NO. 9 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, TEXAS, ET AL.,
Defendants

REPLY BRIEF OF TEXAS IN OPPOSITION TO MOTION FOR INJUNCTION AND SUPPLEMENTAL DECREE

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QUESTIONS PRESENTED

1. Whether, for the purpose of measuring the limits of the grant to Texas, the term "coast line" in the Submerged Lands Act means the coast line as it existed in 1845, or the present coast line as such term was defined and applied by the Court in *United States v. California,* 381 U.S. 139.

2. Whether permanent jetties constructed as integral parts of harbor systems after 1845 form a part of the Texas "coast line" as that term is used in the Submerged Lands Act.

STATEMENT

Plaintiff's Statement (Brief, 3-8) adequately explains the status of the case and nature of the controversy, subject to the following amplifications:

Areas in Controversy

The present controversy involves only the location of those portions of Texas' three leagues of submerged land in the Gulf of Mexico opposite the permanent jetties which form integral parts of the harbor systems of the Ports of Galveston and Sabine Pass. They were constructed after 1875 and prior to 1950. See Plaintiff's Brief, 5-6, Fn. 4. Also, see Stipulation, Appendix B.

It is undisputed that such harbor works today form a part of the coast line, and that a line across their outer limits constitutes the baseline from which the Nation's territorial sea is measured.[1] The baseline status of such structures is described in a State Department publication, *Sovereignty of the Sea* (1965), as follows:

> ". . . permanent harbor works which form a part of the harbor system are regarded as a part of the coast. Thus, a breakwater or jetty may project the baseline seaward for hundreds of yards.'"[2] (p. 11).

In *United States v. California,* 381 U.S. 139, 175 (1965), the Court said:

> "The Convention on the Territorial Sea and the Contiguous Zone (Art. 8) states without qualification that 'the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.' We take that to be the line incorporated in the Submerged Lands Act."

The Government agrees that such baseline is followed

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[1]Article 8, Convention of the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639.

[2]*Sovereignty of the Sea,* U.S. Department of State, Geographic Bulletin No. 3, April 1965.

by the Nation, and it has heretofore asserted that Section 8 is apparently mandatory, stating:

> "Such, apparently, is the intent of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, 106 Cong. Rec. 11174, which provides that the outermost permanent harbor works 'shall be regarded' as forming part of the coast. A Norwegian proposal to substitute 'may be regarded,' to make the provision permissive rather than mandatory, was rejected by the conference committee that prepared the convention. United Nations Conference on the Law of the Sea: Official Records, Vol. III: First Committee (Territorial Sea and Contiguous Zone) Summary Records of Meetings and Annexes (U.N. Doc. A/CONF. 13/39), 141-142, 239. (p. 36)" Brief of the United States in Answer to California's Exceptions to the Report of the Special Master, June 1964, p. 36, *United States v. California,* supra.[3]

The inclusion of the harbor jetties as part of the baseline affects the extent of the seaward boundary only in the areas opposite the jetties. At such points, the "envelope" method of delimiting the seaward boundary results in a smooth perimeter line, all points of which are equidistant from the nearest point or points on the jetties, and a straight line drawn between the outer ends of the jetties.[3a] The method and effect

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[3]Previously in its Amended Exceptions in the same case, April 1964, at p. 23, the Government refers to the same action and said: "At the Conference, Mr. Francois, Expert to the Secretariat, successfully opposed a Norwegian proposal to substitute 'may be regarded' for 'shall be regarded,' saying that 'States had long regarded *harbour works such as jetties* as part of their land territory and that practice should be universally recognized as unchallengeable.'" (Emphasis supplied throughout unless otherwise noted.)

[3a]See Supplemental Decree in this case with reference to the Calcasieu Pass jetties (382 U.S. 288, 290) and Decree in

are illustrated on Exhibit A, opposite this page, which is from a State Department publication, *Sovereignty of the Sea,* Geographic Bulletin No. 3, April 1965, page 29.

The seaward arc opposite the jetties returns at each end to the three mile or three league distance from the natural coast line. The application made by the Court with reference to Calcasieu Pass Jetties in Louisiana is shown on Exhibit B on the reverse side of Exhibit A. See Supplemental Decree of December 13, 1965 in this case (382 U.S. 288) and the maps filed with the original papers.

The general effect of measuring from the baseline at the jetties of the Port of Galveston in the present proceeding is shown on Exhibit C, following Exhibit B.

United States v. California, 382 U.S. 448, with reference to San Pedro Harbor and Crescent City Harbor breakwaters; also, Shalowitz, *Shore and Sea Boundaries,* Vol. I, 169-172, U.S. Department of Commerce, Coast and Geodetic Survey, 1962.

EXHIBIT A

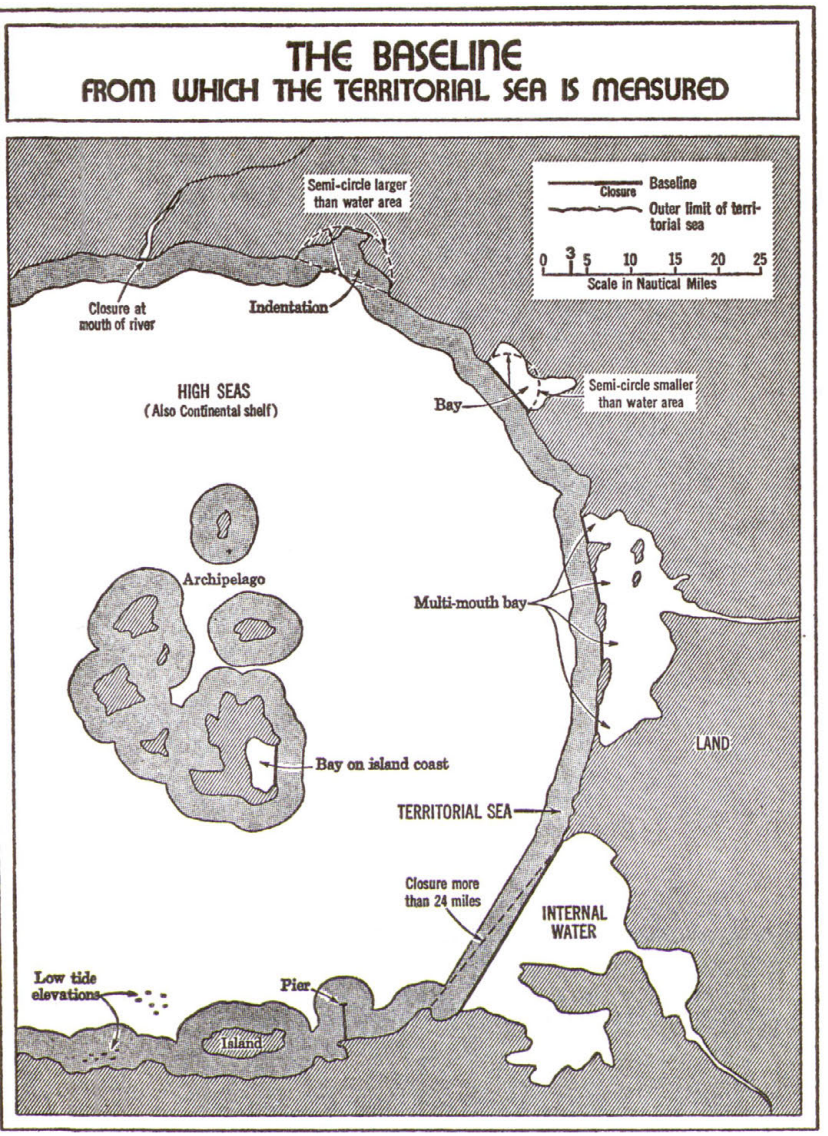
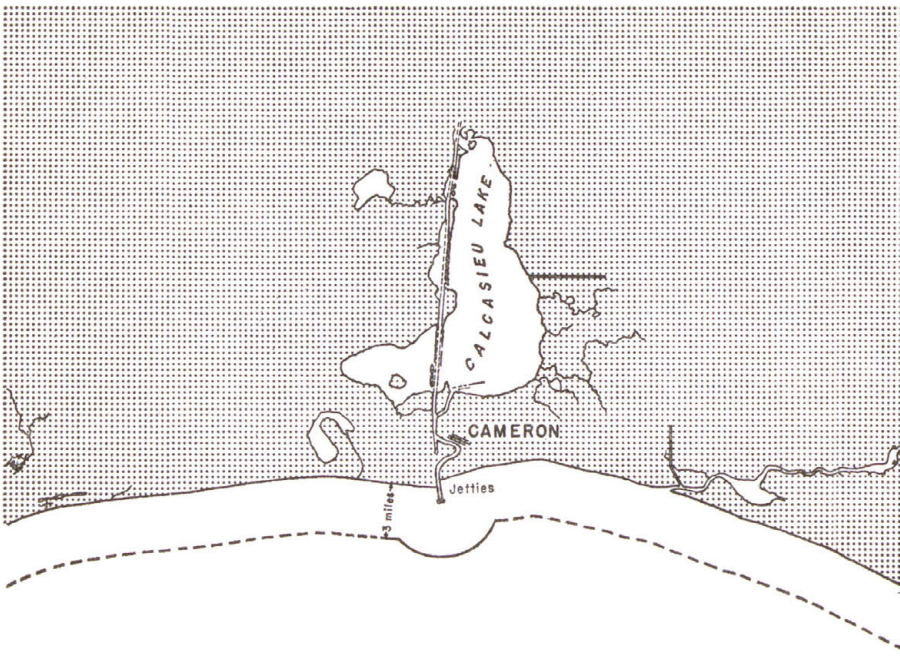


EXHIBIT A: Reprinted from *Sovereignty of the Sea,* U.S. Dept. of State, Geographic Bulletin No. 3, April 1965, p. 29. Note treatment of the artificial structure, "Pier," at bottom of drawing.



GULF OF MEXICO

EXHIBIT B

SHOWING AREA (Solid Line Arc) AWARDED TO LOUISIANA OPPOSITE THE CALCASIEU PASS JETTIES BY MEASURING FROM THE TIPS OF THE JETTIES. U.S. v. LOUISIANA, ET AL, 382 U.S. 288.

SOURCE: EXHIBIT 1, U.S.A. v. STATE OF LOUISIANA, ET AL NO. 9, ORIGINAL

EXHIBIT C

PREPARED BY
GENERAL LAND OFFICE - STATE OF TEXAS

Nature of the Controversy

The basic question is whether the baseline from which to measure the Texas grant is the ancient coast line as it existed in 1845 or the present coast line, which includes permanent harbor works constructed since 1845.

The Court held in *United States v. California,* supra, that the term "coast line" as used in the Submerged Lands Act means the present coast line, and that it is the same baseline as used by the United States in international relations. Over the objection of both the United States and California, the Court applied the present definitions contained in the *Convention of the Territorial Sea and Contiguous Zone* of 1958, in which some of the baseline provisions concerning bays were different from those which existed at the time the Act was passed (1953) and previously. In this connection, the Court said:

> "... It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions. We adopt them for purposes of the Submerged Lands Act. *This establishes a single coast line for both the administration of the Submerged Lands Act and the conduct of our future international relations* (barring an unexpected change in the rules established by the Convention). Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." (p. 165-166).

Use of the term "present coast line" in this statement and brief refers to the coast line called for in the Submerged Lands Act as interpreted by this Court in

the *California* case, which includes both past and future accretions and artificial structures and treats certain historic bays as inland waters. However, there are no "historic" inland waters involved in the present controversy.

The Government contends that an exception or different interpretation of "coast line" should be made as to Texas, so as to measure from its physical and legal location in 1845 rather than the present legal and geographical location. It seeks a Supplemental Decree, declaring (1) generally that as to Texas the term "coast line" as used in the Submerged Lands Act does not mean the present coast line but that it means the coast line as it existed when Texas became a member of the Union in 1845, and (2) specifically that such term does not include the jetties which form integral parts of the harbor system of the Port of Galveston and Sabine Pass, because they were constructed after 1845.

Texas contends that the statutory term, including its time element as heretofore interpreted by this Court in the *California* case, is applicable to all the coastal States alike; that the Government's contentions in this case are contrary to the Court's decision in the *California* case and to the basic decision and decree in this case.

ARGUMENT

I. THE TERM "COAST LINE" AS USED IN THE SUBMERGED LANDS ACT IS EQUALLY APPLICABLE TO ALL COASTAL STATES AND MEANS THE PRESENT COAST LINE, INCLUDING PERMANENT ARTIFICIAL STRUCTURES WHICH FORM INTEGRAL PARTS OF HARBOR SYSTEMS.

II. THE TERM WAS SO INTERPRETED AND APPLIED IN U.S. V. CALIFORNIA, 381 U.S. 139. THAT DECISION IS CONTROLLING HERE.

The Government's contentions in this case are not only contrary to the holdings of this Court in the *California* case, but they are also contrary to the final position taken by the Government in that case after the passage of the Submerged Lands Act.

Prior to the enactment of the Submerged Lands Act, the Government had argued before the Special Master that the term "coast line" meant the line that existed when California became a member of the Union, and that it did not include artificial harbor works which were constructed after 1850. The arguments were the same as it now presents in the present proceeding.

However, after the enactment of the Submerged Lands Act, the Government changed its position before the Court and conceded that the Act called for the then existing coast line and that this included artificial harbor works which existed on the date of the Act, but not those constructed thereafter. The following excerpts are from the Government's Briefs:

> "The Submerged Lands Act made a present grant, measured by the low-water line and limit of inland waters as they were on the date of the Act (May 22, 1953)."[1]

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[1]Brief of the United States in Answer to California's Exceptions to the Report of the Special Master, June 1964, p. 12. *United States v. California*, 381 U.S. 139. Three times the Plaintiff referred to the Act as a grant *"in praesenti"* in stressing the date of the Act as the time applicable to the definitions of the baseline. (Id., 26, 35, 147.)

"The Submerged Lands Act, on the other hand, is a grant *in praesenti* to California of the submerged lands within three miles of its 'coast line' and must be understood to refer to *the coast line that existed on the date of the Act, May 22, 1953.*" (Id., 26)

* * *

"Indeed, the enactment of the Submerged Lands Act in essence restricts the scope of exceptions which the United States had taken to the Special Master's conclusion that, with respect to artificial changes in the shore and changes in the law, the boundary was to be fixed as of 1947. We took the position there that California's rights in submerged lands were to be measured by the coast line that existed when California entered the Union in 1850, including artificial works then in existence. However, we asserted that artificial changes subsequent to 1850 were of no effect so far as California's proprietary rights were concerned. (Fn. 16) As our Brief in Support of Amended Exceptions to the Special Master's Report (filed April 1, 1964), pp. 22-26, makes clear, *we now concede that the Submerged Lands Act, by making a grant measured from the coast line in existence on the date of the Act, has given the State the benefit of artificial works in existence at that time.*" (Id., p. 29).

In the Plaintiff's Amended Exceptions, last above referred to, the Government said with special reference to harbor works:

"The conclusion to be drawn from the foregoing discussion—that artificial changes in the shore line, including man-made harbor works, should have no effect on the extent of California's proprietary rights in submerged lands—has been modified somewhat by the Submerged Lands Act. That Act

granted to California the submerged lands of the Pacific Ocean within three miles of the coast line, defining the 'coast line' as '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.' Sections 2 and 3, 43 U.S.C. 1301 and 1311.

"In our judgment, Congress intended this definition to embrace the same shore line and outer limit of inland waters *as were then recognized for purposes of international law.* Those were the actual shore, whether natural or artificial, (Fn. 16) and the outer limit of inland waters, whether naturally or artificially enclosed, (Fn. 17)."[5]

* * *

"But while we do not dispute that the Submerged Lands Act granted a belt of submerged lands measured from artificial extensions of the coastline existing on the date of the Act, the grant is not to be understood to include artificial extensions made thereafter. The grant made by the Act was wholly in present terms, that the interests therein described 'are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States' and their successors." (Id., 25).

Note that some of the foregoing statements made on behalf of the United States referred not alone to California but to the meaning of "coast line" generally applicable under the Act to all the coastal States. That they were so intended is fully demonstrated by legislative history cited by the Government (Id., 24-25) showing that the same existing coast line, including

[5]Amended Exceptions of the United States to the Report of the Special Master, April 1964, pp. 22-23.

artificial structures, was intended for all the States electing to claim it.[6]

It is not understandable how the Government can contend in this case for such an inconsistent interpretation of the same Act and the same definitions, especially after this Court's decision in the *California* case. However, in fairness, the Government's Brief herein does preface many of its arguments with such phrases as "the statutory reference *may be* construed" or "*may* be understood" (p. 10), "*seems* to grant" (p. 12), and "we think it arguable" (p. 15). It contains this further admission with reference to its Point I:

> "*The reading of the Submerged Lands Act just suggested is not the only permissible one.* The purpose of Congress in granting the Gulf States the submerged lands *within* their boundaries 'as they existed' when the State was admitted into the Union may well have been to give each such State, not the particular area that it claimed at the time, but the area it would today enjoy if its historic boundary had been effective against the claims of the United States, held to be paramount in *United States v. Texas,* supra. There is support for this view in the Court's first opinion in the present case. See 363 U.S. at 26-28." (Id., 16).

In any event, the Court held in the *California* case that the term "coast line" as used in the Act means the present coast line, including the outermost limits of permanent harbor works. In spite of the Government's capitulation as to baseline segments (harbor works and seaward extent of inland waters) as they

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[6]See also Closing Brief of the United States in Support of its Exceptions to the Report of the Special Master, July 1964, pp. 6-10, *U.S. v. California,* supra.

existed in 1953, the issue of "present" vs. "past" coast lines still remained in the case, because the Government contended that changes in the coast line by artificial means or new legal concepts since 1953 should not apply.[7]

After reviewing the legislative history, the Court held that Congress had left this question of baseline to the Court, and it held that the coast line at the time of the survey or decree controls. The Court adopted the definitions contained in the present Convention of 1958 as applicable to the term "coast line" for the purposes of the Submerged Lands Act, and held that it includes future natural or artificial accretions and artificial structures theretofore or thereafter built.

A. SAME ISSUES RAISED AND DECIDED IN THE *CALIFORNIA* CASE.

The present case does not involve any artificial structures or legal concepts which were not in existence in 1953. The structures were built before 1953, and the Government concedes that the present baseline rule with reference to harbors has existed at least since 1930. (Plaintiff's Brief, pp. 21, 29-41). This case does, however, involve another effort by the Government to fix a past or ancient coast line instead of the present coast line, as that term has been defined by this Court for the purposes of the Submerged Lands Act.

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[7]Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, June 1964, pp. 146-149. The main issue was whether the ten mile rule for bays which existed in 1953 should be used in determining that part of the baseline marked by the seaward extent of inland waters or the present twenty-four mile rule established by the Convention of 1958.

Raising the same issues and making the same arguments as those which were overruled in the *California* case, the Government urges that an exception should be grafted onto the Act in the case of Texas and Florida simply because the limits of their historic seaward boundaries were held in this original action to presently extend more than three miles from the coast line defined in the Act. This, in spite of the fact that the Act has only one "coast line" definition applicable alike to all the coastal States.

The Act plainly applies the same term as the baseline from which to measure the grant (whether three miles or three leagues) to all coastal States. The Government has pointed out no distinction within the Act and no legislative history in support of its contention that the Congress intended the term to mean the present coast line for some States and the ancient coast line for others. As held in the *California* case, Congress actually left the definition or amplification of this term to the Court, and the Court has adopted the concept of the present coast line for the purposes of the Act.

The only legislative history cited by Plaintiff (Brief, pp. 13-14) is an exchange between Senators Cordon and Long which disproves rather than supports the theory that an ancient coast line was intended to be used. It referred to Section 4 and the establishment of new boundaries, not to Section 2. Senator Cordon opposed Senator Long's proposed amendment permitting a State to set new boundaries from ancient coast lines, and it was withdrawn.

It is interesting to note that the Government itself used part of this same colloquy to prove a completely opposite interpretation (the one Texas contends for

now) in its Amended Exceptions (Infra, Fn. 5, p. 24) in the *California* case, as follows:

> "As noted (supra, p. 16) the Senate committee which reported the Submerged Lands Act specifically rejected a proposed definition of inland water, stating 'that the question of what constitutes inland waters should be left where Congress finds it.' The legislative history of the Act contains evidence that Congress accepted the line then drawn in international law along the edge of lands which had been artificially filled. See, for example, the Statement of Senator Long in the course of the Senate committee hearings on the bill (Hearings, S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess. (Pt. 2), p. 1357):
>
> > 'The bill spells out two things: One, that where the States have reclaimed land, they are entitled to take that reclaimed land and they can measure *their present coastline* out 3 miles from where, by action of man, they have reclaimed land. . . . Where there have been accretions, both manmade and natural, *it is agreed under the terms of this bill that the coastline would be measured from the outward limit of those accretions.*'
>
> "That statement was near the end of several pages of discussion of boundary questions, and apparently reflected the consensus of the committee as disclosed by that discussion. It was not questioned by anyone."

Also, the Court referred to the same colloquy in its *California* opinion, noting the statements by Senator Cordon, that the term "coast line" is used "in the present tense." Senator Cordon said, "It is the coast line as of now . . .", and he argued against the use of an-

cient or historic coast lines.[8] Referring to the latter statement, the Court said:

> "That statement was made in reply to a suggestion that a State should have the choice of extending its boundaries three miles from its present coastline or three miles from its coastline as of the time it entered the Union. Senator Cordon's reply expresses his opposition to that idea on the ground that the exact location of the ancient shoreline would be extremely difficult to determine. It reveals no intent to restrict the courts in framing the definitions to be used to determine the *present coastline.*" *U.S. v. California,* supra, Fn. 33, p. 166.

In overruling the contentions of the Government on that part of the coast line marked by the seaward limit of inland waters, the Court held:

> "The United States contends that we must ignore the Convention on the Territorial Sea and the Contiguous Zone in performing our duty of giving content to 'inland waters' as used in the Submerged Lands Act, and must restrict ourselves to determining what our decision would have been had the question been presented to us for decision on May 22, 1953, the date of enactment. . . . It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act." (Id., p. 164).

With specific reference to harbor works, the Court held:

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[8]Senate Hearings 1354-1355: quoted in *United States v. California,* 381 U.S. 139, 166, footnote 33.

"The Convention on the Territorial Sea and the Contiguous Zone (Art. 8) states without qualification that 'the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.' We take that to be the line incorporated in the Submerged Lands Act." (Id., p. 175).

In its subsequent decree, 382 U.S. 448, the Court amplified even further its interpretation with reference to the correct baseline being at the seaward end of present harbor works, as follows:

* * *

"2. As used herein coast line means—

"(b) The line marking the seaward limit of inland waters.

"The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system within the meaning of Article 8 of the Convention of the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639.

* * *

"4. As used herein, 'inland waters' means waters landward of the baseline of the territorial sea, which are now recognized as internal waters of the United States under the Convention of the Territorial Sea and Contiguous Zone. The inland waters referred to in paragraph 2(b) hereof include—

"(b) Any port, landward of its outermost permanent harbor works and a straight line across its entrance;

* * *

"7. The inland waters of the Port of San Pedro are those enclosed by the breakwater and by

straight lines across openings in the breakwater; but the limits of the port, east of the eastern end of the breakwater are not determined by this decree.

"8. The inland waters of Crescent City Harbour are those enclosed within the breakwaters and a straight line from the outer end of the west breakwater to the southern extremity of Whalen Island."

Thus, in interpreting the meaning of "coast line" and "inland waters" as used in the Submerged Lands Act with reference to all coastal States, the Court fixed the line at the "outermost permanent harbor works" of San Pedro Bay and Crescent City Harbor. The map of San Pedro Bay (Exhibit D) inserted opposite this page shows that the breakwaters extend more than six miles across the open sea and are at some points at least two miles from the natural coast line.

B. SAME HOLDING AS TO CALCASIEU PASS JETTIES IN LOUISIANA

Another precedent for such treatment of protective harbor works was set by this Court in a subsequent decree in the present case (382 U.S. 288) with respect to the jetties of Calcasieu Pass in Louisiana. (See map, Exhibit B, following page 4, supra). That decree was apparently consented to by the Government. However, prior to the *California* case, the Government had contended that the baseline should be at the natural coast line rather than at the end of jetties. The decree fixed the baseline from which to measure Louisiana's grant opposite the Calcasieu jetties as follows:

"(a) In the vicinity of Calcasieu Pass, all that portion of the disputed area bounded on the land-

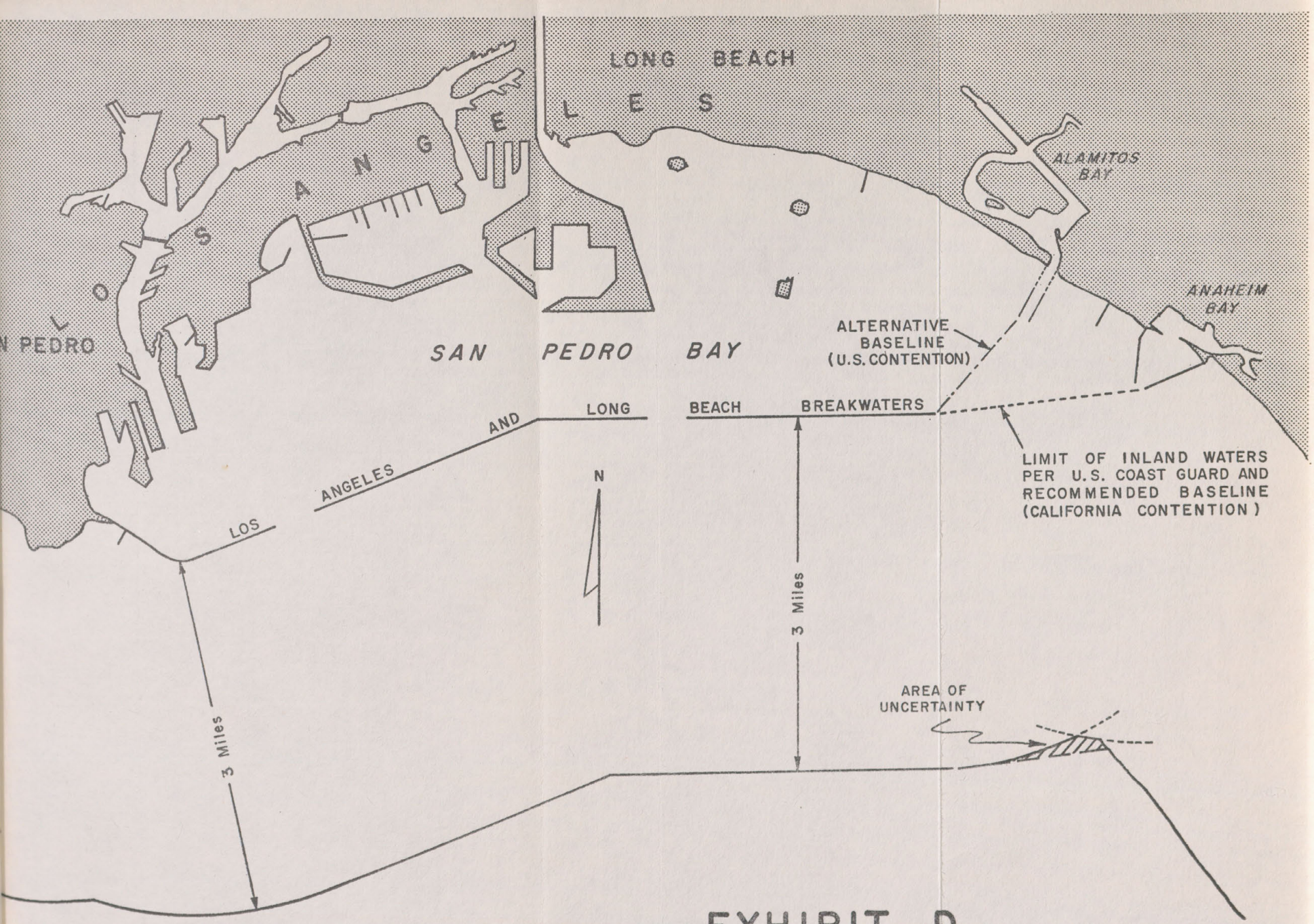

EXHIBIT D

BASE MAP TAKEN FROM A MAP PREPARED BY STATE OF CALIFORNIA

ward side by the seaward boundary of Zone 1, and bounded on the seaward side by a line three geographical miles seaward from the tip of the western jetty, at x=1,362,416, y=397,822; from the tip of the eastern jetty, at x=1,363,392, y=397,870; and from a straight line between said points.'"

C. HISTORIC BOUNDARIES AS USED IN LEGISLATIVE HISTORY REFERRED TO SEAWARD EXTENT AND NOT TO THE BASELINE.

Although the words "historic boundaries" do not appear in the Submerged Lands Act, they were used hundreds of times throughout the legislative process in describing the seaward extent of the grant.[10] We have found no instance in which the term "historic" was used to describe the baseline intended to be used from which to measure such seaward limits, and the Government cites no such reference.

Plaintiff's novel contention that a State receiving a grant to its historic seaward boundary should be required to measure from its historic coast line is the same as arguing that all coastal States should measure from their historic coast lines, because the whole philosophy of the Act was to grant submerged

[9]This decree also states: "These baselines are ambulatory and subject to continued modification by natural or artificial changes in the shore line. . . ." This further emphasizes the Court's interpretation that the baseline as fixed by the Act and interpreted by this Court is present and current rather than being tied to its location at an ancient or historic date.

[10]In the committee hearings, reports, and debates in the 53rd Congress, the term "historic State boundaries" was used 813 times in describing the extent of the grant. In most instances these referred generally to all the States, not simply to coastal States which contended for three leagues instead of three miles.

lands to all the coastal States out to the seaward limit of their historic boundaries. In the Atlantic and Pacific Oceans the historic extent was recognized to be three miles, and the Act so limited States fronting on those Oceans. In the Gulf of Mexico, the widest possible historic boundary was recognized to be three leagues, and Congress so limited the States fronting on the Gulf.

The Congress wisely refrained from measuring the historic extent of any seaward boundaries from ancient or historic coast lines, which are not susceptible of accurate determination, allowing instead for measurement from the present or existing coast lines of all the coastal States. This was the conclusion of the Court after thorough examination of the Act and its legislative history in the *California* case. There is no reason to make extensive repetitions of legislative history, but we do cite the conclusions reached in a book written by Aaron L. Shalowitz, the Government's principal technical adviser and witness on the cartographic phases of the *California* case before the Special Master. In this book, published in 1962,[11] before the Court's final decision in the *California* case (1965), Mr. Shalowitz said:

> "Reading the act as a whole together with the discussions, however, it seems reasonable to assume that what the Congress wished to preserve for the states was the concept of a distance fixed as of the date of admission—3 miles, 6 miles, etc.—rather than the concept of a fixed line in the water. . . . Under this interpretation, the historic distance

[11]Shore and Sea Boundaries, by Aaron L. Shalowitz, published by the Department of Commerce, Coast and Geodetic Survey, 1962, Vol. I, pp. 167-168.

would be applied to the *present coastline* to fix the outer boundary of the state. . . .

"Adoption of the theory of a *present* coastline is also supported by the reference in Section 2(a)(2) of the act to the 'coast line of each such State' . . ., rather than to the coastline as it existed when the state entered the Union. *The throw back in time is only in reference to boundaries.*

"This theory of the Submerged Lands Act is in accord with the common law rule, which is the federal rule, that where the sea is a boundary the doctrine of erosion and accretion is normally applicable and the boundary shifts with the change.

"If the theory of a past coastline were accepted, it could in extreme cases operate to deprive a state entirely of a contiguous water zone: for example, where the coastline has built out 3 miles or more. . . . And, conversely, in the case of a heavily eroded coast the distance could be much greater than the limitation specified in Section 2(b) of the act. . . . Such results could hardly have been intended by the proponents of the legislation.

"From a practical point of view, the theory of a *present coastline* is the logical solution, for it would be an exceedingly difficult, if not impossible, task to determine the line of ordinary low water as of a distant past. Accurate surveys of our coast did not begin to become available until the middle of the 19th century and in many sections the low-water line has never actually been surveyed."

As a footnote to his second paragraph quoted above, Mr. Shalowitz says:

"This would seem to be supported by the Supreme Court's interpretation of the basic theory of the Submerged Lands Act, namely, to restore the states to the ownership of submerged lands

within their *present* boundaries but determined by the historic action taken with respect to them jointly by Congress and the state. *United States v. Louisiana et al.,* 363 U.S. 1, 28 (1960), citing Representative Willis as to the meaning of 'historic boundaries' and how they would be ascertained."

This interpretation is consistent with the treatment given in the next succeeding sub-section (Sec. 2 (a) (3), to filled lands which were formerly beneath navigable waters. It is also consistent with the Senate Committee's treatment of the immediately preceding definition relating to nontidal waters (Sec. 2(a)(1), where a clarifying amendment was made to include changes in those waters since a State became a member of the Union. The Committee Report explained this change as follows:

"Clarifying amendment. The nontidal or inland areas, title to which is legislatively recognized as being in the States, should not be limited to the submerged lands beneath inland navigable waters as they existed at the time statehood was acquired. The new language would recognize the changes that have taken place since admission." Senate Report No. 133, S.J. Res. 13, 83d Cong., 1st Sess., 1953, 18 U.S. Code Congressional and Administrative Laws 1953, p. 1492.

D. THE COURT'S BASIC OPINION IN THIS CASE SUPPORTS THE "PRESENT" COAST LINE THEORY AS APPLICABLE TO ALL COASTAL STATES ALIKE.

The Court's basic opinion in the present case, *United States v. Louisiana et al,* 363 U.S. 1 (1960), was a forerunner of its subsequent opinion as to the time element

with respect to coast lines. While the basic opinion concerned only the seaward extent of Gulf State boundaries, the time element as to the baseline was apparently so obvious that the Court referred to it several times in the present tense. This was true also with reference to seaward boundaries, even though based on historic actions. For instance, the Court said:

> "The earlier 'quitclaim' bills defined the grant in terms of *presently existing* boundaries, since such boundaries would have circumscribed the lands owned by the States under an application of *Pollard* to the marginal sea. However, the sponsors of these measures soon recognized that present boundaries could be ascertained only by reference to historic events. The claims advanced by the Gulf States during consideration of earlier bills were identical to those subsequently asserted. The theory of those claims as we have noted depended either, as in the cases of Texas and Florida, upon a constitutional or statutory provision allegedly ratified by Congressional acquiescence, or, as in the cases of Louisiana, Mississippi, and Alabama, upon express Congressional action. Indeed, it could hardly have been contended that Congressional action surrounding the event of admission was not . . . relevant to the determination of *present* boundaries. Some suggestions were made, however, that States might by their own action have effectively extended, or be able to extend, their boundaries subsequent to admission. . . . To exclude the possibility that States might be able to establish present boundaries based on extravagant unilateral extensions such as those recently made by Texas and Louisiana, . . . subsequent drafts of the bill introduced the twofold test of the present Act—boundaries which existed at the time of admission and boundaries heretofore approved by Congress. . . . It is apparent that the purpose of the change was

not to alter the basic theory of the grant, but to assure that the determination of boundaries would be made in accordance with that theory—that the States should be 'restored' to the ownership of submerged lands *within their present boundaries,* determined, however, by the historic action taken with respect to them jointly by Congress and the State. . . . It was such action that the framers of this legislation conceived to fix the States' boundaries against subsequent change without their consent and therefore to confer upon them the long-standing equities which the measure was intended to recognize. . . ." (pp. 26-29).

* * *

"Although the Submerged Lands Act requires that a State's boundary in excess of three miles must have existed 'at the time' of its admission, *that phrase was intended, in substance, to define a State's present boundaries by reference to the events surrounding its admission.*" (p. 61).

Coast lines are referred to by the Court in the present tense with reference to Louisiana as follows:

". . . We decide now only that Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, *wherever those lines may ultimately be shown to be.*" (p. 79).

The same present tense is used in the Court's Conclusion with reference to the coasts of all the other States (pp. 83-84), and also in the subsequent decree, 364 U.S. 502.

E. THE SAME TERM AS INTERPRETED BY THIS COURT IS APPLICABLE TO ALL THE COASTAL STATES, INCLUDING TEXAS.

The Government concedes that the Court has decided against its contentions in the three mile States of California and Louisiana, where the coast line was fixed at the outer limit of permanent harbor works. It concedes that the same rule would apply to Texas if its seaward limits had stopped at the basic three miles granted alike to all the coastal States. However, the Government argues that since Texas was held by this Court to have an additional seaward extent totaling three leagues, then its entire grant (including the first three miles) must be measured from its ancient coastline.

This is an interesting theory, but it is not embodied in the Act. Its exposition does not demonstrate a thorough understanding of the terms of the Act or of what the Court has held in the *California* case and in this case.

In arguing that the term "coast line" means one location as to States receiving a three mile grant and another as to States receiving in excess thereof, Plaintiff completely ignores the fact that the Submerged Lands Act provides the same baseline for all coastal States. The Act does not leave the grant open on both ends. It is fixed at the coast line. Using the present tense, the Act begins the grant at "the coast line of each such State" and grants three miles to all coastal States plus ("and to") an additional extent (limited to a total of three leagues) for any State whose boun-

dary *extends* into the Gulf of Mexico beyond three geographical miles.[12]

There is no language whatever in the Act indicating that the baseline is conditioned upon or shall vary with the seaward extent of historic boundaries, or that the present coastline shall apply in one case and a different historic coast line in another.

There is only one definition of "coast line" in the Act, and it is equally applicable to all the coastal States as the baseline from which to measure the three miles granted to all of them plus whatever distance in excess thereof any Gulf Coast State may prove itself entitled to.

This is demonstrated conclusively in the original decree entered in the present case (364 U.S. 502), wherein the Court treated the coast lines of Texas and Florida, which were awarded a distance of three leagues, in the same language and with the same definition as the coast lines of Louisiana, Mississippi, and Alabama, which received only three miles. No distinction was made, and in fact the decree uses the single phrase "coast lines" to cover all the Gulf States, as follows:

> "2. As against the United States, the defendant States are respectively entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico, extending seaward from *their coast lines* for a distance of three leagues in the case of Texas and Florida and three geographic miles in the case of Louisiana, Mississippi and Alabama, and the United States is not entitled, as against any of such States, to any interest in such

[12]Submerged Lands Act, May 22, 1953, 67 Stat. 29, Sec. 2(a)(2). Relevant portions are contained in Appendix A of this brief.

lands, minerals or resources, with the exceptions provided by § 5 of the Submerged Lands Act, 43 USC § 1313."

The Act granting "lands beneath navigable waters" and defining them reads:

"Sec. 2. When used in this Act—

"(a) The term 'lands beneath navigable waters' means—

* * *

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

* * *

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

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which *is* in direct contact with the open sea and

the line *marking* the seaward limit of inland waters;" 67 Stat. 29.

It is readily obvious that each coastal State, including Texas, was granted three miles (plus any additional distance it could sustain, not to exceed three leagues) from its coast line, as that term is defined in the Act. The Congress left further amplification of that definition to the Court, which held in the *California* case that it means the coast line and related inland waters as defined in the Convention of the Territorial Sea and the Contiguous Zone (15 U.S.T., Pt. 2, 1606), including outermost harbor works.

In view of this holding, the definitions adopted by the Court are just as effective as if they had been written into the Act itself, and it applies to each State precisely the same as the Act and its definitions apply alike to each State. Obviously, this baseline is applicable to the first three miles of the grant to every coastal State, and to any excess covered by a present boundary based on historic enactments. The extent in excess of three miles is clearly an additional geographical distance measured from the same coast line. It was enacted as a continuation of the same sentence "*and to* the boundary line (present tense) of each such State where in any case such boundary as it existed at the time such State became a member of the Union . . . *extends* (present tense) seaward . . . beyond three geographical miles, . . . "(Brackets and emphasis added.)

Clearly, both distances are to be measured from the same baseline. The Act does not provide that after measuring the basic three geographical miles (one marine league) from the present coast line, any State which succeeds in sustaining its right to an additional

two leagues must go back and measure again from a different and more ancient line. This would have meant a different baseline criteria for different States, which Congress neither intended nor provided. If Congress had intended a different coast line for different states it would have said so.

In seeking to fix a different baseline for Texas, Plaintiff attempts to apply alternatives which are not in the Act. We refer to the Government's argument (Brief, p. 11) that Texas is entitled to the lands "that are either (a) *within* three miles of the modern coast line, or (b), to a limit of nine miles, *within* the boundary of Texas as it existed when Texas became a member of the Union." The definition of "lands beneath navigable waters," in Section 2(a)(2), which determines the extent of the grant, does not contain any such "either-or" alternatives. Neither does it use the word "within." In spite of this, Plaintiff injects and employs the word 12 times throughout its argument.[13]

Actually, the definition calls for the same starting point (coast line) and extends "seaward to" three miles from the coast line "and to" the maximum limit of three leagues for any Gulf Coast State which can show that the seaward extent of its historic boundary "*extends seaward* . . . beyond three geographical miles . . ." Both the distance of three miles and any excess are granted from the same coast line.

There are two fallacies in Plaintiff's argument (Brief, p. 11) that Texas is attempting "to combine the most favorable elements of both provisions by measuring its historical three-league width from the modern

[13]Plaintiff's Brief, pp. 8, 10, 11, 12, 14, 15, 22.

coast . . ." In the first place, in beginning at the modern coast, Texas is attempting only to follow the Act as it was written by Congress and interpreted by this Court in the *California* case. In the second place, the modern coast is not always the most favorable to the State.[14] Avulsive erosions occurred on the shore at Galveston in the storm of 1900, which cut the present coast much farther back than it formerly existed.[15] These two jetties, affecting only two tiny areas of the Texas coast, have not necessarily gained as much land as has been lost by avulsive changes along the 367 mile Texas coast since 1845. Along the Gulf the ancient coast line has been eroded in many places by sudden storms and hurricanes, leaving the present coast in such places more unfavorable as a State baseline than the ancient coast.[16]

The Act and its legislative history show that Congress not only intended for the same baseline to apply

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[14]See Shalowitz, Shore and Sea Boundaries, Vol. I, p. 168, Department of Commerce, Coast and Geodetic Survey, 1962.

[15]*Beach Erosion at Galveston, Tex.,* House Document No. 400, 73d Cong., 2d Sess., a report from the Acting Secretary of War dated June 4, 1934; *Gulf Shore of Galveston Island, Tex., Beach Erosion Control Study,* May 22, 1953, House Document No. 218, 83d Cong., 1st Session, pp. 15-23. Referring to the section of Galveston's East Beach from the south jetty to 10th Street, the latter report (p. 18) states: "Early surveys of shore show that prior to construction of the jetty there was extensive erosion over most of this reach, with a maximum recession of the shoreline from 1838 to 1875 of about 2,000 feet."

[16]Senator Long insisted (but did not prevail) on the ancient coast line, because he reported: "For instance, in my State we can show where lands were patented by the Fedral Government that have since been washed away, in some instances more than a mile or perhaps even as far as 2 miles." Hearings, Senate Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess., Pt. 2, Executive Sessions, p. 1344.

to all the Coastal States, but that it should be the same as used by the Nation as a baseline from which to measure its territorial waters in dealing with other nations.

The Government conceded this in the *California* case in the following statement:

> "As we have previously shown (supra, pp. 18-23), Congress deliberately chose to measure the grant made by the Submerged Lands Act from the same baseline as was used by this Court in its decrees in this and related cases, i.e. from the line between inland waters and the territorial sea."[17]

For instance, the Senate committee deleted certain definitions of inland waters (an intricate part of the baseline) at the request of the State Department upon representation that they might embarass the Nation in its dealings with foreign governments on the subject. S. Rep. No. 133, 83d Cong., 1st Sess., 1953 (Cong. Doc. Ser. No. 11659, pp. 14, 18). The Committee left the subject as it found it, with the final definition and adjudication to be made by the Court, which held in the *California* case that criteria agreed upon by the Nation in the Convention of the Territorial Sea and Contiguous Zone should apply.

The Court stated that it was influenced in its decision by the practical advisability of maintaining *a single baseline* from which to measure both the domes-

[17]Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, p. 34; *United States v. California,* 381 U.S. 139. With reference to accretions from artificial structures, Plaintiff further agreed to the desirability of a uniform baseline for all the States: "Moreover, the applicable general rules should, so far as possible, be uniform throughout all the coastal states." Brief for the United States, May 1952, p. 163, *United States v. California,* supra.

tic grants and the territorial waters. In this connection, the Court said:

> ". . . This establishes *a single coastline* for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention). Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." 381 U.S. 139, 165.

What Plaintiff contends for here would undo the single coast line as to Texas and provide one line (as the coast existed in 1845) for the administration of the Submerged Lands Act and another for the measurement of the territorial sea and conduct of international relations. Obviously, this was not intended by Congress, and the contention is foreclosed by this Court's decision in the *California* case.

F. PRESENT HARBOR WORKS FORM A PART OF THE COAST LINE CALLED FOR IN THE ACT

The non-existence of the harbor works in 1845 has no bearing on this case. The controlling fact is that they presently exist, and they existed at the time the Submerged Lands Act was passed. They were an integral part of the "coast line" of the United States under the recognized rules of international law when the Submerged Lands Act was passed in 1953.[18]

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[18]The Government concedes that the principle embodied in Section 8 of the Convention on the Territorial Sea and Contiguous Zone regarding outermost harbor works as part of the coast was followed by the United States and established in international law at least as early as 1930. Plaintiff's Brief, 21, 29-41.

The Government argues that under the holding in *United States v. Texas,* 339 U.S. 707, 340 U.S. 900, "Texas had no rights in the submerged lands in 1845. Its rights flow exclusively from the Submerged Lands Act . . ." (Plaintiff's Brief, 15). If that be true, and we concede that it is except as to harbor works and inland waters landward of the coast line,[19] then the location of the coast line as of 1845 has no bearing in determining what was granted by the Submerged Lands Act. That Act granted submerged lands seaward of the existing coast line, or at least the coast line which existed at the time the Act was passed. The harbor works in question were then and are now in existence; they formed a part of the coast line then and now; and their non-existence in 1845 is completely irrelevant.

What the United States owned in 1953 it could and did convey to the States in terms of an existing coast as the baseline from which to measure the seaward limits of the grant.

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[19]The decision and decree in the *Texas* case in 1950, 339 U.S. 707 and 340 U.S. 900, awarded to the United States only those lands beneath the marginal sea described as "lying seaward of the ordinary low-water mark on the *coast* of Texas, and outside of the inland waters." Since the outermost permanent harbor works at that time constituted a part of the coast both in fact and in law, and were landward of the marginal sea, Texas contends that their ownership by the State was not disturbed by the 1950 decision. However, there is no necessity for pressing this point now, since the Submerged Lands Act, as interpreted by this Court, so clearly confirms State title and uses the harbor works as the baseline from which to measure both the marginal sea and the limits of the grant under the Submerged Lands Act.

III. THE ORIGINAL DECREE IN THIS CASE HAS AWARDED TEXAS TITLE TO THE SUBMERGED LANDS SEAWARD FROM ITS PRESENT COASTLINE, INCLUDING HARBOR WORKS.

In addition to the Submerged Lands Act, the basic decree in this case (364 U.S. 502), using the same definition as contained in the Submerged Lands Act, awards Texas the land in controversy, using the following language:

> "1. . . . As used in this decree, 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.
>
> "2. As against the United States, the defendant States are respectively entitled to all lands, minerals and other natural resources underlying the Gulf of Mexico, extending seaward from their coast lines for a distance of three leagues in the case of Texas and Florida and three geographic miles in the case of Louisiana, Mississippi and Alabama, and the United States is not entitled, as against any of such States, to any interest in such lands, minerals or resources, with the exceptions provided by § 5 of the Submerged Lands Act, 43 USC § 1313."

When this decree was entered on December 12, 1960, the term "coast line" already had been accepted by the United States and in international law as including permanent jetties which formed parts of harbor systems, and the waters enclosed by them were recognized to be inland waters. The United States took this position as early as 1930, and the Solicitor General, in May 1952, stated:

"It is true that at the 1930 Conference at the Hague, the United States proposed that the 'outermost permanent harbour works' be considered part of the coast for the purpose of determining the extent of territorial waters (Acts of Conference, p. 200), and that the Second Sub-Committee so recommended (Acts of Conference, p. 219). That would cover artificial ports as well as natural harbors. In so far as the right of the vessels of foreign nations to enter such 'ports' is concerned, it is probably still the position of the United States that the completion of permanent harbor works carves the particular area out of the high seas and vests complete control in the nation owning the mainland, and in that respect makes the area 'inland waters.' "[80]

In explaining the chronology and prior status of the rule, the Solicitor General said further in the *California* case.:

"Article 8 of the Convention on the Territorial Sea and the Contiguous Zone provides: 'For the purpose of delimiting the territorial sea, the outermost permanent harbourworks which form an integral part of the harbour system shall be regarded as forming part of the coast.' 106 Cong. Rec. 11174. This followed the proposal of the International Law Commission, which said in its commentary, 'The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State.' Report of the International Law Commission Covering the work of its Eighth Session, 23 April-4 July 1956, p. 16.

"At the Conference, Mr. Francois, Expert to the Secretariat, successfully opposed a Norwegian

[80]Brief of the United States before the Special Master, May 1952, p. 101, *United States v. California,* 381 U.S. 139.

> proposal to substitute 'may be regarded' for 'shall be regarded,' saying that 'States had long regarded harbour works such as jetties as part of their land territory and that practice should be universally recognized as unchallengeable.' "[21]

By 1958 the rule had been further confirmed and written into the Convention of the Territorial Sea and Contiguous Zone, which was approved by the United States Senate on May 26, 1960 (106 Cong. Rec. 11196), and ratified by the President on March 24, 1961 (44 State Dept. Bull. 609)

Thus, it is obvious that the rule stated in Section 8 of the Convention of 1958 relating to the specific matter of outermost harbor works constituting part of the coast (and the enclosed waters constituting inland waters) was in effect on December 12, 1960, when this Court awarded all lands seaward of the Texas coast line and seaward of inland waters to Texas for a distance of three leagues.

Therefore, this case has been decided in so far as the base line at outer harbor works is concerned. Texas has been awarded the specific lands here in controversy seaward of the harbor works, and the basic decree is res judicata in this proceeding.

CONCLUSION

The term "coast line" as used in the Submerged Lands Act and in the basic decree in this case means the present coast line, including the artificial harbor works of the Port of Galveston and Sabine Pass, the

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[21] *Amended Exceptions of the United States to the Report of the Special Master,* supra p. 23, Fn. 17.

same as this Court has held with respect to the coast and breakwaters of California and the Calcasieu Pass jetties of Louisiana. A supplemental decree should be entered declaring that this is the baseline to be used from which to measure the three league line dividing the submerged lands of Texas from the submerged lands of the United States under the decree of December 12, 1960; that Texas is entitled to the submerged lands, minerals and other natural resources underlying the Gulf of Mexico seaward of such baseline for a distance of three marine leagues; and that the United States has no title thereto or interest therein. The Motion of the United States for Injunctive Relief should be denied.

Respectfully submitted,

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CERTIFICATE

I, Crawford C. Martin, Attorney General of Texas, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of September, 1967, I served copies of the foregoing brief either in person or by mail, postage prepaid, to the office of the Attorney General and of the Solicitor General of the United States, respectively, in the Department of Justice Building, Washington, D.C., and to the Attorney's Generals of the States of Alabama, Florida, Louisiana and Mississippi respectively.

Crawford C. Martin

APPENDIX A

Definitions in Submerged Lands Act, May 22, 1953, 67 Stat. 29:

Sec. 2 [43 U.S.C. 1301] When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(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, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title 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 Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

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

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, ET AL.

STIPULATION BETWEEN THE UNITED STATES AND THE STATE OF TEXAS

WHEREAS, On March 24, 1967, the United States moved the Court for injunctive relief and entry of a supplemental decree as to the State of Texas in the above-entitled case; and

WHEREAS, The United States and the State of Texas are in agreement as to certain facts material to the determination of that motion;

NOW, THEREFORE, The United States and the State of Texas stipulate to the following facts for the purposes of said motion:

1. There were no artificial harbor works or other structures extending into the Gulf of Mexico on the coast of Texas in 1845.

2. The jetties at Sabine Pass and Galveston Harbor existed in their present form in 1953.

3. The jetties at Sabine Pass and Galveston Harbor are permanent harbor works constituting integral parts of the harbor system within the meaning of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606, 1609.

Executed this 8th day of September, 1967.

THE UNITED STATES OF AMERICA

by RALPH S. SPRITZER
Ralph S. Spritzer (s)
Acting Solicitor General

THE STATE OF TEXAS

by CRAWFORD C. MARTIN
Crawford C. Martin (s)
Attorney General