not to define "inland waters" specifically, "because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it." (S. Rep. No. 133, 83rd Cong., 1st Sess., p. 18; See also: 99 Cong. Rec. 2633; and 1953 Senate Hearings, Part 2, p. 1285.) Also, Congress did not adopt the criteria recommended by the Special Master for the ascertainment of inland waters, although such criteria were considered by it. (1953 Senate Hearings, pp. 1211-29.)

1. Congress Never Intended to Use "Inland Waters" in the Same Sense as That Term Was Used in This Court's Decree.

The United States asserts that the Submerged Lands Act used the term "inland waters" in the same sense as did this Court's decree and order. (U. S. Answering Brief, p. 19.) In both instances, the Government alleges, "inland waters" was used in an international law sense so that "the problem is now, as it was before the Special Master to identify the waters that would have been considered inland waters in relations between the United States and foreign nations." (U. S. Answering Brief, p. 34.) Thus, the plaintiff urges that the test controlling the location of the outer limit of inland waters is the same under the Act as it was before the Special Master. (U. S. Answering Brief, p. 17.)

California contends that as used in the Act, Congress intended inland waters to identify those areas which the states always thought were inland waters, with due regard to the concept of state historic boundaries.

On pages 20-21 of the United States Answering Brief it is pointed out that the Senate Committee on Interior and Insular Affairs deleted all words following the term "inland waters" which appeared in the definition of "coast line" in Senate Joint Resolution 13 as originally introduced.[5] From such action the plaintiff

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

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

concludes that Congress intended inland waters to be defined precisely as that term was used in this Court's decree. Actually, Congress had no such intention, as the Committee's own explanation reveals:

> "The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it.
>
> "In this connection, however, the committee states categorically that the deletion of the quoted language in no way constitutes an indication that the so-called 'Boggs Formula,' the rule limiting bays to areas whose headlands are not more than 10 miles apart, or the artificial 'arcs of circles' method is or should be the policy of the United States in delimiting inland waters or defining coastlines. *The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto.*" Senate Report No. 133, 83d Cong., 1st Sess., p. 18. (Emphasis added.)

The Senate Committee's hearings in executive session and the debates on the floor of the Senate cor-

roborate the conclusion in the Committee Report that the purpose of this particular amendment, and the fundamental intent underlying S.J. Res. 13 were to restore the historical expectations of the States.[6]

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[6](a) Senator Cordon: "The chair submits that the purpose of striking the language was to put the Congress in a position of not having to determine matters that are highly technical.

"The elimination of the language still follows what the Chair understands to be the philosophy of the bill, that we are putting the States where they thought they were, and not attempting now to create either a situation in law or a basis for a rule of evidence that may or may not have been sound when the States came into the Union. I believe that the elimination of the language does that. I believe that it will not prejudice any State on account of anything in this bill.

"It may not do as good a job for some State as it would if the Congress legislatively met the State's contention and agreed with it. But, as I understand it, what we seek to do is neither to agree nor to disagree, but to announce legislatively that we seek to place the States in the position the States believed themselves to be prior to the California decision, and to leave to them at the same time every remedy in the courts of this country that they then had or thought they had with reference to what they thought was theirs.

"Senator Daniel. Mr. Chairman, I would vote for Senator Long's amendment if it is offered, but I agree fully with the chairman that the striking of these words was not done in any manner to prejudice the rights of the States, and that the effect would not be to bind us to the Boggs formula or anybody else's formula. I just want to state that for the record, if this record is ever used in the future." 1953 Senate Hearings, Part 2, pp. 1383-84.

(b) "Senator Anderson . . . I subscribe fully to what the chairman said quite awhile ago in pointing out that this bill does not seek to take away from or add to the position of these States as they came into the Union." (1953 Senate Hearings, Part 2, *supra,* p. 1385.)

(c) "Mr. Long. Mr. President, I regret that I was not present at the time the Senator from Oregon touched upon the definition of the term 'coastline.' I should like to call his attention to page 18 of the committee report, which refers to the fact that certain words were stricken in connection with the term 'inland waters.' The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' were striken at the request, I believe, of the Department of Justice, and also on objection by the State Department.

2. Congress Rejected Proposals to Define the Area Restored to the States in Terms of United States Foreign Policy.

In the course of the Senate debates on S. J. Res. 13, various amendments were introduced aimed at defining and limiting the extent of the rights transferred to the States in terms of areas claimed by the United States in its relations with foreign nations. This is the same construction which plaintiff seeks to place upon the term "inland waters" in the Submerged Lands Act as finally adopted. Each of these proposed amend-

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"In striking those words the committee attempted to make clear in its explanation that it is not committed to any particular formula for the determination of inland waters, and it made clear that it does not believe that either the United States Government or a State government is bound by the so-called Boggs formula, which would provide, in effect, that if there can be drawn across a bay a line of exactly 10 miles, the water would be regarded as inland waters, but in the case of a bay of the same relative shape if a line drawn across its mouth would be 10½ or 11 miles, it would not be regarded as inland waters. Such a formula was rejected by the committee, and the committee made it clear that it did not intend to accept a rule of 3 miles or 10 miles across a bay to determine whether it was a bay.

"Mr. Cordon. The committee, as I recall, and I think I am correct, neither accepted nor rejected the Boggs formula or any other formula. It specifically pointed out in its explanation as follows:

" 'The committee states categorically that the deletion of the quoted language in no way constitutes an indication that the so-called Boggs formula, the rule limiting bays to areas whose headlands are not more than 10 miles apart, or the artificial arcs-of-circles method is or should be the policy of the United States in delimiting inland waters or defining coastlines.'

"Then the explanation goes on to say:

" 'The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto.'

"That is a clear statement of the views of the committee, and I say to the Senate that as those views were expressed in committee, they are expressed in the report." (99 Cong. Rec. p. 2633.)

ments was defeated.[7] Allowing for a divergence of opinion over the reasons for the rejection of these amendments, it is undeniable that the concept of defining inland waters in terms of United States international relations with foreign nations specifically was presented to Congress but was never adopted.

Certainly, if Congress intended that the term "coast line" should have the meaning ascribed to it by plaintiff, namely, that coastline asserted by the United States in the conduct of its international affairs, without regard to state historic seaward boundaries, the

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[7](a) Senator Anderson introduced an amendment proposing that the states be given a percentage of royalties received from oil and gas production obtained within three nautical miles of the coastline. (99 Cong. Rec. 2905-07.) Senator Anderson made it clear that his proposal embodies the three miles claimed by the United States internationally. (99 Cong. Rec. 3951.) This amendment was tabled. (99 Cong. Rec. 3956-57.)

(b) Senator Douglas offered an amendment which would have stricken any reference to the boundaries of a State at the time of its entry into the Union, thereby removing the concept of historic boundaries from the joint resolution. (99 Cong. Rec. 3957-59.) In limiting the area to be restored to the states to three miles from the coastline Senator Douglas emphasized that such three mile limitation was based on considerations of foreign policy. (99 Cong. Rec. 3960; See also the remarks of Senator Sparkman, 99 Cong. Rec. 4099.) Senator Cordon noted that the limitation sought to be imposed by Senator Douglas was contrary to the philosophy of S. J. 13. (99 Cong. Rec. 4106.) This amendment was defeated. (99 Cong. Rec. 4114.)

(c) Senator Monroney authored an amendment which would limit the area restored to the States to three miles seaward from the ordinary low tide mark. (99 Cong. Rec. 4157-58.) Senator Monroney emphasized that this three-mile limit was based on the claims of the United States in international affairs. (99 Cong. Rec. 4201.) Again, this amendment was rejected. (99 Cong. Rec. 4203.)

(d) Senator Magnuson also offered an amendment which would have limited the area restored to the states to three miles from the coastline. (99 Cong. Rec. 4473.) The Senator made it clear that this distance was that claimed by the United States as against foreign nations. (99 Cong. Rec. 4474-78.) This suggested amendment also failed. (99 Cong. Rec. 4478.)

Act could have easily so recited. Indeed, such a proposal was submitted to the Senate Committee on Interior and Insular Affairs in testimony from a Mr. John J. Real, who represented the Fishermen's Cooperative Association of San Pedro, California and various other organizations. (1953 Senate Hearings, p. 295 *et seq.*) Expressing his belief as to the necessity of conforming a definition of coastline with present United States foreign policy (*id.* 310), Mr. Real recommended certain changes to S. J. Res. 13, including the following revision:

> "Sec. 2. When used in this Act—
>
> ". . .
>
> "(b) The term 'coast line' means (1) the line of ordinary low water along that portion of the coast which is in direct contact with the sea, or (2) the line asserted by the United States as marking the seaward limit of its inland waters in respect of estuaries, ports, harbors, bays, channels, straits, historic bays, sounds, or other bodies of water along its coast." (*Id.* 311.)

However, Congress refrained from adopting a statutory definition of coastline whereby the identity of inland waters would be determined by the State Department in its international relations. In Senator Cordon's words:

> "It was sought not to get into that field because you were in a field then where, in our attempts to take care of a *purely domestic matter,* we might be putting the United States on record with a precedent *which we intended only to apply domestically* but which might be applied internationally. . . ." (Emphasis added.) (1953 Senate Hearings, Part 2, p. 1378.)

3. The Apportionment of the Seabed of the Continental Shelf Between the Nation and the States Is a Purely Domestic Matter Not Dependent Upon United States Foreign Policy.

The Government gives lip-service recognition to the proposition that the Submerged Lands Act apportioned between the state and national governments the proprietary rights in the seabed, as a purely domestic matter. (U. S. Answering Brief, p. 19.) In the next breath, the plaintiff insists that the location of this line of demarcation is totally dependent upon the application of United States foreign policy criteria. (U. S. Answering Brief, p. 34.)[8]

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[8]Significantly, the plaintiff made substantially the same argument in its controversy with the Gulf States that it makes in this case. There, as here, the Government conceded that the Submerged Lands Act involved a purely domestic matter. In ascertaining the extent of the restoration of submerged lands to the states under that act, however, the Government argued that the ascertainment of state boundaries must be made by reference to United States foreign policy. (*United States v. Louisiana,* 363 U.S. 1, 32-33 (1960).) This Court rejected that argument stating:

> "We agree that the Submerged Lands Act does not contain any formula to be followed in the judicial ascertainment of state boundaries, and that therefore, we must determine, as an independent matter, whether boundaries, for purposes of the Act, are to be taken as fixed by historical events such as those pointed to in the Congressional hearings and debates, or whether they must be regarded as limited by Executive policy on the extent of territorial waters, as contended by the Government. However, in light of the purely domestic purposes of the Act, we see no irreconcilable conflict between the Executive policy relied on by the Government and the historical events claimed to have fixed seaward boundaries for some States in excess of three miles. We think that the Government's contentions on this score rest on an oversimplification of the problem." (363 U.S. at 33.)

And later this Court reiterated:

> ". . . As we have noted, the boundaries contemplated by the Submerged Lands Act are those fixed by virtue of

As heretofore demonstrated, the Submerged Lands Act was designed to do equity between the United States and some of its member states following this Court's decision in *United States v. California,* 332 U.S. 19 (1947) and related cases. Specifically, Congress attempted to do equity to the states because the paramount rights doctrine enunciated in *United States v. California,* which was predicated upon United States foreign policy, failed to do so. Nevertheless, the Government maintains that the proper way to do equity under the Act is by invoking the same principles of United States foreign policy which necessitated the legislation. California urges that the Act contemplates the application of whatever principles or criteria which do equity, and this permits the application of all criteria necessary to restore the historical expectations of the states including recognition of what the states always thought were inland waters.

Let us examine the Government's allegation that the term "inland waters" as used in the Submerged Lands Act must refer to the same "inland waters" as were referred to by the Court's decree in this case. (332 U.S. 804, 805.) Admittedly, "inland waters" were not defined in *United States v. California,* or any related case. The subsequently adopted Submerged Lands Act also deliberately elected not to define that term. (1953 Senate Hearings, Part 2, p. 1285.) Nevertheless, the United States has no hesitancy in unequivocally asserting that inland waters means the same thing in both the decree and the Act, despite the fact that it was

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Congressional power to admit new States and to define the extent of their territory, not by virtue of the Executive power to determine this country's obligations *vis-á-vis* foreign nations. . . ." (363 U.S. at 51.)

defined in neither place. We believe that Congress recognized that it did not know exactly what "inland waters" meant, that it therefore did not purport to define that term with particularity but purposely left the ascertainment of its meaning for subsequent judicial interpretation with due regard to the avowed purpose of the Act to realize the historic expectations of the states. Paraphrasing the language of this Court in *United States v. Louisiana, supra,* 363 U.S. at 33: we agree that the Submerged Lands Act does not contain any formula to be followed in the judicial ascertainment of inland waters, and that therefore the Court must determine, as an independent matter, whether the boundaries of inland waters, for purposes of the Act, are to be taken as fixed by historical events such as those pointed out in the Congressional hearings and debates, or whether they must be regarded as limited by Executive policy on the extent of territorial waters, as contended by the Government.

4. Congress Left It to the Courts to Define "Inland Waters" Precisely, With Due Regard to the Act's Purpose to Restore the Historical Expectations of the States.

The Government (U. S. Answering Brief, p. 21) depends upon a statement by Senator Holland: "The joint resolution simply continues the outer boundary of inland waters pursuant to the decisions of the Supreme Court already made." 99 Cong. Rec. 2756. Obviously this quote has little meaning unless it can be tied to any decision of the Supreme Court defining "inland waters," and the Government has cited none.[9] Indeed,

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[9]Senator Holland and Senator Cordon made other references to "inland waters" having been well defined by this Court. (99

we have been unable to find any decision of this Court defining the term "inland waters" or establishing criteria for determining that status.

We believe that Senator Holland merely said that "inland waters" means whatever the decisions of this Court say it means. He never stated that any particular definition was approved by the Act. In the course of the discussion wherein Senator Holland referred to decisions of the Supreme Court already made, he also made the following statements:

> (1) ". . . there is nothing in this resolution which would affect the right of California or any other State to claim what it thinks it is entitled to claim. . . ." (99 Cong. Rec. p. 2756.);
>
> (2) ". . . The Senator from Florida knows full well that if the United States Supreme Court should change its mind as to what constituted the outer limits of inland waters, and should change it to a sufficient degree, it could open up, not only under this joint resolution, but of its own initiative, questions which would reach out much farther than anything we have been talking about here." (99 Cong. Rec. p. 2757.);

and

> (3) ". . . There is no way for us to foreclose the Supreme Court from changing its mind. It

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Cong. Rec. 2756-77; Senate Hearing, pp. 1304-05, 1385.) We have been unable to identify the cases these Senators had in mind. We submit that they could not have been referring to the *California, Louisiana* and *Texas* cases, since none of them purported to define "inland waters." Perhaps they were alluding to the 52 Supreme Court decisions and the 244 State and Federal Court decisions mentioned by Senators Long and Daniel as having approved the *Pollard* rule. (99 Cong. Rec. p. 2818.)

might change its mind with reference to inland waters and their delimitation." (99 Cong. Rec. p. 2757.)

Thus, it is evident that Senator Holland was not contemplating any definition of "inland waters" frozen by reference to prior judicial decisions. This is wholly consistent with the oft-announced intention of Congress not to define "inland waters" with particularity, but to leave it to the courts to give precision to that term within the spirit of the Submerged Lands Act. (Senate Report No. 133, 83d Cong. 1st Sess. p. 18; 1953 Senate Hearings, Part 2, p. 1285.) In conformity with the avowed purpose of the Act to realize the historical expectations of the States, it follows that Congress intended "inland waters" to be defined in terms of what the States believed they always possessed.

C. The Submerged Lands Act Contemplated a Changing Coastline Rather Than One Fixed at the Date of the Act.

The United States recognizes that the Submerged Lands Act did establish a new date for determination of the location of the coastline as distinguished from that deemed controlling by the Special Master. In the Government's own words "At the time of those proceedings the coast line in the view of the Special Master, was to be fixed as of the date of the Court's decree, October 27, 1947." (U. S. Answering Brief, p. 26.) Pursuant to the Act, plaintiff avers, the coastline therein referred to must be fixed as of May 22, 1953, the date of the statute. (U. S. Answering Brief, p. 26.) In contrast, California has consistently maintained that the term "coastline" employed in the Act, contemplates

a line constantly changing in actual location but defined in accordance with historic criteria. (Calif. Brief in Support of Exceptions Vol. I pp. 19-24; Calif. Reply Brief pp. 17-20.)

In an effort to freeze the coastline as of May 22, 1953, the Government quotes Senator Cordon as stating:

> ". . . It is the coastline as of now. We have confirmed here 3 miles from the coastline as of now. . . ." (1953 Senate Hearings, Part 2, p. 1354.)

Yet it must be remembered that Senator Cordon, at the time, was discussing a proposed amendment by Senator Long to measure three geographical miles from the coast as it existed at the time of a state's entry into the Union (1953 Senate Hearings, Part 2, pp. 1344-45, 1353-58). As between the time of admission, and the time the Act was being considered, Senator Cordon favored the "coastline as of now." However, the Senator was not purporting to eliminate recognition under the Act of possible future changes in the coastline. To the contrary, the legislative history makes it clear that Senator Cordon envisioned a future changing coastline. Discussing S. J. Resolution 13 on the floor of the Senate, he said:

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

Plaintiff regards the amendment eliminating the words "or hereafter" from sections 2(a)(2), 2(b) and

4 of the Submerged Lands Act as decisive evidence of the Senate's intent to adopt that coastline which existed as of the date of the Act. (U. S. Answering Brief p. 27.) This argument is fallacious because the words "or hereafter" had nothing to do with the location of a coastline. Prior to their being stricken, these words had referred to possible future Congressional approval of extensions of state seaward boundaries.[10] Of these specific deletions, Senator Daniel said:

> "All such language as 'hereafter approved' was taken out by an amendment agreed to yesterday afternoon as a corrective measure. As the Senator from Florida [Senator Holland] said, the intention was to write specifically into the joint resolution what the authors have said all along would be its effect—that it covered only land within the historic boundaries. . . ." 99 Cong. Rec. p. 4175.

D. The Ascertainment of the Extent of California's Entitlement to a Portion of the Continental Shelf Has No Tendency to Embarrass the United States in Its Conduct of Foreign Affairs.

The Plaintiff's argument that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs" (U. S. Answering Brief, p. 39; see also *id.*, pp. 157, 167) is used as a smokescreen to becloud the real issue in this case, namely, how did Congress in the Submerged Lands Act divide the seabed and subsoil of the continental shelf between the nation and the states. This division

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[10]As Senators Holland and Lehman pointed out Congress retains the power at any time to approve any seaward extension of State Boundaries. 99 Cong. Rec. p. 2976.

is purely a domestic matter which this Court has already indicated has no tendency to embarrass the United States in the conduct of its foreign affairs. *United States v Louisiana, supra,* 363 U.S. at 30-36. Sections 3(d) and 6 of the Act reserve the authority and paramount rights of the United States in the waters over the continental shelf for the constitutional purposes of commerce, navigation, national defense and international affairs. Under these provisions the United States may, for purposes of conducting its international affairs, classify the waters overlying the continental shelf in any manner deemed proper. For example, the Government undoubtedly will treat as high seas some of the waters located more than three geographical miles but less than three leagues from the Texas and Florida coastlines, completely unimpeded and unembarrassed by this Court's decision that the seabed and subsoil offlying these states are subject to state ownership to a distance of three leagues.[11] In this case, there is absolutely no conflict with the principle that courts should not embarrass the executive arm of the Government in the conduct of foreign affairs, and that proposition should not be allowed to prevent the doing of equity to California in the domestic matter of ascertaining the extent of that State's entitlement to a portion of the floor of the continental shelf.

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[11]See. *e.g.,* the discussion of the Legal Advisor of the State Department indicating that the Submerged Lands Act and the Truman Proclamation in no wise affect this nation's support of the doctrine of Freedom of the Seas. 1 *American Foreign Policy, 1950-1955, Basic Documents* 1346, 1348-49, 1352-53, Department of State Publication 6446 (1957.)

E. Conclusion of Argument as to Congressional Intent.

The foregoing discussion has shown that the present problem is not to locate the baseline under this Court's prior decree or pursuant to the recommendations of the Special Master. Instead, in conformity with the purpose of the Submerged Lands Act, this Court must restore the historical expectations of this State according to its claims, understandings and uses throughout its history. In succeeding portions of this brief we shall point out those historical expectations of California intended by Congress to be restored to this State by the Act, and show that the term "inland waters" as used in the Submerged Lands Act can and must be interpreted consistently with these expectations.

II

THE SUBMERGED LANDS ACT RECOGNIZED AND CONFIRMED CALIFORNIA'S CLAIMS AND EXPECTATIONS TO ALL BAYS ALONG ITS COAST, AND TO INTERVENING WATERS BETWEEN ITS MAINLAND AND OFFSHORE ISLANDS.

Any identification of the historic expectations of California must begin by determining the State's constitutional boundaries, as approved by Congress. Specifically, Article XII of California Constitution of 1849, as approved by Congress, sets California's seaward boundary as follows:

> ". . . thence running west and along said [Mexican] boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction, and following the direction of the Pacific Coast to the 42d degree of north

> latitude, thence on the line of said 42d degree of north latitude to the place of beginning. *Also all the islands, harbors, and bays, along and adjacent to the Pacific Coast.*" (Emphasis added.)

California has previously stated its position, fully supported by historic evidence, as to the meaning of this State Constitutional provision, which position may be summarized as follows: that the term "bays" means any body of water that was considered a bay in 1849, regardless of its size or dimension; and that California's seaward boundary runs three miles from a line along the shore where that shore is in direct contact with the open sea and, where this is not the case, from a line drawn across entrances to harbors and bays and along the seaward side of the islands adjacent to the coast. (Calif. Brief in Support of Exceptions, Vol. I, pp. 36-37.)

With great particularity, the State set forth the intention and meaning of the seaward boundary established by the California Constitution of 1849 (Calif. Brief in Support of Exceptions, Vol. I, pp. 35-65, plus Appendices B & C). The United States has chosen to ignore this subject matter because, despite the clearly contrary statements of Congress and of this Court, the Government still adheres to the Special Master's theory that State historic boundaries are irrelevant. (U. S. Answering Brief, pp. 11-12, 26.) Consequently, no portion of the Government's brief accords any weight to California's historical claims or expectations. However, we have heretofore demonstrated that the Submerged Lands Act has made California's historic boundaries not only relevant but vital in properly measuring the State's seaward boundary. Nonetheless, the plaintiff

has deemed it unnecessary to controvert the following propositions: (1) the California Constitutional Convention of 1849 intended to select a baseline for the seaward boundary other than the shoreline (Calif. Brief in Support of Exceptions, Vol. I, pp. 38-39) and, (2) that the California Constitutional Convention intended to include within the State's boundaries all bays and all waters between the islands and the mainland. (Calif. Brief in Support of Exceptions, Vol. I, pp. 40-59.)

A. There Is No Doubt That the Claims, Understandings, Expectations and Uses of California Included All Bays Along Its Coast Within the State's Historic and Constitutional Boundaries.

California's entitlement to all the bays along its coast is established by clear and convincing proof.

1. The California Constitutional Convention of 1849 Specifically Included All Bays Along the Pacific Coast as Being Within the State's Boundaries.

The State's Constitutional language, to wit: "Also all the islands, harbors and bays, along and adjacent to the Pacific Coast" (Calif. Const. of 1849, Art. XII) is unequivocal in its inclusion within California's boundaries of *all bays along the coast,* without regard to their size or dimension. We shall not repeat the detailed history and background of California's Constitutional Convention of 1849 which formulated the heretofore quoted boundary description.[12] That this Convention carefully considered the question of the state's seaward boundaries and deliberately adopted the language in question is demonstrated by the fact that numerous

[12]Calif. Brief in Support of Exceptions, Vol. I, pp. 38-46.

boundary descriptions were presented to it, and that each of these proposals in varying forms clearly demonstrated that all bays along the coast were to be part of California. Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution,* pp. 123-24, 168-70, 417 (Washington 1850). Moreover, by virtue of the treaty of Guadalupe Hidalgo (9 Stat. 922-43) by which the territory of Upper California was ceded to the United States by the Republic of Mexico, the United States assumed that jurisdiction, both territorial and maritime, which Mexico had heretofore asserted over the area ceded, and which embraced all of the ports, harbors, bays and inlets along the coast of California.[13] Undoubtedly, the delegates at the California Constitutional Convention of 1849, in fixing California's boundaries, intended to include therein all of Upper California ceded to the United States by the treaty of Guadalupe Hidalgo.[14]

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[13]See *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 242-43, 252 Pac. 722, 724 (1927).

[14]Browne, *Report of the Debates, etc. supra,* 175, 193; See also Calif. Brief in Support of Exceptions, Vol. I, pp. 40-45. As stated in *United States v. Carrillo,* 13 F. Supp. 121 (S. D. Calif. 1935):

> "The state of California was admitted into the nation of the United States shortly after the territory within its limits had become unquestionably American through the Treaty of Guadalupe Hidalgo as it was proclaimed July 4, 1848, by the President of the United States. It may be claimed that California was an independent nation for a short time from the raising of the Bear Flag at Monterey to the admission into the Union, but as a functioning government it never was recognized by other nations. No territorial government was ever established by the United States for California. It may be said, therefore, that the government under the California Constitution of 1849 succeeded the Mexican sovereignty with all of its rights, and, of course, the Mexican sovereignty succeeded the Spanish sovereignty."

2. **The Framers of the California Constitution Meant ". . . All . . . Bays Along and Adjacent to the Pacific Coast" to Include What They Popularly Believed to Be Bays.**

It cannot be reasonably assumed that the delegates at the California Constitutional Convention in 1849 used the term "bays" in any technical sense. Further, it is a justifiable assumption that these delegates had little doubt in their own minds that bays were meant to identify what were generally or popularly regarded as bays at the time.

The logic employed by the Permanent Court of Arbitration to ascertain the meaning of "bays" in the North Atlantic Coast Fisheries Arbitration proceeding in 1910 is particularly analogous. There, the Court of Arbitration wrote:

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

> be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general." (*North Atlantic Coast Fisheries Arbitration,* 1 S. Doc. No. 870, 61st Cong., 3d Sess. 92, 97.)

Similarly, the draftors of the California Constitution probably were not bothered by subtle refinements as to the meaning of bays but thought that they and everyone else were able to identify bays on the California coast. For example, it is inconceivable that the California Constitutional Convention of 1849, which met at the City of Monterey situated on what was then undeniably recognized as Monterey Bay,[15] did not even regard this body of water as one of the bays contemplated for inclusion within the State's constitutional boundaries.

Previously, in Volume II of California's Brief in Support of Exceptions, the State demonstrated that in addition to Monterey (Appendix B-V, pp. 152-78), San Luis Obispo (Appendix B-VI, pp. 179-89), Santa Monica (Appendix B-III, pp. 131-46), and San Pedro (Appendix B-II, pp. 103-30) Bays each must be regarded as having been included as a bay within the meaning of California's Constitution of 1849. To avoid

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[15]See materials collected in Calif. Brief in Support of Exceptions, Vol. II, Appendix B-V, pp. 152-78.

unnecessary duplication, and because these materials were not challenged by the Government, they will not be repeated here.

3. Judicial Decisions Prior to 1947, Recognizing That Bays Along the California Coast Are Within the State's Constitutional Boundaries, Are Persuasive Aids in Ascertaining the Expectations of California Confirmed by the Submerged Lands Act.

As stated by this Court in *United States v. Louisiana, supra,* Congress, in confirming the expectations of the states in existence prior to 1947, conceived of this expected ownership in terms of the states' territorial boundaries. In the Court's own words: "This framework was employed because the sponsors understood this Court to have established, prior to the California decision, a rule of state ownership itself defined in terms of state territorial boundaries, whether located at or below low-water mark." (363 U.S. at 19-20.)

The United States has raised the highly technical question as to whether the cases relied upon by the State establish California's bays as inland, or merely territorial, waters. We believe that they clearly establish their character as inland waters even under international law criteria.[16] However, be that as it may, there can be no doubt but that these Federal and State court decisions established that the waters in question were bays for purposes of defining California's seaward boundary. If the fundamental intention of Congress is to be carried out, such a determination as to boundaries must be given effect regardless of the applicability of the technical criteria proposed by the United States.

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[16]See Point 4 of this argument, *infra.*

An examination of each of the following decisions shows that the waters in question were such as to extend seaward the boundaries of the State, and were thus "inland waters" for the purpose of defining such boundaries.

Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 Pac. 722 (1927) was an application by a Nevada corporation for a writ of prohibition restraining the Superior Court of Santa Cruz County, California, from enjoining petitioner's fish reduction operations conducted within the headlands of Monterey Bay, but more than three nautical miles from low-water mark along the shore thereof. In denying the writ the California Supreme Court squarely held that Monterey Bay "is within the boundaries of the State of California and of the counties respectively of Santa Cruz and Monterey." (200 Cal. at 246.) Thus the jurisdiction of the Superior Court was upheld solely because the waters involved were within this State's boundaries. Moreover, in reaching its decision the Supreme Court said:

> ". . . This language in our first constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all those several bays and harbors which indent its coast."[17] (200 Cal. at 243.)

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[17]Previously the same plaintiff, Ocean Industries, Inc., unsuccessfully sought an injunction in the United States District Court. The Federal Court held:

> "The boundary of the state of California is defined in the Constitution of California (section 1 of article 21), and includes 'all the islands, harbors, and bays along and

In *United States v. Carrillo,* 13 F. Supp. 121 (S. D. Calif. 1935) defendants were on trial in the federal court for acts of piracy and robbing and plundering a gambling vessel, and conspiracy. The ship in question had been anchored off the shore of California in San Pedro Bay. In granting a motion to dismiss those counts charging piracy on the high seas for want of jurisdiction, the Federal Court said:

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

and

> ". . . That position [of the vessel] being landward from a straight line drawn between Point Lasuen and Point Firmin, it follows that the 'Monte Carlo' gambling ship or hulk lay in American and California waters, and that this motion must be decided in accord therewith." (13 F. Supp. at 122.)

Basically, the lack of jurisdiction of the Federal Court stemmed from recognition of the principle that a vessel located within California's boundaries cannot be on the high seas.

People v. Stralla, 14 Cal.2d 617, 96 P.2d 941 (1939) involved a criminal prosecution for keeping and operating a gambling ship operated in the waters of Santa Monica Bay, at a point four miles oceanward from the end of the municipal pier of the City of Santa Monica and approximately six miles landward from a line drawn between the headlands, Point Vicente on the

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adjacent to the coast.' The quoted language declares in effect that Monterey Bay is a part of the territory of the state." *Ocean Industries, Inc. v. Greene,* 15 F. 2d 862, 863, (N. D. Calif. 1926.)

south and Point Dume on the north,[18] and in affirming the conviction, the California Supreme Court said:

> "We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the state by the Constitution." (14 Cal.2d at 632-33.)

The *Stralla* case makes it clear that the territorial jurisdiction of the State existed because Santa Monica Bay was one of the bays included within California's territorial boundaries under its Constitution. The State's criminal jurisdiction, under its own statutes, was totally dependent upon the area in question being within California's boundaries.

In each of the foregoing cases, the court's jurisdiction turned upon whether the area involved was within the territorial jurisdiction; *i.e.,* physical boundaries of California. Together they constitute square holdings that Monterey, San Pedro and Santa Monica Bays are bays within the meaning of California's Constitution. Once it is determined that a bay is within this State's

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[18]California criminal jurisdiction requires the act to be committed within the territory of California. Calif. Penal Code Sec. 27(1), 778a; *People v. Buffum,* 40 Cal.2d 709, 716, 256 P.2d 317, 320 (1953).

boundary, then the three geographical miles restored to California by the Submerged Lands Act must be measured from a line drawn between the headlands of such bay. Most importantly, the language consistently employed in these decisions leaves no doubt but that the California Constitution of 1849 intended to and did embrace within the boundaries of the State all bays along the coast. As we will demonstrate in the next section of this brief, a finding that a bay is within California's boundaries is necessarily a finding that the waters of such a bay are inland waters of this State.

The Government would construe our Constitutional provisions concerning bays to include only those bodies of water that meet some highly technical and transitory formula.[19] The framers of the Constitution had no such restriction in mind. It is submitted that when, in the 1840's people spoke of the great bays of California, including San Francisco, Monterey and San Diego,[20] they thought of these bodies of water as being part of California, irrespective of any technical formula which might today be invoked to distinguish these several bays. The decisions in the cited cases confirm that the Constitution of 1849 contains no such restricting formula.

In addition, the judicial declarations that Monterey, San Pedro and Santa Monica Bays are internal waters

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[19]We have shown (Calif. Brief in Support of Exceptions, Vol. I, pp. 47-59) that as of 1849, none of the technical imitations urged by the United States had any general acceptance and that, indeed, the then current concept of inland waters was clearly broad enough to include all the bays and other water areas here in controversy.

[20]See letter from General Kearny to War Department, March 15, 1847, Senate Document, 31st Congress, 1st Sess. Vol. 9, p. 270 (1849-50).

subject to domestic laws and regulations, and not part of the high seas, have received Governmental and world-wide notoriety and recognition as demonstrating the status of these three bays as inland waters under international law.[21]

4. California's Bays Are Inland Waters Rather Than Territorial Sea.

The Government declares that the actions of California and the judicial decisions concluding that specific bodies of water were bays within the meaning of the State's Constitution established at best that these bays are territorial sea as distinguished from inland waters. (U. S. Answering Brief, pp. 172, 102, 139.)[22]

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[21]In addition to the recognition by California that the bays in question in the cited decision constituted part of the territory of California, the United States has accorded similar recognition. The *Ocean Industries* and *Carrillo* cases were cited in the official digest of international law of the State Department (1 Hackworth, *Digest of International Law,* 694-95, 708-10 (1940)), and were relied upon by the State Department in its memorandum to the United Nations of January 6, 1950. (United States Memorandum on the Regime of the High Seas, annexed to a Note to the United Nations, International Law Commission, II Yearbook 60, 61 (1950).) As we noted in our opening brief (Calif. Brief in Support of Exceptions, Vol. I, pp. 64, 136), the United States Attorney filed an *amicus curiae* brief in support of the portion of the State of California in the *Stralla* case. The plaintiff disposes of this Governmental action by catagorizing it as "an unfortunate aberration." (U. S. Answering Brief, p. 112.)

Furthermore, the cited cases concerning California's bays have received wide international recognition (see the authorities collected in Calif. Brief in Support of Exceptions, Vol. I, pp. 133-36), and continue to receive such recognition today. (Bouchez, *The Regime of Bays in International Law,* 235-37 (1964); Strohl, *The International Law of Bays,* 280-83 (1963).)

[22]Plaintiff itself recognizes that bays have a different status than the territorial or marginal sea. (U. S. Answering Brief, p. 72, n. 50.)

Conversely, California insists that once a body of water is regarded as a bay within the meaning of its constitution, then it necessarily constitutes inland waters.

The parties have always agreed that the United States has consistently claimed a marginal sea of three miles, and this Court has so recognized. (*United States v. California, supra,* 332 U.S. at 33.) This claim is usually stated as follows: ". . . that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore, with the exception of waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent state: . . ." (United States Memorandum on the Regime of the High Seas, annexed to a Note to the United Nations, U. N. International Law Commission, II Yearbook 60, 61 (1950).)[23] The foregoing position necessarily comprehends that landlocked waters and bays have a status different from territorial waters.

There has been some confusion in international law concerning the character of waters within bays. As early as 1806, however, Azuni described the status of bays by stating:

> ". . . These obligations relative to ports, are of equal force in bays and gulfs, as they also make a part of the sovereignty of the state, within whose dominion and territory they are situated, . . ." (1 Azuni, *The Maritime Law of Europe* 234 (1806).)

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[23]In this same Memorandum, the State Department cited the *Ocean Industries* case (200 Cal. 235) and the *Carrillo* case (13 F. Supp. 121) holding that Monterey and San Pedro Bays are bays within the meaning of the California Constitution, as authority for the aforestated quotation.

More recent writers equate bays with inland or interior waters.[24] The international conferences on delineating the territorial sea have likewise treated bays and waters landward of the marginal belt as inland waters.[25]

As California pointed out in its Reply Brief, the waters of ports and harbors are always considered inland waters. (Calif. Reply Br., p. 9, n. 6.) The language of the California Constitutional boundary description, namely: "Also all the islands, harbors, and bays, along and adjacent to the Pacific Coast" treats

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[24]See, *e.g.*, Hostie, "Le domaine maritime", 8 *Revue de droit international et de législation comparée* 215, 239 (3d Series (1927); Castberg, "Distinction entre les eaux territorial et les eaux interieures". 45 *Annuaire de l' Institut de droit international,* Vol. I, 113, 121, 172 (1954); Bouchez, *The Regime of Bays in International Law,* 109 (1964); Strohl, *The International Law of Bays,* 404-05 (1963) stating that historic bays are internal waters.

[25]This concept is reflected in Article 4 of the draft convention prepared by a Committee of Experts in 1926 in preparation for the 1930 Hague Conference: ". . . The waters of such bays are assimilated to internal waters." (Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations 72, L. of N. Publ. 1927, V.1; L. of N. Doc. C.196 M.70, 1927 V; see also, *id.* at 40.)

The proposal of the United States delegation at the 1930 Hague Conference explicitly provided that waters of bays fulfilling specified requirements should be regarded as "interior waters." (1 *Acts of Conference for the Codification of International Law* 132; L. of N. Publ. 1930. V.14; L. of N. Doc. C.351. M. 145.1930V.)

The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L.52) similarly treats all waters behind a baseline and within bays as inland waters. Art. 5 provides in part: "1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."

The International Court of Justice in the *Anglo-Norwegian Fisheries Case* recognized the internal character of historic waters. "By 'historic waters' are usually meant waters which are treated as internal waters . . ." [1951] I. C. J. Rep. 116, 130.

bays and harbors alike.[26] There is little doubt that in international law, as of 1849 and preceding that date, the status of bays and ports and harbors was identical.[27] It is submitted that at the time California's sea-

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[26]The separation of the "three English miles" and "all . . . harbors, and bays . . ." in Article XII of California's Constitution of 1849 shows a recognition of the distinction between the marginal belt and other water areas.

[27]*e.g.,* Rutherforth opined that a nation had jurisdiction ". . . over so much of the ocean as is included within the land: so that all ships, and all persons, who are in them, are under the jurisdiction of the nation, if they are *in any of its ports, or in any bays, or other arms of the sea,* which are appendages to the land." Rutherforth, *Institutes of Natural Law* 497, (2d American Ed. 1832.) (Emphasis added.)

The Jay Treaty of November 19, 1794 between Great Britain and the United States provided in Article XXI:

> "Neither of the said parties shall permit the ships goods belonging to the subjects or citizens of the others to be taken within cannon shot of the coast, *nor in any of the bays, ports or rivers of their territories,* by ships of war or others having commission from any Prince, Republic or State whatever." (1 Malloy, *Treaties, etc. Between the United States of America and Other Powers,* 590, 604.) (Emphasis added.)

Article XI of the Treaty between the United States and Mexico of April 5, 1831, provided for the return of certain vessels from "*in the rivers, bays, ports,* or dominions" of the other party. (1 Malloy, *Treaties etc., supra,* 1088.) (Emphasis added.)

In 1849, Secretary of State Buchanan stated: "The exclusive jurisdiction of a nation extends to *the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands; . . .*" (1 Moore, *Digest of International Law,* 705 (1906). (Emphasis added.)

The assimilation of bays and gulfs to ports and harbors is also reflected in a series of European treaties: Article 6 of Treaty between Great Britain and the Netherlands, and Denmark and Norway December 8/18, 1691 (Crocker, *The Extent of the Marginal Sea,* 518 (1919); Article 28 of Treaty between France and Russia, January 11, 1787 (*Id.* 521-22); Article 19 of Treaty between Russia and the Kingdom of Two Sicilies, January 6/17, 1787 (*Id.,* 598); Article XXV of Treaty between Russia and Sweden, March 13, 1801 (*Id.* 620).

See also Fulton, *The Sovereignty of the Sea,* 547 (1911).

ward boundaries were established, it was well understood that bays, ports and harbors were of a status different from that of the marginal sea, and the status of the former is now called "inland waters."

The United States, consistent with international law, has traditionally drawn its three mile marginal belt seaward from the outer limits of bays which are "unquestionably within the jurisdiction of the adjacent state . . ."[28] To our knowledge the United States has never disputed that such bays are inland waters. The bays in controversy in this case are unquestionably within the jurisdiction of California and our Constitution so declares. Nevertheless, within these bays the Government seeks to draw the three mile belt in such a way as to leave outside that belt an area subject to the jurisdiction of California and within the territory of California. This area the plaintiff refuses to recognize as inland waters. Such a construction would negate our Constitution which declares that all bays are within the State's boundaries, and also would do violence to the intent of the Submerged Lands Act to realize the State's historic expectations. The only reasonable conclusion is that all "bays" within the meaning of the California Constitution are State inland waters under the Submerged Lands Act.

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[28]United States Memorandum, *supra,* I.L.C. II Yearbook 60, 61 (1950).

B. California's Historic and Constitutional Boundaries Also Include the Water Areas Between the Mainland and Offlying Islands.

California's claim to the intervening waters between the mainland and the offshore islands is reasonable and valid.

1. The Boundaries Set by the California Constitutional Convention of 1849 Encompassed the Territory of Upper California Ceded to the United States by Mexico, Which Area Included the Waters Between the Mainland and Off-Lying Islands.

Heretofore, we demonstrated that while California was under Spanish and Mexican dominion,[29] these nations claimed sovereignty and jurisdiction over the mainland, the offlying islands and the waters between them.[30] When the Treaty of Guadalupe Hidalgo ceded to the United States the territory of Upper California, the United States "assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays and inlets along the coast of California *and for a considerable though perhaps indefinite distance into the ocean,* including dominion over the numerous islands lying adjacent to said coast. . . ." *Ocean Industries, Inc. v. Superior Court, supra,* (200 Cal. at 242-43) (Em-

[29]Appendix B, Vol. II, California's Brief in Support of Exceptions, contains materials pertaining to the discovery, occupation, use and control of the maritime areas of Upper California including the waters now in controversy, during the Spanish and Mexican periods.

[30]The California Supreme Court in *Ocean Industries, Inc. v. Superior Court supra,* 200 Cal. at 242 ably summarized the claims and recognized jurisdiction of Spain and her successor Mexico over the coast of California and for a distance of ten leagues into the ocean.

phasis added). The Disturnell Map,[31] attached to the Treaty of Guadalupe Hidalgo, contains selective shading which clearly reveals that the water areas between the mainland and offlying islands were regarded as part of the territory of Upper California transferred to the United States by that treaty. In turn the California Constitutional Convention of 1849 intended to include within the boundaries of this State, all of the aforementioned territory of Upper California which had been so acquired by this Nation. *United States v. Carrillo, supra,* (13 F. Supp. 121). Construed in the light of that intention, the language of the California Constitution describing the State's seaward boundary as to including "all the islands, harbors and bays, along and adjacent to the Pacific Coast" must have envisioned the inclusion within California of the water areas between the mainland and the adjacent islands.

The Government asserts that "The Court has already recognized that statutes and charters such as California mentions . . ., establishing jurisdiction over all islands within a certain distance of the shore, are not to be understood as thereby including jurisdiction over the waters. *United States v. Louisiana,* 363 U. S. 1, 67-69." (U. S. Answering Brief, p. 138.) What the Court said there was:

> "The conclusion that language claiming all islands within a certain distance of the coast is not

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[31]"Mapa de los Estados Unidos de Méjico, Lo Publican J. Disturnell, 102 Broadway, Nueva York (1847 Revised Edition)." A copy of this map is attached to volume 5 of Miller, *Treaties and Other International Acts of the United States of America* (1937), and in turn was reproduced and attached to California's opening brief. (Calif. Brief in Support of Exceptions, Vol. II, App. CI.)

> meant to claim *all the marginal sea to that distance* is further confirmed . . . ." (363 U.S. at 69.) (Emphasis added.)

and

> "The construction here contended for by Louisiana would, in contrast, sweep within the State's jurisdiction waters and submerged lands which *bear no proximate relation to any islands,* and which would otherwise be part of the high seas." (363 U.S. at 69-70.) (Emphasis added.)

In the *Louisana* case, that State endeavored to extend its entire seaward boundary because of a boundary description which included "all islands within three leagues of the coast." More specifically, Louisiana tried to expand its coastline even in areas where there were no islands. Thus, Louisiana did not purport to confine its claim to waters between that State's mainland and its offlying islands.[32] In denying this attempted projection of Louisiana's entire seaward boundary, this Court merely held that a boundary description which includes all islands within a specified distance does not encompass all of the waters within that distance.[33] The

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[32]Relative to three States on the Gulf Coast, the Government conceded that the waters between the mainland and the offlying islands did constitute inland waters. (363 U. S. at 66, n. 108; 82 nn. 135, 139.)

[33]The boundary descriptions referred to by this Court were:
Louisiana: ". . . to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast; . . . ."
La. Act of Admission, 1812, 2 Stat. 702 (363 U.S. at 66.)
Mississippi: ". . . thence due south to the Gulf of Mexico, thence westwardly, including all of the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne. . . ."
Act of March 1, 1817, 3 Stat. 348; (363 U.S. at 81.)
Alabama: ". . . thence, due south, to the Gulf of Mexico;

California case, however, is markedly different. First, our Constitutional boundary includes "all islands . . . along and adjacent to the Pacific Coast" but does not contain any mileage limitation. Second and most important, California does not claim that its entire coastline is extended any specific distance, or at all, because of the location of any offlying island or islands. Rather, California's claim is based on the proximate relation of the claimed waters to the offshore inlands.[34]

2. The Government Has Cited No Case Involving the State of California Which Presented Any Issue as to the Status of Water Areas More Than Three Miles From Land and Located Between the Mainland and the Southern California Islands.

The Government cites several cases which it contends hold contrary to California's present claims concerning the status of the waters between the mainland and the offshore islands. (U. S. Answering Brief, pp. 177-78.)

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thence, eastwardly, including all islands within six leagues of the shore to the Perdido River. . . ."

Ala. Admission Act, 3 Stat. 608; Enabling Act, 3 Stat. 489, 490. (363 U. S. at 82.)

The Court also referred to the Georgia boundary statute, Georgia Code Ann. §§ 15-101, which provided in part:

". . . to the Atlantic Ocean, and extending therein three English miles from low-water mark; thence running in a northeasterly direction and following the direction of the Atlantic Coast to a point . . . and also all the islands within 20 marine leagues of the seacoast." (363 U.S. at 69.)

This Court, in discussing the Georgia boundary, which has language similar to California's, did not purport to determine whether Georgia in fact had any islands situated as are California's islands, and if so, what the status would be of the water between such islands and the mainland. The Court merely stated that Georgia claimed only three miles of marginal sea (as does California). (363 U.S. at 69.)

[34]We have heretofore set forth in detail evidence of the historical interdependence of the Southern California islands, the mainland and the intervening waters. See Calif. Brief in Support of Exceptions, Vol. II, App. B-I.

In fact, in none of these cases was the status of the intervening waters more than three miles from land in dispute between the State of California or one of its agencies or subdivisions and other litigants.

The language of the court in *Muchenberger v. City of Santa Monica,* 206 Cal. 635, 638, 275 Pac. 803 (1929) concerning the seaward limits of the City of Santa Monica was obvious dictum and such limits were never in issue.[35] Ten years later, of course, when the status of Santa Monica Bay was in issue, this same court held that Bay to be within the territory of California. *People v. Stralla, supra.* (14 Cal.2d at 632-33.)

In *Wilmington T. Co. v. Railroad Commission,* 166 Cal. 741, 137 Pac. 1153 (1913), *aff'd.* 236 U.S. 151 (1915), the question presented was the jurisdiction of the California Railroad Commission to regulate traffic between San Pedro and Avalon Harbor on Catalina Island. Both courts held such jurisdiction existed even though the trip between the two parts crossed "high

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[35]The Government, in a footnote, refers to *Rex, Inc. v. Superior Court,* 34 Cal. App. 2d 96, 93 P.2d 182 (1939), (U. S. Answering Brief, p. 170, n. 131.) This case held, ". . . that the territorial limit of the State of California at Santa Monica, for the reasons set forth in the Stralla decision, is the Pacific Ocean and extending therein three English miles." (34 Cal.App.2d at 97.) As the court recognized, a hearing had at that time been granted by the California Supreme Court in the *Stralla* case. The District Court of Appeal was relying on its decision in the *Stralla* case (88 P.2d 736.) As we have repeatedly noted, the Supreme Court ultimately decided in that case all of Santa Monica Bay was within the territory of California. (14 Cal.2d 617, 96 P.2d 941.) When the California Supreme Court grants a hearing after decision in the District Court of Appeal, the decision in the latter court no longer exists and is not the law of California. (See *People v. Woods,* 19 Cal.App.2d 556, 560, 65 P. 2d 940 (1937).)

seas." The question of whether the intervening waters in fact constituted high seas was never raised, the Railroad Commission apparently assuming this to be so. (166 Cal. at 742-43, 744, 236 U.S. at 152-53.) As it was ultimately determined, whether the vessels involved traversed the high seas was utterly immaterial in the case.

The question in *In re Marincovich,* 48 Cal.App. 474, 192 Pac. 156 (1920) and *Suttori v. Peckham,* 48 Cal. App. 88, 191 Pac. 960 (1920), was whether an area well within three miles of Santa Catalina Island constituted State waters. In neither case was the area beyond three miles and lying between Catalina Island the mainland involved. As stated in the *Marincovich* opinion:

> *"Unless the people of the state, in their definition of the state's boundary as contained in article XXI of the constitution [of 1879], have decreed otherwise,* the sovereignty and jurisdiction of California extends over a belt of water, 3 miles wide, circling the island, and the waters of such belt are territorial waters of the state—they are the 'state waters' referred to in the statutory definition of fish and game district twenty." (48 Cal. App. at 476-77.) (Emphasis added.)

In the *Marincovich* and *Suttori* cases there was no necessity for the courts to have determined, and they did not decide, whether the California Constitutional boundary definition [of 1879] encompassed any waters located more than three miles off Catalina Island. The quotation from *Marincovich* shows that the court was not purporting to fix the fullest possible extent of the State's boundaries under its Constitution. This is

evident from the Court's language to wit: "*Unless the people* . . . in their definition of the state's boundary . . . in . . . the constitution . . . *have decreed otherwise* . . ." (Emphasis added) Such terminology specifically allows for the contingency that the State Constitutional boundary did decree otherwise. Consequently, the *Marincovich* and *Suttori* cases are of no assistance to plaintiff, if the State is correct in its assertion that the boundaries set by the California Constitutional Convention of 1849, encompassed the Territory of Upper California ceded to the United States by Mexico, which area included all of the waters between the mainland and the offlying islands.

California noted in its opening brief the existence of the decision in *Hooker v. Raytheon Co.,* 212 F. Supp. 687 (S. D. Calif. 1962) and pointed out that California was not a party to that case and our examination of the file discloses that the court was not furnished with the extensive historical data now presented by the State. (Calif. Brief in Support of Exceptions, Vol. I, p. 131, n. 84.) In order to exercise jurisdiction under the Death on the High Seas Act (46 U. S. C. §§ 761-68) the Court had to find that the death occurred, ". . . on the high seas beyond a marine league from the shore of any State . . .," (46 U.S.C. § 761) and beyond "the territorial limits of any State." (46 U.S.C. § 767.) It is submitted that California should not be bound by a determination in a case in which the State had no opportunity to prove its territorial boundary.

3. California and the United States Have Regarded the Waters Between the Mainland and the Southern California Islands as Within the County Boundaries of This State.

The Government maintains that previous actions of the California Legislature in describing county boundaries are irreconcilable with the State's present contention as to the inland water status of those areas located between the mainland and the offlying islands. (U. S. Answering Brief, pp. 173-75.) The plaintiff insists that "this legislation shows that, from the earliest descriptions in 1850 down to the 1947 revisions now in effect, the Legislature has always understood that the State boundary, between the Mexican border and Point Conception, is three miles from the mainland." (U. S. Answering Brief, p. 174,) This California denies.

It is conceded that California's county boundaries were, and in some cases still remain, inartfully drawn.[36]

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[36]The difficulty encountered in delineating county boundaries was explained in a report to the California Senate by Mr. De la Guerra on January 4, 1850, which reads in part:

> "The time, occupied by your Committee in this work, has been unavoidably protracted until now, on account of the circumstances and difficulties by which they were surrounded; such as the total absence of maps sufficiently correct to enable your Committee to determine, with requisite accuracy, the courses of rivers, mountains, and other natural landmarks, which they have been compelled to adopt, in most cases, as the limits of the different Counties." *Journal of the Senate of the State of California at Their First Session,* p. 411, Appendix E. (1850.)

Moreover, as stated in the "Report of Lieutenant Washington A. Bartlett, United States Navy, assistant in the coast survey, to the Superintendent, on the general character of the coast of California," Washington, January 6, 1851:

> "The islands which lie off the coast between Cape Conception and San Diego are not yet determined in position, with any very close approach to accuracy . . . They are as

Such is true of county boundaries removed from the coast[37] as well as seaward boundaries.

Despite technical irregularities which may appear in the State's boundary descriptions, there is a readily ascertainable intent by the California Legislature to project the limits of the three original coastal counties of Santa Barbara, Los Angeles and San Diego more than three miles seaward from the mainland.[38] In construing the meaning of county boundary descriptions, every effort must be made to reconcile county boundaries with the State Constitution since the Legislature is powerless to exclude from the jurisdiction of the state

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follows: Santa Rosa, or Miguel, San Bernardo, Santa Cruz, Saint Nicholas, Santa Barbara, Santa Catalina, San Clemente, or Salvador, San Juan, and the Coronados isles." (*Annual Report of the Superintendent of the Coast Survey, 1851,* Appendix No. 48, p. 525 (1852).)

Of course, San Juan is a completely mythical island in this area.

Similarly, the following quotation appears in Davidson, *Directory for the Pacific Coast of the United States,* 13 (1858):

"Islands of the Santa Barbara Channel . . .

"Until the Coast Survey first examined in detail the islands lying off the main, between San Diego and Point Conception, nothing accurate was known of their number, peculiarities, extent, or position. Upon all maps, of as recent date as 1850, an island called San Juan was laid down; and upon a map of the republic of Mexico, compiled in the United States and dated 1847, we find no less than twelve large islands, the positions and extent of which are most grotesquely erroneous. The island of San Miguel, the most western of the Santa Barbara group is placed 70 miles SE. of Point Conception, instead of 23 miles SE. by S.½ S. The same general remarks will apply to the coastline as thereon represented."

[37]See *County of Mariposa v. County of Madera,* 142 Cal. 50, 56-58, 75 Pac. 572 (1904); and Coy, *California County Boundaries,* 8-9 (1923). For example, Coy mentions the legislative formation of an alleged Pautah County (Calif. Stats. 1852, C. 118 p. 193) despite the fact the area described for such county was entirely outside California and was in fact in the then Territory of Utah.

[38]These county boundaries and the legislative intent pertaining thereto are discussed in Appendix B hereof.

or its political subdivisions any of its land or water areas which had been embraced by the express terms of the State's organic law. (*Ocean Industries, Inc. v. Superior Court, supra,* 200 Cal. at 243-44.)

Corroborative of the State's position that the seaward boundaries of its coastal counties extend more than three miles from the California mainland are a series of maps issued by the United States Government during the period from 1885 through 1963. Each of these maps clearly and unequivocally depicts the seaward extension of California's county boundaries in substantial conformity with California's present claims.[39]

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[39]For example:

1. In 1885 a map entitled "STATE OF CALIFORNIA, Department of Interior, General Land Office (1885) [compiled from the official Records of the General Land Office and other sources]" shows the Santa Barbara-Ventura County line extending almost to Begg Rock near San Nicholas Island. The Ventura-Los Angeles County Line is drawn almost to San Nicholas Island and the Los Angeles-San Diego County Line is located between San Clemente Island and the mainland and extending southerly and seaward of San Clemente Island. This map has been reproduced and is attached as Appendix C-I.

2. A map described as: "LONG BEACH, UNITED STATES (California), NI 11-7, Prepared under the direction of the Chief of Engineers by the Army Map Service (AM), Corps of Engineers, Department of the Army, Washington, D. C. Compiled in 1947, from United States Quadrangles, 1:25,000, 1:62,500 and 1:125,000 Corps of Engineers, 1923-1924, U.S. C. & G. S. Charts, 1935-1946. Planimetric detail partially revised from aerial photography by photo-planimetric methods. Control by U. S. Coast and Geodetic Survey. [Interior-Geological Survey, Washington, D. C.-1960-NS, MR 0136]." This map shows: (1) the Santa Barbara-Ventura County Line extends more than 3 miles seaward of Santa Cruz Island; (2) the Ventura-Los Angeles County Line runs to the west of Santa Barbara Island and extends far seaward thereof; (3) the Los Angeles-Orange County boundary is located far more than three miles from any land and between Santa Catalina Island and the mainland; and (4) the "Index to Boundaries" further confirms that the water areas between the mainland and the islands are included within the four designated coastal

III.

THE PROPER BASELINE IN AREAS IN DIRECT CONTACT WITH THE OPEN SEA IS THE LINE OF MEAN LOWER LOW WATER, AS MARKED ON LARGE-SCALE CHARTS OFFICIALLY RECOGNIZED BY THE UNITED STATES.

Section 2(c) of the Submerged Lands Act employs the term "line of ordinary low water" as part of the baseline from which the three geographical miles are to be measured. The decree of this Court used the term "ordinary low-water mark." (332 U.S. 804, 805.) Either phrase, although not a technical term, would ordinarily give little trouble, except that along the California coast there are each day two low tides of unequal height. (See Calif. Brief in Support of Exceptions, Vol. I, pp. 115-16, n. 72.) The problem then becomes, to which low tide was this Court and Congress referring? The Government contends that the terms refer to a mythical line determined by averaging both low tides over a representative period of time of approximately 18.6 years. (U. S. Answering Brief, p. 179.) It is California's position that the terms must be understood to refer to the line of the average of the lower of the low tides since this is the line used on officially recognized large scale charts both today and contem-

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counties. This "Index to Boundaries" has been reproduced and appears in Appendix B.

3. A map described as "LONG BEACH, CALIFORNIA, NI 11-7, Series V502, P. Prepared by the Army Map Service (SX), Corps of Engineers, U. S. Army, Washington, D. C., constructed and molded in 1963 from Western United States, 1:250,000 Series V-502, Edition 2-AMS, Sheet NI 11-7, 1957." This map, first printed in June of 1963 continues to portray the Santa Barbara, Ventura, Los Angeles and Orange County seaward boundaries in the same manner as did the preceding map. The 1963 map is reproduced and is attached hereto as Appendix C-II.

poraneously with California's admission into the Union.

The Government's contention rests on two arguments. First, it urges that the terms in question have their origin in the common law concept of proprietary rights in tidelands (U. S. Answering Brief, p. 181), and hence that the low water line should be defined by analogy to the common law property rule applicable to the line of ordinary *high* tide which defines that line as the mean of all high tides. (*Borax Consolidated, Ltd. v. Los Angeles,* 296 U.S. 10, 26-27 (1935).) Secondly, the Government relies upon expert testimony that the non-technical term "ordinary low water mark" as used by this Court in the 1947 decree herein (322 U.S. 804, 805) should be understood as having the same meaning as the technical term "mean low water" which was said to be the mean of all low tides, and argues that the term "line of ordinary low water" as used in the Submerged Lands Act necessarily has the same meaning as the term "ordinary low water mark" as used in the decree.

The United States' contentions as to the criteria for determining the line of ordinary low water again illustrate the inconsistency of the position they are urging upon this Court. In effect, they are urging the adoption of United States foreign policy (as of 1953) in defining the status of inland waters, and the adoption (at least in part) of private property principles in defining the line of ordinary low water. (See U. S. Brief in Support of Amended Exceptions, pp. 17-22.) California has previously shown that in the conduct of its foreign relations, the United States, by its ratification of the 1958 Geneva Convention on the Territorial

Sea and the Contiguous Zone (U.N. Doc. A/Conf. 13/L. 52), has unequivocally adopted the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State" (Article 3); that this position is in confirmation of the American recommendation and the Second Sub-Committee report at the 1930 Hague Conference (3 *Acts of Conference for the Codification of International Law, supra,* 197, 217); and that the large-scale charts officially adopted by the United States use the line of lower low water. (Calif. Brief in Support of Exceptions, Vol. I, pp. 114-18.) Thus, there can be no doubt, and the United States does not deny, that if the Government were correct in its basic contention that questions of ownership under the Submerged Lands Act are to be determined as matters of external sovereignty, the line of lower low water would be proper.

Although California does not, of course, accept the premise that principles of external sovereignty are determinative, we have recognized that international law analogies may be relevant in defining a State's historic seaward boundaries and hence in resolving questions of interpretation under the Submerged Lands Act. This is illustrated by the case of *Manchester v. Massachusetts,* 139 U.S. 240, 264 (1890) which holds that a state's power to define its seaward boundaries must be exercised within the limits of the law of nations. Consequently, where, as here, we are faced with the necessity of choosing between analogies to international law principles and analogies to private property concepts, the former are clearly more appropriate. As heretofore pointed out, Congress intended to define state ownership in terms of state territorial or gov-

ernmental jurisdiction. (*United States v. Louisiana, supra,* 363 U.S. at 19-20.) This governmental jurisdiction was never dependent upon common law property concepts.

The comparatively small horizontal distances involved in using one criterion for determining the line of ordinary high or low water as against another may be of substantial significance to an adjacent landowner for purposes of determining his private property rights in valuable shoreline lands. However, for purposes of defining the seaward limits of the governmental jurisdiction of either the State or the United States, the vital considerations of certainty and ease of determination far outweigh minor differences as to the extent of such jurisdiction. There can be no question but that this certainty and ease are far better served by a baseline clearly delineated upon officially adopted maps than by one which is merely a mathematical abstraction which must be determined by computations over an 18.6 year period.

The historic use of the line of mean lower low water upon United States Coast Survey Charts at or near the time of California's admission into the Union is illustrated by the letter of January 13, 1964, from Rear Admiral James C. Tison, Jr., Deputy Director of the United States Coast and Goedetic Survey, a copy of which is attached as Appendix A hereto.[40] This letter

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[40]The Report of the Superintendent of the Coast Survey showing the progress of the survey during the year 1854 bears the legend ". . . the mean of the lowest low water of each 24 hours—the plane of reference" on a chart entitled "Reconnaissance of the Western Coast of the United States, Middle Sheet, from San Francisco to Umpquah River 1854". *Report of the Superintendent of the Coast Survey, etc.,* Sketch No. 42. J, No. 2 (Washington, 1855).

states that the line of low water shown upon Survey T-892 (an 1859 Coast Survey Map of the California shoreline from Point Fermin eastward to the San Gabriel River) "represents the line of *mean lower low water* in an area other than ledge[41] as determined by the topographer." (Emphasis added.)

The expert testimony referred to by the United States (U. S. Answering Brief, pp. 179-80), is to the effect that the term "ordinary low water" would always be understood as meaning mean low water, that is the mean of all low waters. This might be true in the context of private property rights. That it is emphatically *not* true in defining the seaward limits of the governmental jurisdiction of the United States is shown by the following language of the American recommendation at the Hague Conference of 1930:

> "The term 'low water' and 'low tide,' as used in this Convention, mean the low water base-line which is employed by the coastal State for the particular coast, whether it be the line of mean low water, the line of lower low water, the line of mean low-water spring tides, or some other similar line of reference." 3 *Acts of Conference, supra,* 201.

For the reasons stated above, the criterion herein urged by the United States is similarly inappropriate for determining the seaward boundary of the State's governmental jurisdiction, which boundary is of fundamental significance under the Submerged Lands Act.

Finally, the Government asserts that this Court has already determined in the original decision in this case

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[41]Where the shoreline consists of a ledge or cliff, there is, of course, no horizontal difference between the lines of high and low tide, and hence, no low tide line is shown.

(332 U.S. 19) that the term "ordinary low water mark" constitutes the mean of all low waters. (U. S. Answering Brief, p. 180.) One looks in vain for any language in this decision which would support this contention. Moreover, if the Court had so determined, there would have been no occasion to submit to the Special Master the question "by what criteria is the ordinary low water mark on the coast of California to be ascertained," as this Court did. (342 U. S. 891 (1951).) Furthermore, it seems highly unlikely that this Court intended to resort to a mathematical abstraction in determining the scope of the "paramount rights" of the United States. In any event, whether the Court had so decided is no longer of concern. The issue now is the meaning of the term "line of ordinary low water" as used in Section 2(c) of the Submerged Lands Act.

IV.

THE STATE DEPARTMENT LETTERS ARE NOT CONCLUSIVE UPON THIS COURT, NOR DO THEY ACCURATELY SET FORTH WELL ESTABLISHED OR TRADITIONAL CRITERIA GOVERNING DELIMITATION OF INLAND WATERS BY THE UNITED STATES.

Although it is now settled that the division of the seabed of the continental shelf between the Nation and the States is purely a domestic matter (*United States v. Louisiana, supra,* 363 U.S. at 35)[42] the Govern-

[42]In the *Louisiana case,* the Government had contended that the judicial ascertainment of state boundaries under the Submerged Lands Act must be regarded as limited by Executive policy on the extent of territorial waters. (363 U. S. at 32-33.) This argument was rejected, this Court stating: ". . . a state territorial boundary beyond three miles is established for purposes of the Submerged Lands Act by Congressional action so fixing it, *irrespective of the limit of territorial waters.*"

ment endeavors to circumvent that holding by continuing to urge that the location of the California's seaward boundary must be resolved by the application of United States foreign policy criteria. (U.S. Answering Brief, p. 34.) Despite California's conviction that the Executive policy of the United States in its foreign relations is entitled to no primary weight as a determinant of a domestic matter between it and the United States, we shall answer on the merits the Government's contentions that: (a) the declarations of the Department of State are a conclusive statement of the principles for fixing the inland waters of the United States; and (b) the declarations of the Department of State correctly set forth the principles historically followed by the Executive Branch in the conduct of international relations.

A. The State Department Letters to the Attorney General Are Not Conclusive in Fixing the Status of Inland Waters Under the Submerged Lands Act.

The plaintiff seeks to invest two State Department letters[43] allegedly setting forth the policy and practice of the Executive Branch for fixing the inland waters of the United States, with an aura of sanctity. No matter how self-serving they may be or how inaccurate, plaintiff insists that they are conclusive as to the

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(363 U. S. at pp. 35-36.) (Emphasis added.) Later, on page 51 of 363 U. S., this Court added:

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

[43]These letters are appended to U. S. Answering Brief, Appendix A3, 4, pages 6a-13a.

matters stated therein and that they are not subject to collateral attack. (U.S. Answering Brief, pp. 43-48.) Essentially, the Government asks this Court to hold that a purely domestic dispute between the Nation and a State in an equitable proceeding can only be decided in 1964 by accepting as determinative two letters written in 1951 and 1952, respectively, by the State Department to the Attorney General for use in this very case. Before the Special Master these letters were intended to establish the then existent and past foreign policy of the United States. (U.S. Answering Brief, p. 43.) Now these letters are invoked to prove United States foreign policy in 1953 when Congress passed the Submerged Lands Act, which later date the Government currently regards as controlling. (U.S. Answering Brief, p. 48.) In declining to accept the State Department's letters as conclusive evidence of past foreign policy, the Special Master wrote: "I do not think that any of the cases cited by counsel or any others that I have been able to find go quite that far. (Cf. *Vermilya-Brown Co. v. Connell,* 355 U.S. 377, 380.)" (Rep. p. 22.)

1. The Cases Cited by Plaintiff Do Not Support Its Claim as to the Conclusive Nature of the State Department Letters.

The plaintiff has cited no case wherein a letter from the State Department has been held conclusive in any litigation between the United States and one of its states. Instead, the Government does cite cases wherein certificates from the Secretary of State have been held conclusive as to a person's diplomatic immunity or lack thereof (*e.g., In re Baiz,* 135 U.S. 403, 422, 432 (1890)) or the sovereign immunity of a ship. (*e.g., Ex*

parte Peru, 318 U.S. 578, 589 (1943).) We do not quarrel with a principle which requires recognition of a certificate from the State Department as determinative of the diplomatic status of individuals or property. Such a principle does not compel a conclusion that a statement of *past policy* must be accepted without question. Nor does it follow that actions of the State Department in domestic matters must be deemed conclusive.

The cases relied upon by plaintiff fail to establish the conclusive character of the State Deparment letters herein discussed.

In *Jones v. United States,* 137 U.S. 202 (1890), pursuant to Congressional action, sovereignty over the Island of Navassa and the power to prosecute criminally under the laws of the United States, necessitated a Presidential proclamation that the island appertained to the United States. The Court accepted as sufficient a proclamation issued by the Secretary of State containing the requisite determination for the reason that the acts of the Secretary of State were in legal contemplation the acts of the President. (137 U.S. at 217.) Sovereignty was established not because the proclamation of the Secretary of State was conclusive evidence of sovereignty, but because his action was held to be Presidential action as required by statute.

Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) involved the location of the eastern boundary of the Louisiana Purchase. There the Court said: "A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature." (27 U.S. at 308.) This is completely consistent with Cali-

fornia's view herein that the extent of the State's seaward boundary is totally dependent upon the intent of Congress in adopting the Submerged Lands Act.

The question of sovereignty over leased military bases in Bermuda was not in issue in *Vermilya-Brown Co. v. Connell,* 355 U.S. 377 (1948) although the Secretary of State had submitted a letter reciting that the arrangements under which the leased areas had been acquired from Great Britain did not and were not intended to transfer sovereignty to the United States. Rather the case turned upon whether an act of Congress was intended to apply to American citizens on those bases. Thus the Court stated:

> ". . . We have no occasion for this opinion to differ from the view as to sovereignty expressed 'for the Secretary of State . . .'"

and

> ". . . Nothing in this opinion is intended to intimate that we have any different view from that expressed for the Secretary of State. In the light of the statement of the Department of State, we predicate our views on the issue presented upon the postulate that the leased area is under the sovereignty of Great Britain. . . ." (335 U.S. at 380.)

The foregoing does not warrant the construction that the Court was powerless to deviate from the view expressed by the Secretary of State.

On the other hand, courts will decide for themselves questions of the extent of sovereignty absent an act of Congress or a treaty. As *In re Cooper,* 143 U.S. 472, 503 (1892) held:

"We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.' "

Similarly the English courts have said:

". . . If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions." (*The Zamora* [1916] 2 A.C. 77, 97.)

Finally, this Court has pointed out that in areas of international law where there is a greater degree of codification or consensus, courts are freer to decide cases independently of so-called political branches.

". . . It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more ap-

propriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with a national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implication of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." (*Banco Nacional de Cuba v. Sabbatino,* 376 U.S. ....; 84 S.C. 923, 940 (1964).)

"There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law." (84 S.C. at 941, n. 34.)

As the Special Master noted, ". . . the policy of the United States in its international relations is expressed perhaps more often by acts than by policy declarations, . . ." (Rep. p. 22.) We believe that the actions of the Government are more reliable evidences of foreign policy than any self-serving declarations of the State Department. Hence, if foreign policy is deemed relevant, we ask this Court to scrutinize the acts of the United States and ascertain therefrom what the policy, if any, of the Government was at any particular time.

2. This Court Need Not and Should Not Accept the State Department Letters as Conclusive.

The basis for the rule that courts will accept declarations of the State Department as conclusive on certain political questions is the desire to avoid embarrassment to the Executive Branch in its conduct of foreign affairs. *Republic of Mexico v. Hoffman,* 324 U.S. 30, 35 (1945). The decision in this case cannot possibly affect the foreign relations of the United States, since the dispute involves purely a domestic matter which does not concern any other nation. The Government attempted, in its argument in the cases involving the extent of the Submerged Lands Act as applied to the Gulf States, to raise the same issue. There the plaintiff urged that the refusal of the State Department to recognize boundaries in excess of three miles resulted in a decisive limitation on the extent of all state maritime boundaries for purposes of the Act. Similarly, the Government contended that a letter from the Secretary of State summarizing historical Executive policy on the subject was conclusive and binding on the Court. *United States v. Louisiana, supra,* 363 U.S. at 32-33. Emphasizing the domestic nature of the matter before it, the Court stated:

> ". . . In our view of the issues in this case we do not reach the government's contention that the Secretary's letter would be conclusive upon us as to the existence of that policy" 363 U.S. at 33, n. 55.

Furthermore, the Government admits that the foreign policy of the United States as to the delimitation of inland waters has changed since 1953 and is now carefully embodied in the 1958 Geneva Convention on

the Territorial Sea and Contiguous Zone, ratified by the United States on March 24, 1961. (44 State Dept. Bull. 609; 2 International Legal Materials 527, 528 (1963); U.S. Answering Brief, pp. 30, n. 17, 147-49.) Assuming, but not conceding, that the pertinent inquiry is to establish United States foreign policy as of 1953, such a determination cannot in any wise affect the present policy or embarrass the State Department. There is thus no reason for plaintiff to invoke the unilateral pronouncements of the State Department herein.

The particular letters sought by plaintiff to be binding on this Court in this case should be viewed with extreme scepticism, in the light of their history. They were obviously written for purposes of litigation, in a case of great magnitude. There is no evidence that the letters in question or their contents were ever disseminated to any foreign governments. They do not appear, nor are they mentioned, in the two volumes of *American Foreign Policy, 1950-1955, Basic Documents* (Dept. of State Publication 6446 (1957)), even though documents relating to the subject of the delimitation of the territorial sea are included (*Id.* Vol. I, pp. 302-23, 1346-56). Most important, as will be soon demonstrated, the letters are not accurate. For example, these letters are at variance with the January 6, 1950 Memorandum to the United Nations (U. S. Memorandum of the Regime of the High Seas, annexed to a note to the United Nations, International Law Commission, II Yearbook 60, 61 (1950) in which the State Department relied on cases holding Monterey (*Ocean Industry, Inc. v. Superior Court, supra,* 200 Cal. 235 (1927)), and San Pedro (*United States v. Carrillo,*

supra, 13 F. Supp. 121 (S.D. Calif. 1935)) Bays to be inland waters, although these bays do not meet the criteria set forth in the letters in question. The Memorandum to the United Nations is the kind of document, along with treaties and statutes, from which the foreign policy of the United States should be ascertained. That Memorandum was communicated by the United Nations to all of the nations of the world, thereby informing all governments that these decisions represented the view of the United States Government in its foreign relations.[44]

We submit that the letters of the State Department, if considered at all relevant by this Court, should be treated for what they are, self-serving declarations written by plaintiff to itself for purpose of litigation.

B. The State Department Letters Do Not Accurately State the Past Position of the United States Because Up to That Time the Government Had No Well Established Policy as to the Delimitation of Inland Waters.

Heretofore, California has demonstrated that the United States had not, either as of 1947 or 1952, taken a consistent, uniform or traditional position establishing criteria for fixing the baseline of the marginal belt.[45]

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[44]As we noted in our Opening Brief (Calif. Brief in Support of Exceptions, Vol. I, p. 135) this Memorandum was cited by the Norwegian government in the *Anglo-Norwegian Fisheries Case* before the International Court of Justice. (3 International Court of Justice, *Fisheries Case, Pleadings, Oral Arguments, Documents,* 336-37, 758 (1951).)

[45]In support of this proposition see the detailed discussion in Calif. Brief in Support of Exceptions, Vol. I, pp. 70-85.

That the State Department letters of 1951 and 1952 were substantially wrong in purporting to show a past and present established United States' policy and adherence to specific criteria for determining whether a particular adjacent area of the sea constituted inland waters, is shown by the following specifics.

1. In 1927, in a note to the Chairman of the International Fisheries Commission, Under Secretary of State Grew, wrote:

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

The Government believes that Mr. Grew was referring to a lack of "generally (*i.e, internationally*) accepted standards." (U. S. Answering Brief, p. 94.) Assuming this to be so, even though in the very next sentence Mr. Grew alluded to "applicable general principles of international law," the significant thing is that the Secretary did not urge the standard which the United States says was an integral part of its well established foreign policy, namely, that bays and gulfs with openings exceeding ten miles constituted high seas.

2. The State Department's letter of July 13, 1929, to the Norwegian Legation, recited:

> "The geographic points for drawing up the basic lines for the territorial waters and the fishery boundary, with the exception of certain limited areas covered by special treaty or agreement, *have not been determined by the United States.* Agencies of the Federal Government have made their own determinations for administrative purposes; for example, the Steamboat Inspection Service has made certain decisions regarding lines separating inland waters from the high seas. *However, no final determination has been made which would be binding alike upon all agencies of the Federal Government.*
>
> "No general statute defines the territorial waters of the United States." (1 Hackworth, *Digest, supra,* 644-45.) (Emphasis added.)

The Government offers the partial explanation that while the United States had not determined the "geographic points" for drawing the baseline of its marginal sea, this does not mean that it had not adopted principles by which those points could be determined. (U. S. Answering Brief, p. 96.) However, it is more reasonable to conclude that the Government would not have submitted so meaningless a reply to Norway, when the inclusion of settled criteria would have furnished substantial assistance to that power. Specifically, Norway had asked for "copies of any regulations which might exist regarding the delineation of the political coastline or the drawing up of the limit between internal and territorial waters." (1 Hackworth, *Digest, supra,* 644.) The inference to be drawn is that the United States

either did not have or was unable to select established criteria. This is substantiated by that portion of the State Department's letter which asserts that various Federal Agencies have made their own determinations and that no final determination has been made which would bind all such agencies.

3. In *United States v. Carrillo, supra* (13 F.Supp. 121), the United States District Court held that San Pedro Bay from Point Fermin to Point Lasuen, a distance of more than ten miles and thereby not meeting plaintiff's asserted criteria, were State inland waters. Apparently, no established Governmental policy or criteria were offered to, or were located by, the Court. While the plaintiff criticizes the District Court for having examined "the practice of governments, explorers, geographers, etc." instead of having secured an authoritative statement from the Executive Department (U. S. Answering Brief, p. 115), the opinion discloses that the court relied upon "Ancient and more modern maps, *as well as maritime publications of the United States Government.* . . ." (13 F.Supp. at 122.) (Emphasis added.)

4. Further evidence that the traditional policy or criteria alleged by plaintiff was neither well defined nor even widely known within the confines of the Government itself, is revealed by the *amicus curiae* brief filed by the United States Attorney for the Southern District of California in *People v. Stralla, supra* (14 Cal.2d 617), when, in obvious departure from the Government's avowed traditional position, its lawyer argued:

> "It is not necessary to the accepted definitions of a bay that it be landlocked or semi-landlocked to a marked degree." (Calif. Brief in the Proceedings Before the Special Master (June 6, 1952), App. 3, p. 12.)

5. Moreover, if traditional United States foreign policy embraced precise criteria for identifying those bays qualifying as inland waters, it is difficult to understand why the *Ocean Industries* (200 Cal. 235) and *Carrillo* (13 F.Supp. 121) cases were reported in the official publication of the State Department in 1940, since these decisions held that two bays were part of California although they did not meet the alleged established criteria. 1 Hackworth, *Digest, supra,* 694-95, 708-10.[46]

6. Also militating against a claimed well-established foreign policy in delimiting inland waters, are the writings of Professor Hyde, former Solicitor for the State Department. Professor Hyde enumerated various indentations in the Alaskan coast which he suggested the United States could claim, and he further stated that the outer reaches of Penobscot Bay, in Maine, between certain islands ". . . are understood to be deemed by the United States to be part of its territorial waters." 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States,* 473 (2d ed. 1945). Taking issue with Professor Hyde's assertions, the Government comments: "Obviously, the State Department's formal statement of what it has done . . . is not to be impeached by Professor Hyde's opinion as to what the

[46]The plaintiff asserts that the *Carrillo* judgment, while binding on the Government in regard to prosecution of that defendant, has not become part of the official position of the United States on the general question of territorial limits. (U. S. Answering Brief, p. 115.) The inclusion of the *Carrillo* case in the State Department's digest would appear to be an adoption of that case as part of United States foreign policy.

United States *might* do, or by his 'understanding' of what it has done . . .". (U. S. Answering Brief, p. 102.) However, the former State Department Solicitor's divergent opinion as to what the United States might do, or has done, is itself persuasive evidence of an absence of settled policy or well-defined criteria on the subject.

7. Additionally, it is significant that the plaintiff, before the Special Master in 1949 and 1950, in outlining materials in support of its case, failed to mention the existence of any well-established United States policy or settled criteria for defining inland waters. Specifically, in his Report of May 22, 1951, the Special Master stated:

> "*Neither party contends, or proposes to submit any evidence to prove, that the criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitely adopted by the United States* or established as customary rules of international law." (Rep. p. 8.) (Emphasis added.)

and

> ". . . *It being conceded that criteria now advanced by the parties have not heretofore been definitely adopted by the United States* or established as existing rules of international law, . . ." (Rep. p. 34.) (Emphasis added.)[47]

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[47]The Special Master indicated that he had received from counsel for the plaintiff certain documents setting forth the position of the plaintiff and material in support thereof. (Rep. p. 4, n. 2.) A review of the cited documents shows that there is not the remotest reference to the fact, if it be one, that the United States had adopted the proposed criteria in its international relations, or that a letter from the State Department on the subject would be forthcoming.

8. Finally, in 1950 the State Department in its Memorandum to the United Nations[48] cited *United States v. Carrillo, supra* (13 F. Supp. 121), and *Ocean Industries, Inc. v. Superior Court, supra* (200 Cal. 235), as supporting the traditional position of the United States. Yet these cases recognized that San Pedro and Monterey Bays, respectively are within California's boundaries although neither bay conforms to the criteria embodied in the State Department letters under discussion. Plaintiff disposes of this Memorandum to the United Nations as dealing with the regime of the high seas and having nothing to do with defining the baseline of the marginal sea. (U. S. Answering Brief, p. 94.) What the Government ignores is the fact that this Memorandum was an official statement of the United States Government on foreign policy and was distributed to all the nations of the world. Therein, the United States relied upon two cited cases holding that Monterey and San Pedro Bays were part of California. Any foreign government would have to conclude that the United States claims these two bays as inland waters as against the world.

California is convinced that as of the date the State Department letters of 1951 and 1952 were written, the United States did not have a well-established policy or sufficiently defined criteria to measure inland waters. Under such circumstances, not only should these letters be denied conclusive status, but they should be accorded little, if any, weight.

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[48]United States Memorandum on the Regime of the High Seas, annexed to a Note to the United Nations, United Nations International Law Commission, II Yearbook 60, 61 (1950).

V.

THE ONLY LIMITATION ON THE STATE'S POWER TO ESTABLISH ITS TERRITORIAL BOUNDARIES IS IMPOSED BY THE LAW OF NATIONS, AND CALIFORNIA'S HISTORIC SEAWARD BOUNDARIES HAVE BEEN ESTABLISHED IN A MANNER FULLY CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LAW.

Erroneously, the United States argues that the only submerged lands to which California is entitled are those inland waters claimed by the United States in 1953 in its relations with foreign governments. (U. S. Answering Brief, pp. 34, 147.) Instead, the scope of the restoration of submerged lands to California under the Submerged Lands Act is to be ascertained within the framework of the State's historic boundaries. *United States v. Louisiana, supra.* (363 U.S. at 19-20.)

In determining a state's boundaries at the time of its entry into the Union, the extent thereof is subject only to limitations imposed by international law. As this Court stated in *Manchester v. Massachusetts,* 137 U.S. 240 (1890):

> "The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; . . ." (137 U.S. at 264.)
>
> "Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; . . ." (*Ibid.*)

Previously, California established that its claims are consistent with international law, as of 1850, 1952 and today. (Calif. Brief in Support of Exceptions, Vol. I,

pp. 46-59, 84-141.) Plaintiff has virtually ignored these contentions, and attempts to answer them indirectly, by twofold assertions: that California's claims are not consistent with United States foreign policy as of 1953 (U. S. Answering Brief, pp. 145-78); and that California has not historically asserted sovereignty over the disputed area (U. S. Answering Brief, pp. 171-78).

A. The Court Is Not Limited to the Law in Effect on the Date of the Submerged Lands Act.

Unsupported by any authority, the Government argues that the law in effect at the date of the enactment of the Submerged Lands Act must be applied in this case. (U. S. Answering Brief, pp. 29-30, 146-48.) Such position depends upon the assumption that Congress intended to freeze the definition of coastline and inland waters as of that date. However, Congress envisioned a changing coastline (99 Cong. Rec. 2697) and foresaw the possibility of a future change of the definition of inland waters by the courts. (99 Cong. Rec. 2757.) Moreover, Congress deliberately refused to define the questioned terms, and left their meaning to be ascertained by the courts by reference to the basic purpose of the Act. (S. Rep. No. 133, 83rd Cong. 1st Sess., p. 18.) The only importance attributable to the date 1953 is that it happened to be the year in which Congress chose to confirm the historic expectations of the states by restoring to them submerged lands within their historic boundaries. (*Cf.* 99 Cong. Rec. 2634.)

A cumulative reason for rejecting 1953, now urged by the Government, as the date controlling the applicable law, is the equitable nature of the instant proceeding where the vital time is that of the ultimate de-

cision. (*Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456, 466 (1943); *American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921); and *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921).) Actually, before the Special Master, plaintiff had contended that the status of inland waters and the boundary lines between inland waters and the marginal sea should be adjudged on the basis of the law in effect at the time of the entry of a supplemental decree. (U. S. Brief Before the Special Master, 163-66.) Here, the necessity to look to the law as it exists at the time of the final decree is unusually compelling since there now exist in international law well-defined rules of general application which will prove useful in ascertaining the meaning of "inland waters" as employed in the Submerged Lands Act, whereas such rules were not available in 1953 and prior thereto.[49]

B. The United States Has Failed to Show That California's Claims Violate International Law.

The Government denies that California's claims to the inland water status of any of the disputed areas can be recognized under any international law principles. (U. S. Answering Brief, p. 145.) We shall answer the United States' contentions seriatim.

1. California May Invoke Principles of International Law Crystallized After 1953.

California regards the field of international law as a legitimate aid in interpreting the meaning of undefined terminology used in the Submerged Lands Act.

[49]See discussion in Calif. Brief in Support of Exceptions, Vol. I, pp. 87-90.

We are convinced that as of 1952, there were no definite, generally applicable rules of international law concerning the delimitation of the marginal sea. (Rep. pp. 8-9; *Anglo-Norwegian Fisheries Case* (*United Kingdom v. Norway,* [1951], I. C. J. Rep. 116, 129-31).) Since the issuance of the Special Master's Report, the United States has ratified the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, *supra,* so that for the first time this Government has indicated its adherence to internationally recognized principles for determining the baseline of the marginal belt.

In one breath the United States urges that the 1958 Geneva Convention may not be applied in this case, ". . . except to the extent that, as a codification of the prior law, it may shed light on what that law was," and that "[i]ts innovations have no effect here." (U. S. Answering Brief, p. 148.) Yet, the plaintiff has no hesitancy in asking this Court to apply a completely new international law principle, favorable to the Government's position herein. Specifically, the Government concedes that the so-called "Boggs formula" for determining whether coastal indentations are inland waters has never received international recognition,[50] and plaintiff urges its replacement by the "semicircle" test, which the United States admits is an innovation (U. S. Answering Brief, pp. 68, 91) pursuant to Article 7(2)

[50]The Government states "In any event, as the Special Master pointed out, there is no coastal indentation in California, less than 10 miles wide, that was disqualified as inland waters merely for failure to comply with the Boggs formula." (U. S. Answering Brief, p. 69.) This Special Master was dealing only with those segments before him. In fact, Bodega Bay, which is less than 10 miles wide, fails to meet the Boggs formula, but meets a semi-circle test. This bay was not before the Special Master.

of the Geneva Convention. Plaintiff's willingness to select and apply to this case favorable new international law principles from this Convention should dispel the Government's opposition to acceptance of the entire Convention.

2. The Santa Barbara and Other Channels Between the Mainland and Islands Lying Off the Southern California Coast Are Not International Straits.

The Santa Barbara Channel is described by plaintiff as a used and useful channel for international traffic between areas of high seas. (U. S. Answering Brief, p. 155.) Also, because the United States has insisted that specific international straits, such as the Straits of Magellan, the Danish Sound and the Strait of Canso, remain free for navigation (U. S. Answering Brief, pp. 121-30), the Government argues that the Santa Barbara Channel and other channels between the mainland and islands lying off the Southern California coast similarly should be kept open. (*Id.* pp. 151-53.) California does not quarrel with the proposition that international law requires that truly international straits do not constitute inland waters and must remain open to navigation of all nations. (*Corfu Channel Case* [1949], I. C. J. Rep. 4.) What we dispute is the classification of the Southern California channels as international highways or straits.

The Government's evidence of the international use of the channels in question is at best ambiguous. (U. S. Answering Brief, p. 152, n. 117.) One witness before the Special Master indicated that the usual route from the Pacific Northwest to the Canal[51] was outside the

[51]Presumably the Panama Canal.

islands and that some ships sail inside the islands. (Tr. pp. 589, 595.) Whether the Pacific Northwest referred to American or foreign ports and whether in American or foreign ships, is not indicated. Another witness merely stated that ships "coming down possibly from the north" through the islands receive better protection than along the outside route (Tr. p. 602, 608) without indicating whether such ships were American or foreign and whether their ports of origin and destination were American or foreign. This evidence falls short of establishing that California's channels are international highways. Nor does the testimony support a contention that the channels are a "useful route" in the same sense as the Corfu Channel.[52]

If the California channels are to be compared to any other bodies of water, an analogy to the Strait of Juan de Fuca should be drawn. In 1846 the United States and Great Britain divided this body of water (1 Moore, *Digest of International Law* 658) which has an opening of over 12½ miles and reaches a width of 17 miles. (See map, opposite p. 54 of Vol. I, Calif. Brief in Support of Exceptions.) Relative to the apportionment of the Strait of Juan de Fuca, the plaintiff says: "[i]t is, however, by no means clear that the United States has regarded this as an international claim to the strait." (U. S. Answering Brief, p. 103.) On the contrary, the United States has regarded the division of this Strait as an international claim. In a letter of

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[52]In the *Corfu Channel Case, supra,* the International Court of Justice noted the large volume of international shipping that used the Corfu Channel during a short period of time, and the fact that foreign navies had used the Channel for many years. ([1949] I. C. J. Rep. at 29.)

May 22, 1891 from Acting Secretary of State Wharton to the Secretary of the Treasury it was stated that:

> ". . . The straits of Juan de Fuca are not a great natural thoroughfare or channel of navigation in an international sense; and in view of their situation it is not apprehended that any other nation can make reasonable objection to the jurisdiction of the Government of the United States and of Great Britain over their entire area. The breadth of the narrowest point is believed to be about ten miles, but is not equal to the width of the Delaware Bay and other bodies of water over which, on account of their situation, the United States have felt authorized to assume jurisdiction." 1 Moore, *Digest, supra,* 658-59.

Certainly, the Strait of Juan de Fuca which separates Vancouver Island from the State of Washington and leads to great ports of two nations, is of far greater international signficance than the California channels. If international law and United States policy in 1846 permitted the aforesaid division of the Strait of Juan de Fuca on the theory that it was not a channel of navigation in the international sense, *i.e.,* not an international strait, it is submitted that current principles of international law fully warrant regarding the Santa Barbara Channel and other channels between the Southern California mainland and offlying islands, as part of the territory of California.

3. California May Utilize the Straight Baseline System.

The Government concedes (U. S. Answering Brief, p. 155) that Article 4 of the 1958 Geneva Convention codifies the principles enunciated by the International

Court of Justice in the *Anglo Norwegian Fisheries Case* ([1951] I.C.J. Rep. 161), which held that a straight baseline system of delimitation of inland waters is not violative of international law. The Government contends, however, that the system is permissive only, and has never been utilized by the United States so that "[i]t would be utterly disruptive of any coherent and responsible foreign and defense policy to accept California's suggestion . . . that a coastal State of the Union may make its own decision as to how far the United States is to avail itself of the possibility of drawing straight baselines." (U. S. Answering Brief, p. 157.) This fear is unjustified because California is not attempting to bind the United States in its foreign relations to any particular system of delimitation. Nor does California assert that the United States has adopted the straight baseline system permissible under the *Fisheries Case*. What California does claim is that in defining its territorial limits it has not exceeded the law of nations, which is the only restriction on the State's power to prescribe its boundaries on the sea. *Manchester v. Massachusetts, supra,* (137 U.S. at 264.)

4. California's Claim to Areas as Historic Inland Waters Are Valid.

Plaintiff denies that the doctrine of historic waters may be applicable to waters off the California coast absent affirmative acts by the United States national government recognizing such status. In the plaintiff's own words: "The establishment of maritime limits is a political matter in the field of foreign policy . . ., and as such it is necessarily within the exclusive province of the federal government." (U. S. Answering Brief, p. 166.) As we have consistently emphasized,

United States foreign relations are not in issue herein; rather the question is the domestic one of identifying those areas which California has always regarded as its inland waters. Additionally, the Government misconstrues the role that the several states play in the foreign relations of this nation. As far as other nations are concerned, the actions of state governments, laws and constitutions are the actions and laws of the United States unless repudiated by the Federal Government.

> "[A]cts *prima facie* law are subject to international cognizance whether issuing from state or national organs. They may not be accepted as definitive however, if their validity is denied by the President. Thus state constitutional or legislative provisions are not really law if in conflict with the national constitution, laws, or treaties; and acts of congress or treaty provisions are not law if in conflict with the Constitution. If the President discovers such a conflict and denies the validity of the purported law his interpretation is conclusive for foreign nations, even though it differs from the view of the court." (Wright, *The Control of American Foreign Relations,* 40 (1922).)[53]
>
> "With reference to the making of national decisions, foreign nations may accept the voice of the President as authoritative. Purported national or state laws and the acts or utterances of subordinates to the President, presumably subject to his

[53]Foreign governments frequently take cognizance of state acts which violate international law and protest against them. See, *e. g.,* Wright, *The Control of American Foreign Relations, supra,* pp. 30, 32; 3 Hackworth, *Digest, supra,* 685, 755-56; 5 *Id.* 169, 596.

> instructions, are the only other pronouncements on this subject which may be considered authoritative, and they cannot, if their validity is promptly denied by the President. On this subject foreign nations are not expected to know the constitutional provisions defining the competence of national organs." (*Ibid.*)

Thus, unless repudiated by the national government, acts of the various states will be recognized internationally. Indeed, as the passage quoted by plaintiff (U. S. Answering Brief, p. 164) from the U.N. Study on *The Juridical Regime of Historic Waters* (U.N. Doc. A/CN. 4/143 (1962)) makes clear:

> "In the first place the acts must emanate from the State *or its organs.*" (*Id.* at 42.) (Emphasis added.)

The Government intimates that the United States could repudiate and disclaim any acts by the State of California. (U.S. Answering Brief, pp. 113, n. 89, 166, 169.) This is so. However, we are not aware that the United States has ever advised a foreign nation that the Government disclaims any act of jurisdiction over coastal waters by the State of California. To the contrary, the State Department has affirmatively relied on the cases holding Monterey Bay (*Ocean Industries, Inc. v. Superior Court, supra,* (220 Cal. 235)) and San Pedro Bay (*United States v. Carrillo, supra,* (13 F.Supp. 121)) to be part of the territory of California in a document[54] sent to the United Nations

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[54]United States Memorandum on the Regime of the High Sea, annexed to a Note to the United Nations, United Nations International Law Commission, II Yearbook 60, 61 (1950).

and communicated to all the nations of the world. These cases were also reported in the State Department's official digest of international law (1 Hackworth, *Digest, supra,* 694-95, 708-10) and together with *People v. Stralla, supra* (14 Cal. 2d 617) pertaining to Santa Monica Bay, have received and continue to be accorded widespread international recognition.[55]

Conclusion.

In the last analysis this Court is charged with doing equity between the Federal Government and the State of California in the domestic matter of dividing the floor of the continental shelf in the manner intended by Congress in enacting the Submerged Lands Act. In the sense that we are not now trying to locate the baseline under this Court's decree or pursuant to the recommendation of the Special Master, his report is obsolete. Under the former approach of the Court in *United States v. California,* and the approach of the Special Master and the parties, the historic boundaries of the State were considered irrelevant. With the adoption of the Submerged Lands Act the historic boundaries of the State, as approved by Congress, became more than relevant, they became crucial. Thus in conformity with the philosophy of the Act, the current need

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[55]Two very recent books cite the California cases. (Bouchez, *The Regime of Bays in International Law,* 235-37 (1964); Strohl, *The International Law of Bays,* 280-83 (1963).) To our knowledge these cases have never been criticized (except in the Government's brief herein) nor has the United States ever disavowed their holdings.

is to restore the historical expectations of California according to its claims, understandings and usages. To effectuate that objective, for the reasons set forth in all of its briefs, California respectfully requests:

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

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

3. That, in the alternative, this Court enter its decree declaring that the coast line of the State of California is the line of ordinary low water, defined in accordance with the criteria set forth in California's Briefs, along that portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of all water areas in controversy before the Special Master; and that the State of California has title to and ownership of, and the right and power to manage, ad-

minister, lease, develop, and use all lands beneath navigable waters, and the natural resources within such lands and waters, lying landward of a line three geographical miles from those portions of the coastline so defined.

Respectfully submitted,

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Attorney General of California,

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KEATINGE & STERLING,
RICHARD H. KEATINGE,
Of Counsel.

Dated: July 28, 1964.

APPENDIX A.

Letter of January 13, 1964 From Deputy Director Tison, U. S. Coast and Geodetic Survey, to California State Lands Division.

In Reply, Please Address the Director,
Coast and Geodetic Survey, and Not the
Signer of this Letter, and Refer to
No. 835
January 13, 1964
0305

U.S. DEPARTMENT OF COMMERCE
COAST AND GEODETIC SURVEY
WASHINGTON 25, D.C.

State Lands Division
Attn: Mr. D. B. Davidson
305 State Building
Los Angeles 12, California

Gentlemen:

The following is an identification of the lines on survey T-892 referred to in your letter of January 7, 1964, your file No. W. O. 2716:

(1) The dotted line adjacent to shore represents the line of mean lower low water in an area other than ledge as determined by the topographer. This is generally somewhat approximate in position.

(2) The first inner solid line represents the line of mean high water or in marsh areas, the outer limit of the marsh as it would appear to the navigator at mean high water.

(3) The second solid line upland from the mean high water line may represent;

a. The 20-feet contour line above mean high water, or

b. The inner limit of the marsh area shown by the cross hatching or

c. Top or bottom of a cliff or bluff shown by hachures.

You can probably specifically identify the feature you refer to as the second solid line.

Sincerely yours,

(Signed) James C. Tison, Jr.
James C. Tison, Jr.
Rear Admiral, C&GS
Deputy Director

APPENDIX B.

Southern California's Coastal Counties Include the Waters Between the Mainland and the Offlying Islands, and This Has Been Recognized on Federal Maps From 1885 to 1963.

The United States asserts that California has not historically exercised sovereignty over the waters between the State's mainland and offshore islands. To sustain this contention, the Federal Government relies heavily upon its interpretation of California's state and county boundaries. (U. S. Answering Brief, pp. 171-176 and Appendix B.)

In this Appendix, California will show that: (1) the technical application of California county boundary descriptions by the Federal Government is improper since such descriptions are to be liberally applied; (2) because of the absence of precise maps at the time of California's admission into the Union, California's county boundary descriptions cannot be literally applied in all instances; and (3) the Federal Government itself, from 1885 to 1963, has employed maps plotting the boundaries of the Southern California Coastal counties as extending into California's Overall Unit of inland waters.

1. County Boundaries Are to Be Interpreted Liberally to Effectuate the Intent of the Legislature.

In discussing California's contentions concerning the Overall Unit Area, the Federal Government erroneously seeks to apply strict rules of construction to the plotting of county boundaries (U. S. Answering Brief, pp. 173-176, and App. B) when, in fact, the rules invoked by the United States are designed for determining

private property rights, whereas county boundaries are to be liberally construed.

In interpreting a municipal boundary[1] which was described as beginning "at the Hudson River" and with a last course running "northerly along the Hudson River to the place of beginning," the New Jersey Supreme Court held that the boundary extended to the center of the river, stating:

> ". . . [T]he description of municipal boundaries is not construed with the same strictness as those outlining the boundaries in grants or contracts. . . ." *Ross v. Mayor and Council of Borough of Edgewater,* 115 N.J. Law 477, 180 Atl. 866, 868, 871 (1935); affirmed 116 N.J.L. 447, 184 Atl. 810 (1936); *cert. denied* 299 U.S. 543.

California courts have held that county boundaries are to be liberally construed.

> ". . . If there is any uncertainty in the statute describing the [county] boundary, it will be construed liberally in support of the evident intention of the Legislature. (*County of Mariposa v. County of Madera,* 142 Cal. 50 [75 P. 572].)" *Bishel v. Faria,* 53 Cal. 2d 254, 258, 347 P.2d 289 (1959).

This same rule of liberal construction has been emphasized in a Florida decision where the inclusion of a phrase in the legislative definition of the boundaries of the City of Sarasota made it impossible to plot the boundaries so that they would enclose an area. In dis-

---

[1]In this discussion the rules concerning both county and city boundaries are the same since the Legislature must define each of their boundaries. See: *Laramie County v. Albany County,* 92 U.S. [2 Otto] 307, 308 (1875).

regarding the phrase as superfluous and ineffectual, the Court said:

> ". . . It is idle to speculate on how and why they [the words of the phrase] were included in the act. Suffice it to say that, applying the ordinary rules of surveying, pertaining to the running of boundary lines, as well as the dictates of common sense, the description as a whole, as contained in the act, clearly describes and encloses a definite area or tract of land. All reasonable presumptions must be indulged by the courts in favor of the validity of legislative enactments, and the rules with reference to the construction of descriptions of municipal territory in acts of the Legislature are more liberal than those applying to descriptions in notices of incorporation and resolutions adopted by incorporations of municipalities under our general laws.
>
> "In *Lane v. State,* 63 Fla. 220, 57 So. 662, it was said:
>
> " 'Where the description of territory incorporated as a municipality by a special law does not utterly fail to cover some area, and the description is not so uncertain as to make it impossible to determine the territory intended to be included in the municipality, the law is not void for uncertainty of description.' " *State v. City of Sarasota,* 92 Fla. 563, 109 So. 473, 477 (1926).

The reason for such construction is twofold. First, a proceeding to establish a county boundary

> ". . . does not involve any question of title to real property, or of the correct boundaries of land, as

> between private claimants. In determining any such question with respect to said ranchos, of course the lines of the patents would govern."
>
> *San Bernardino County v. Reichert,* 87 Cal. 287, 289, 25 P. 692 (1890).

Regardless of where a county boundary is determined to be located the rights of private land owners to possess their lands are unaffected. Thus, in the *Reichert* case it was held that a line incorrectly drawn between two ranchos was the actual boundary line between San Bernardino and San Diego Counties since it was the specific line the Legislature intended to adopt. This would not prevent the owners of the ranchos from having the line resurveyed to establish their rights under their respective patents although such a survey would not affect the county boundary line.

> "Counties are merely local subdivisions of the state, created by the legislature for governmental purpose, and are denominated public corporations for the reason that they are but parts of the machinery employed in carrying on the political affairs of the state. . . ."
>
> *Los Angeles County v. Orange County,* 97 Cal. 329, 331, 32 P. 316 (1893).

The second reason for a liberal application of county boundary descriptions is the fact that legislative enactments must be harmonized with the organic law of the state, *i.e.*, a state's constitution. As the California Supreme Court stated in determining that Monterey Bay was entirely within the boundaries of California:

> ". . . In interpreting this act [defining Santa Cruz County], intended to set off the land and water

> area of California into appropriate political subdivisions, we are to do so in such a way as to reconcile its terms if reasonably possible, with the language of the constitution, since it would not be presumed to be the intent of the legislature to do that which it would have no power to do, viz., to exclude from the jurisdiction of the state of California or its political subdivisions any of its land or water area which have been embraced therein by the express terms of its constitution. This being so, if there are any ambiguities in the act in question they are to be resolved in harmony with the text of the organic law."
>
> *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 243-244, 252 P. 722 (1927).

The Federal Government stresses the phrase "parallel to the coast" which appears in several of California's county boundary descriptions. Plaintiff asserts that this terminology places these county boundaries three miles from the mainland. (U. S. Answering Brief, p. 175, App. B pp. 20a, 22a, 23a, 28a.) This construction has been rejected by California's Supreme Court:

> ". . . The petitioner, however, lays especial emphasis upon the description reading, 'Thence in a northerly direction *parallel to the coast* to the point of beginning.' When, however, we read the act in its entirety we find that the phrase 'parallel to the coast' is repeatedly applied with reference to the general coast lines of every coast county described therein, regardless of the bays and inlets along said respective coast lines. Reasonably interpreted this phrase may bear a meaning entirely consistent with the phrasing of the constitution which includes

within the state boundaries 'all *islands,* harbors and *bays* along and adjacent to the coast.' " (Emphasis added to word islands.)

Ocean Industries, Inc. v. Superior Court, supra (200 Cal. at 244.)

Moreover, the plaintiff seeks a literal construction of section 3907 of the California Political Code of 1872 (U. S. Answering Brief, p. 21a), which states:

"3907. The words 'in,' 'to,' or 'from' the ocean shore mean a point three miles from shore. The words 'along,' 'with,' 'by,' or 'on' the ocean shore, mean a line parallel with and three miles from the shore." (Currently Calif. Government Code § 23075.)

However, the *Ocean Industries* case, *supra* (200 Cal. at 244) makes it clear that the terminology used in county boundary descriptions, must, if possible, be given a meaning consistent with the State's Constitutional boundary description. Thus, in the *Ocean Industries* case the Supreme Court of California held that the phrases "into the ocean" and "in the Pacific Ocean," as used in the statutory descriptions of the boundaries of Santa Cruz and Monterey Counties respectively, meant that the three mile belt is to be measured from a line joining the headlands of Monterey Bay and not from the shore of the bay itself.

As will be hereinafter shown, the words and phrases used in California's coastal boundary descriptions were interpreted by Federal Government cartographers during the period from 1885 through 1963 as projecting these seaward boundaries into the ocean for distances substantially in excess of three miles from the mainland.

2. The Historic Setting Surrounding the Creation of California's Counties Explains Discrepancies in Legislation Establishing the Boundaries of the Coastal Counties.

California has demonstrated that the State's boundaries as defined in its Constitution of 1849, and approved by Congress, included all lands and waters of the territory of Upper California ceded by Mexico to the United States. (Calif. Brief in Support of Exceptions, Vol. I, pp. 35-46.) As pointed out in the *Ocean Industries* case the Mexican government granted to the United States

> ". . . all of the ports, harbors, bays, and inlets along the coast of California and *for a considerable though perhaps indefinite distance into the ocean,* including dominion over the numerous islands lying therein adjacent to said coast."
>
> *Ocean Industries, Inc. v. Superior Court, supra,* (200 Cal. at 243).) (Emphasis added.)

In turn, California succeeded to the same sovereignty and dominion. *United States v. Carrillo,* 13 F. Supp. 121 (S.D. Calif. 1935).

It was the intention of the California Legislature to divide all the territory so included within the State's boundaries into counties, including coastal waters. *Ocean Industries, Inc. v. Superior Court, supra* (200 Cal. 235).

Actually, the task of correctly describing the counties was impossible because of a lack of accurate maps, as historic materials conclusively demonstrate.[2]

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[2](a) For example, The Report of Mr. de la Guerra on Counties and County Boundaries of January 4, 1850 to the California Senate, discloses:

The inaccurate and ambiguous nature of California's original county boundary descriptions has been widely

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"Mr. President:

"The Committee on Counties and County Boundaries, having to the best of their ability performed the task assigned to them, or rather that portion of task which relates to the subdivision of the State into Counties, beg leave respectfully to submit herewith the result of their labor, for the consideration of the Senate.

"The time, occupied by your Committee in this work, has been unavoidably protracted until now, on account of the circumstances and difficulties by which they were surrounded; such as the total absence of maps sufficiently correct to enable your Committee to determine, with requisite accuracy, the courses of rivers, mountains, and other natural landmarks, which they have been compelled to adopt, in most cases, as the limits of the different Counties."

Journal of the Senate of the State of California at their First Session, p. 411, Appendix E (1850).

(b) Lieutenant Washington A. Bartlett, U.S. Navy, assistant in the coast survey, in writing to the Superintendent of the Coast Survey on January 6, 1851 concerning the general character of the California coast, stated his belief as to the presence of the non-existent San Juan Island when he wrote:

"The islands which lie off the coast between Cape Conception and San Diego are not yet determined in position, with any very close approach to accuracy. . . . They are as follows: Santa Rosa, or Miguel, San Bernardo, Santa Cruz, Saint Nicholas, Santa Barbara, Santa Catalina, San Clemente, or Salvador, San Juan, and the Coronado isles."

Annual Report of the Superintendent of the Coast Survey Showing the Progress of the Survey During the Year 1851, House Ex. Doc. No. 26, 32d Cong. 1st Sess. p. 525, Appendix 48 (Washington 1852).

(c) The Progress Map 1849-51, Sketch J, Sketches Accompanying the Pacific Coast Survey for 1851 shows an unnamed island between San Clemente Island and San Diego.

Sketches Accompanying Report of Coast Survey for 1851, House Ex. Doc. No. 3, 32d Cong. 2d Sess., Sketch J.

(d) Writing in 1858 George Davidson, Assistant Superintendent of the Coast Survey described early technical knowledge concerning California's coastline at the time it came into the Union.

"Islands of the Santa Barbara Channel.

". . .

"Until the Coast Survey first examined in detail the islands lying off the main, between San Diego and Point Conception, nothing accurate was known of their number,

recognized (Coy, *California County Boundaries,* pp. 1-56 (Berkeley 1923); *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 243-44, 252 P. 722 (1927); *County of Mariposa v. County of Madera,* 142 Cal. 50, 75 P. 572 (1904)), and has posed many problems.[3]

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peculiarities, extent, or position, Upon all maps, of as recent a date as 1850, an island called San Juan was laid down; and upon a map of the republic of Mexico, compiled in the United States, and dated 1847, we find no less than twelve large islands, the positions and extent of which are most grotesquely erroneous. The island of San Miguel, the most western of the Santa Barbara group, is placed 70 miles SE. of Point Conception, instead of 23 miles SE. by S. ½ S. The same general remarks will apply to the coast line as thereon represented."

Davidson, *Directory for the Pacific Coast of the United States,* 1858, p. 13.

(e) The first map showing the offshore islands without San Juan Island was not published until 1853.

Report of the Superintendent of the Coast Survey Showing the Progress During the Year 1852, Senate Ex. Doc. No. 58, 32d Cong. 2d Sess., Map. J No. 9 (Wash. 1853).

[3](a) Typical of the problems encountered in applying the original county boundaries is the fact that no "farm called Trumfo," the boundary of which was to be the point of beginning for Los Angeles County, could be found on any map. In 1851, the Legislature corrected this problem by adopting a new point of beginning.

Coy, *California County Boundaries* (Berkeley 1923) pp. 140-41.

(b) The original boundaries of Napa and Mendocino Counties also had to be clarified to overcome the fact that the lines described could not be made to conform to the topography of the country and they conflicted most radically with the well-defined boundaries of surrounding counties. Two of the problems encountered in applying the boundaries were that it was impossible to pass two creeks on the way to the summit of the Coast Range and it was impossible to follow the true summit and properly limit Napa County. Thus, the only way the boundaries could be applied was to approximate their location by reference to the adjacent counties.

Coy, *op cit,* pp. 8, 166-67, 187-90.

(c) Even after 1850, errors occurred in the descriptions of new counties which were carved out of the original counties.

Therefore the California Legislature, although intending to divide all of the State into counties, encountered considerable technical difficulties so that the resultant county boundaries did little more than reflect the general legislative intent.

3. Federal Government Maps Applying County Boundary Descriptions From 1885 to 1963 Have Shown Southern California Coastal Counties Extending From the Mainland to Include the Offshore Islands and Intervening Waters.

The Department of Interior in 1885 published a map of the State of California showing Southern California coastal county boundaries extending considerable distances from the mainland into the ocean. A portion of this map has been reproduced and is attached in Ap-

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An example of this was the fact that the north-south line separating Los Angeles County from the newly created San Bernardino County in 1853 was entirely disregarded by early maps and shown as running northwesterly instead. This boundary was redefined in 1872 to conform with the maps.
Coy, *op cit,* pp. 144-45.

(d) The Legislature in redefining Los Angeles County in 1856 completely ignored the fact that San Bernardino County had been taken from Los Angeles County in 1853.
Coy, *op cit,* p. 147.

(e) The California Legislature created a no man's land between Mariposa, Fresno and Madera Counties due to a mistake as to the location of Mt. Lyell in the Sierra-Nevada Mountains.
County of Mariposa v. County of Madera, supra (142 Cal. at 56-57).

(f) Two final examples of problems encountered with county boundaries follow: In 1852, the Legislature attempted to take Mare Island in San Francisco Bay from Solano County and place it in Sonoma County. The result was to exclude the island from both counties, a situation which had to be corrected by subsequent legislation. (Coy, *California County Boundaries, supra,* pp. 8-9.) Also, in 1852, the Legislature created Pautah County despite the fact that it was entirely outside California and within the Territory of Utah. (*Id.* at 9-10.)

pendix C-I. Similarly, a number of maps published by the United States Army Map Service place a segment of the Los Angeles — Orange County boundary, running in a north-south direction, considerably more than three miles from any point on land in the waters between Santa Catalina Island and the mainland. These maps also show the Santa Barbara — Ventura County and Ventura-Los Angeles County seaward boundaries as being more than three miles from land. The latest map showing these lines was published in 1963, and a copy thereof is attached as Appendix C-II.[4]

To aid the Court in understanding these federal maps and the county boundary descriptions, we have prepared a map of the Southern California coast, opposite p. 14, which combines the county boundary portrayals on the Government's 1885 and 1963 maps in heavy red, and the following lines:

a. A blue line indicating the base line claimed by California in this case;

b. Two narrow red lines indicating a base line drawn in conformity with the county boundaries shown by the federal cartographers in 1885 and a line three miles seaward thereof; and

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[4]Certain editions of the Army Map Service Maps contain an "Index to Boundaries" which further confirms that the water areas between the mainland and the Southern California islands are included within the coastal counties. This "Index to Boundaries" from the 1960 edition has been reproduced in the Appendix, p. 16, and is taken from a map entitled "LONG BEACH, UNITED STATES (California), NI 11-7, Prepared under the direction of the Chief of Engineers by the Army Map Service (AM) Corps of Engineers, Department of the Army, Washington, D. C. . . . [Interior-Geological Survey, Washington, D. C. — 1960 — NS, MR 0136]." The Ventura-Los Angeles County boundary line depicted on this Index runs almost to a point on a line drawn between the outermost islands.

c. A broken red line indicating our extension of the Los Angeles-Orange County boundary shown on the 1963 map of the Army Map Service.

California contends that the Government's maps, following a reasonable construction of the county boundaries, correctly depict these boundaries as running three miles seaward from a base line drawn from the mainland at the Mexican border to the nearest point on San Clemente Island and then around the outer rim of islands back to the mainland at Point Conception, thereby substantially enclosing the "overall unit area" claimed by California.

Originally, there were but three coastal counties in Southern California, *i.e.*, San Diego, Los Angeles, and Santa Barbara. In 1872, Ventura County was carved out of Santa Barbara County and in 1889, Orange County was carved out of Los Angeles County. In the ensuing discussion, we shall show how the aforesaid Federal maps disclose a rational and consistent method of drawing the seaward boundaries of the counties in question so as to include the offlying islands and the intervening waters and we shall also discuss the effect of the carving out of the two newer counties.

a *San Diego County*

The seaward boundary of San Diego County as of 1885 when the Department of Interior map was drawn, was described as follows:

> ". . . Beginning at south corner of Los Angeles in the Pacific Ocean, opposite San Mateo Point; thence northerly along the western line of Rancho Santa Margarita . . . [northerly, easterly, southerly, to] the boundary line between the United States

CALIFORNIA

PISMO BEACH

SAN LUIS OBISPO BAY

35°00'

Pt. Sal

Pt. Arguello

Pt. Conception

SANTA BARBARA

VENTURA

SANTA BARBARA CHANNEL

SANTA BARBARA COUNTY

Richardson Rock

SAN MIGUEL I.

SANTA ROSA I.

SANTA CRUZ I.

ANACAPA I.

34°00'

SANTA MONICA

LOS ANGELES

Pt. Dume

SANTA MONICA BAY

LONG BEACH

SAN PEDRO BAY

HUNTINGTON BEACH

SAN PEDRO CHANNEL

VENTURA COUNTY

LOS ANGELES COUNTY

LAGUNA BEACH

SANTA BARBARA I.

3 MILES

Begg Rk.

SANTA CATALINA I.

ORANGE COUNTY

OUTER SANTA BARBARA CHANNEL

SAN NICOLAS I.

OCEANSIDE

GULF OF SANTA CATALINA

PACIFIC OCEAN

SAN CLEMENTE I.

SAN DIEGO COUNTY

SAN DIEGO

MEXICO

LOS CORONADOS

33°00'

COUNTY BOUNDARIES AS INDICATED ON FEDERAL MAPS.

CALIFORNIA'S OVERALL UNIT AREA.

NAUTICAL MILES

0 10 20 30 40

120°00' 119°00' 118°00'

and Mexico; thence westerly, following that boundary line into the Pacific Ocean; thence northerly to the place of beginning."

(California Political Code § 3944 (1872).)

The most southerly broad red line shown on the map opposite page 14 is the San Diego-Los Angeles County boundary, as depicted on the Department of Interior map of 1885, these two counties having been contiguous at that date. It will be noted that this line is drawn normal (*i.e.*, perpendicular) to the general direction of the shoreline in that vicinity, in accordance with the generally prevailing rule applying to the seaward extension of land boundaries. (Grimes, *Clark on Surveying and Boundaries* § 638, pp. 758-59 (3d ed. 1959).) It should also be noted that the termination point of this line is located three miles seaward from a line drawn from the Mexican border to the nearest point on San Clemente Island. Thus, it is apparent that the line appearing upon the Interior Department's map was not drawn haphazardly or by accident, but that it constitutes a careful and deliberate depiction of the seaward extension of the San Diego-Los Angeles County boundary. The very slight discrepancy between the terminal point of this line and the outer limit of the Overall Unit Area contended for by California is explained by the fact that the Interior Department's map is apparently predicated upon a baseline commencing at the Mexican border, while California's baseline commences at Point Loma which is a natural headland. Both baselines terminate at the most southeasterly point of San Clemente Island and both embody the same fundamental concept of including the intervening waters within State and County boundaries.

b. *Orange County*

Orange County was created in 1889 after publication of the Interior Department's map of 1885. The intention of the Legislature was to carve this county out of the "southeast part of Los Angeles County. . . ." Calif. Stats. 1889, c. 110, § 1, p. 123. The second heavy red line (from the south) shown upon the map opposite page 14, is derived from the 1963 Army Map Service Map (App. C-II hereto), which in turn is based upon earlier maps issued by this Service.[5] This line portrays a segment of the Los Angeles-Orange County boundary line. It is located substantially more than three miles from any point of land. California's landward and seaward extensions of this segment are shown by a broken red line. It is noteworthy that this line, so extended, intersects the former Los Angeles-San Diego County line as shown on the Interior Department's map of 1885 at its most seaward point. This is in accordance with the aforesaid legislative intention to create Orange County wholly out of the southeastern part of Los Angeles County. Drawn in any other manner, the line appearing on the 1963 Army map (and upon earlier Army maps) would either have left a hiatus between it and the San Diego County line shown on the 1885 map, or would have intruded onto waters within the boundary of San Diego County as shown on the 1885 map. Thus, here again, it is apparent that the line in question was drawn by the Army Map Service

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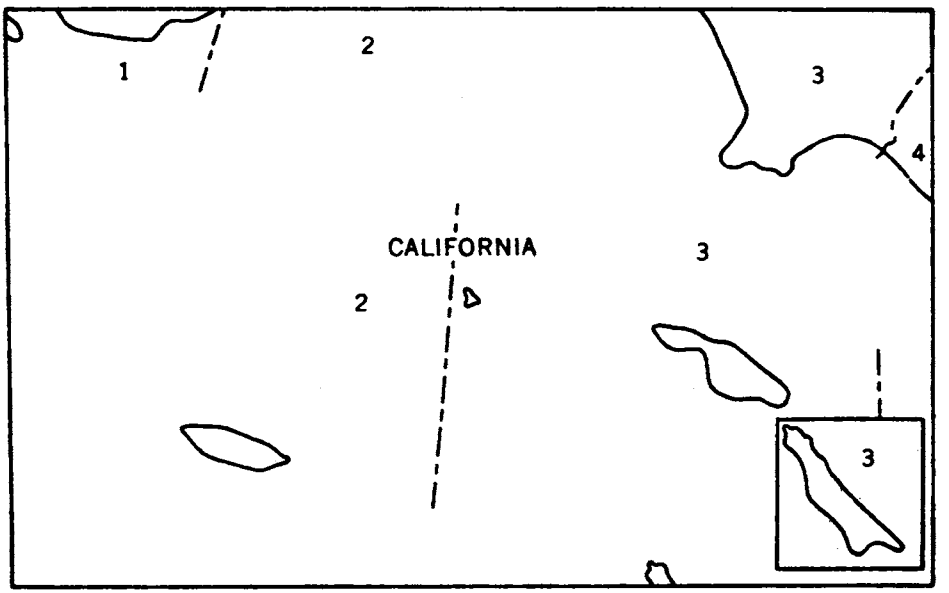
[5]*E.g.*, LONG BEACH, UNITED STATES, California, NI 11-7, A.M.S.Series V502, N3300-W11800/100 x 200, Army Map Service, Corps of Engineers, Department of the Army, 665033 11-49 (1949);

LONG BEACH, UNITED STATES, California, NI 11-7, Interior-Geological Survey, Washington, D.C.—1960—NS MR 0136 (1960).

INDEX TO BOUNDARIES



California Counties
1. Santa Barbara
2. Ventura
3. Los Angeles
4. Orange

Source: Long Beach, United States (California)—NI 11-7 Prepared under direction of Chief of Engineers by Army Map Service (AM), Corps of Engineers, Department of the Army, Washington, D.C.—Compiled in 1947 from United States Quadrangles, 1:25,000, 1:62,500, and 1:125,000, Corps of Engineers, 1923-1944; USC, & GS Charts, 1935-1946. . . . Road and railroad data verified by State authorities. Control by U.S. Coast and Geodetic Survey. INTERIOR—GEOLOGICAL SURVEY, WASHINGTON D.C.—1960—NS MR 0136;

Long Beach, United States (California) NI 11-7 A.M.S. Series V 502, N3300—W11800/100x200, Army Map Service, Corps of Engineers, Department of the Army, 665033 11-49 (1949).

carefully and deliberately so as to include intervening waters as contended by California.

c. *Los Angeles County*

The third broad red line (from the south) shown upon the map opposite page 14, is the Los Angeles-Ventura County boundary as shown upon the Department of Interior's map of 1885. The segment of this County boundary shown upon the 1963 Army map coincides with a portion of the 1885 line. It should be noted that the seaward terminal point of this boundary line is on a line three miles seaward of a baseline drawn from Santa Barbara Island to the southeasterly point of San Nicolas Island. Although this is not the baseline herein suggested by California, it is entirely consistent with our position that this baseline is to be drawn around the outermost islands. It seems clear that the terminal point was not selected at random, but that it was deliberately located so as to be consistent with the inclusion of the outer islands and the intervening waters within Los Angeles County.

The legal description of Los Angeles County in effect at the time of the 1885 Interior Department map was as follows:

> ". . . Beginning at southeast corner of Santa Barbara, *in the Pacific Ocean, at a point on extension line of the northern boundary* of the rancho called Malaga, western corner; thence northeasterly, so as to include said rancho, . . . [northerly, easterly, southerly]; thence southwesterly, on San Diego line as established in Section 3944, to northwest corner of San Diego, *in the Pacific Ocean;* thence northwesterly, along ocean shore to place of beginning;

including the Islands of Santa Catalina, San Clement, and *the islands off the coast included in Los Angeles County.*" (Emphasis added.) Calif. Political Code § 3945 (1872).)

This description is noteworthy in several respects:

1. It not only includes the named islands of Santa Catalina and "San Clement" but also includes "the islands off the coast included in Los Angeles County." Obviously, such additional islands would *not* be within the boundaries of Los Angeles County if these boundaries were drawn as alleged by the United States, *i.e.* as consisting of one line parallel to the shore of the mainland and other entirely separated lines creating a belt around each island.

2. The boundary line is described as going "to northwest corner of San Diego, in the Pacific Ocean; thence northwesterly, along ocean shore to place of beginning . . ." The United States has argued that the line *cannot* go northwesterly and still include San Clemente and Catalina Islands within a single compact area. (U.S. Answering Brief, App. B. p. 24a.) This argument, however, is based upon the assumption that the United States is correct that the "northwest corner of San Diego [County], in the Pacific Ocean" is located within three miles of the shore of the mainland. Thus, the Government's argument is circular. If, in fact, the northwesterly corner of San Diego County is located as alleged by California and as shown on the Interior Department's map of 1885 (*i.e.,* at a point three miles seaward of a baseline drawn from the extreme southerly end of the California mainland to the southeasterly tip of San Clemente Island), the boundary line of Los

Angeles County *can* be drawn "northwesterly" so as to include the named islands.

d. *Ventura and Santa Barbara Counties*

The fourth broad red line (from the south) on the map opposite page 14 hereof, is the Ventura-Santa Barbara County boundary which is shown upon the 1885 Interior Department map. A portion of this same line appears upon the maps issued by the Army Map Service. (See, *e.g.,* Exhibit C-II.) The seaward termination of this line is very close to a point on a line three miles seaward from a baseline drawn from the northwesterly end of San Nicolas Island to the nearest point on Santa Cruz Island. This baseline is similar to that proposed by California which goes from the same point on San Nicolas Island to Begg Rock and then to Santa Cruz Island.

The descriptions of Ventura and Santa Barbara Counties in effect as of 1885, the date of publication of the Interior Department map, were as follows:

Ventura County:

> ". . . Commencing on the coast of the Pacific Ocean, at the mouth of the Rincon Creek; thence following up the center of said creek to its source; . . . [northerly, easterly]; thence southerly along the line between the said Santa Barbara County and Los Angeles County to the Pacific Ocean and three miles therein; thence in a northwesterly direction to a point due south of and three miles distant from the center of the mouth of Rincon Creek; thence north to the point of beginning, and including the Islands of Anacapa and San Nicholas." (Calif. Stats. 1871-72, c. 351, p. 484.)

Santa Barbara County:

> ". . . Beginning at the western corner of Los Angeles, as established in Section 3945; thence northerly, on westerly line of Los Angeles, . . . [northerly, westerly] to the Santa Maria River; thence down said river, and down the creek which divides that part of Guadalupe [*Sic*] Rancho known as La Larga from that known as Oso Flacco, to a point in the Pacific Ocean opposite the mouth of said creek, forming northwest corner; thence southeasterly, by the ocean shore, to the place of beginning; including the Islands of Santa Barbara, San Nicolas, San Miguel, Santa Rosa, and Santa Cruz." (Calif. Political Code §3946 (1872).)[6]

The Ventura-Santa Barbara County boundary line shown upon the Federal maps is consistent with these verbal descriptions insofar as the boundary includes San Nicolas and Anacapa Islands within Ventura County, and Santa Cruz, Santa Rosa and San Miguel Islands within Santa Barbara County. They are incon-

[6]A plotting of the quoted descriptions of Ventura and Santa Barbara Counties would reveal that the entire area of Ventura County would be included within Santa Barbara County. This is explained by the procedure followed by the Legislature in 1872. The Legislature that year enacted the Political Code and therein re-defined the boundaries of the three original Southern California Coastal Counties, San Diego, Los Angeles and Santa Barbara. (Calif. Political Code §§ 3944-46.) The enactment of the Political Code was intended to precede in effect all other legislation at the session. (Calif. Political Code §§4478-79 (1872); Coy, *California County Boundaries, supra,* 37.) The Legislature then created Ventura County out of the eastern part of Santa Barbara County. (Calif. Stats. 1871-72, c. 351, §1, p. 484.) The Legislature did not, however, redefine the boundaries of Santa Barbara County to exclude the area of the newly created Ventura County.

sistent with regard to Santa Barbara Island which is verbally described as being within Santa Barbara County, but is shown upon the Federal maps as being in Los Angeles County. This inconsistency is discussed below.

e. *Santa Barbara Island*

The Government has correctly pointed out that Santa Barbara Island, although lying off the mainland of Los Angeles County, is included within the description of Santa Barbara County, and that this inclusion creates serious conflicts when the boundaries of Los Angeles, Ventura and Santa Barbara Counties are extended seaward in accordance with California's contentions. (U.S. Answering Brief, App. B, pp. 26a-27a, 29a.)

The original inclusion in 1850 of Santa Barbara Island within Santa Barbara County (Calif. Stats. 1850, c. 15, p. 59) is easily explained by the fact that this island is located very close to the seaward portion of the original southerly boundary of Santa Barbara County as it existed before the creation of Ventura County; and by the absence at that time of reliable cartographical data concerning the offshore islands (see *supra,* point 2 of this Appendix).[7]

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[7]Although cartographical data as to the actual locations of the various islands were probably available as of 1872, when Ventura County was created, the legislative history of the creation of that County indicates that the California Legislature was still unaware of the location of Santa Barbara Island and the problems created thereby. When Ventura County was carved out of Santa Barbara County by the Legislature in 1872, the legislative committee reports on this subject do not even mention Santa Barbara Island. The Report of the California Senate Committee on County Boundaries, in referring to the size of

It is the position of the United States that the conflict created by the inclusion of Santa Barbara Island within Santa Barbara County can only be resolved by placing a separate belt around each offlying island. However, it can also be resolved by placing this island within the boundaries of Los Angeles County. It is noteworthy, therefore, that later writers and cartographers *have* placed Santa Barbara Island within Los Angeles County,[8] and thus have recognized the necessity of resolving the problems created by the verbal description of Santa Barbara County, which problems would not exist if the United States position were correct.

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the then Santa Barbara County, included only the islands of San Miguel, Santa Rosa, Santa Cruz, San Nicolas and Anacapa as part of that County. (Sacramento Daily Union, Vol. XLII, March 2, 1872, p. 1, col. 4.) Similarly, the Report of the Assembly Committee on Counties and Boundaries reported only five rather than six islands in the original Santa Barbara County. (*Id.*, February 13, 1872, p. 1, col. 7.) In redefining the boundary of Santa Barbara County that year, however, the Legislature did include Santa Barbara Island within that county. (Calif. Political Code § 3946 (1872).)

[8]The Federal maps appended to this brief (App. C) both place Santa Barbara Island in Los Angeles County.

Lt. Cmdr. Wheeler placed this island in Los Angeles County in his discussion of the Channel Islands, which was based on " . . . the best information which could be found in the U.S. Naval and U.S. Coast and Geodetic Survey publications. . . ." (Wheeler, "California's Little Known Channel Islands," 70 *U.S. Naval Institute Proceedings,* No. 3, p. 258 (1944).)

". . . Santa Barbara Island, approximately 2 miles long by one mile wide just out of the sea about 40 miles off the shores of Los Angeles County in which jurisdiction it lies." ("A Guide to the Channel City", *American Guide Series,* W.P.A. Project, p. 76 (1941);

See also: Hillinger, *The California Islands,* 113 (1958).

Conclusion.

The above discussion shows that the boundaries of the Southern California coastal counties are reconcilable with California's position that each county consisted of a compact area, including both the offlying islands and the intervening waters. This position is supported by generally accepted rules for construing the boundaries of counties and other local entities. Inconsistencies in the seaward portions of these county boundaries are fully explained by the original absence of reliable cartographical data. The Federal maps show a deliberate effort to reconcile these boundaries with a baseline going around the outermost islands, which baseline is very similar to that urged by California in the present case.

APPENDIX C.

I.

1885 Department of Interior Map.

II.

1963 Army Map Service Map.

LONG BEACH

TO MOSAIC, CUT ALONG THIS NEATLINE AND OVERLAP ADJACENT MARGIN

EDITION 2-AMS

REFER TO THIS MAP AS:
NI 11-7
SERIES V502P

V502P
Edition 2-AMS (First Printing, 6-63)

Prepared by the Army Map Service (SX), Corps of Engineers, U.S. Army, Washington, D.C. Constructed and molded in 1963 from Western United States, 1:250,000, Series V502, Edition 2-AMS, Sheet NI 11-7, 1957.

Horizontal Scale 1:250,000; Vertical Scale 1:125,000 (Vertical Exaggeration 2:1)

20 Statute Miles
30 Kilometers
15 Nautical Miles

CONTOUR INTERVAL 200 FEET WITH SUPPLEMENTARY CONTOURS AT 100 FOOT INTERVALS

TRANSVERSE MERCATOR PROJECTION

BLUE NUMBERED LINES INDICATE THE 10,000 METER UNIVERSAL TRANSVERSE MERCATOR GRID, ZONE 11
THE LAST FOUR DIGITS OF THE GRID NUMBERS ARE OMITTED

1960 MAGNETIC DECLINATION FOR THIS SHEET VARIES FROM 15°15′ EASTERLY FOR THE CENTER OF THE WEST EDGE TO 15°00′ EASTERLY FOR THE CENTER OF THE EAST EDGE. MEAN ANNUAL CHANGE IS NEGLIGIBLE.

USERS NOTING ERRORS OR OMISSIONS ON THIS MAP ARE URGED TO MARK HEREON AND FORWARD DIRECTLY TO COMMANDING OFFICER, ARMY MAP SERVICE, WASHINGTON, D.C. MAPS SO FORWARDED WILL BE RETURNED OR REPLACED IF DESIRED.

SX 6-63 PRINTED BY ARMY MAP SERVICE, CORPS OF ENGINEERS

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Wm A. J. SPARKS, COMMISSIONER.
STATE OF CALIFORNIA.
Scale 15 Miles to 1 inch.
1885
Compiled from the official Records of the General Land Office and other sources
under supervision of
G. P. STRUM, Principal Draughtsman G.L.O.
Photo lith.& print by Julius Bien & Co. 139 Duane St. N.Y.
EXPLANATIONS.
State Capital
U.S. Surveyor General's Office
U.S. Land Offices
County Seats
Towns, Villages
Private Land Grants
Rail Road Land Grant Limits
Military Reservations
Indian
Boundary of Counties
Rail Roads completed
Townships Subdivided
Dry Lakebeds and Salt Lakes
FRESNO
INYO
TULARE
KERN
SAN LUIS OBISPO
SANTA BARBARA
VENTURA
SAN BERNARDINO
SAN DIEGO
TULARE LAKE
SANTA BARBARA CHANNEL
MEXICO
ARIZONA
Longitude West 42° from Washington
Drawn by G.P. Strum

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

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