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**BY FIRST CLASS & ELECTRONIC
MAIL (northeastplanning@fws.gov)**

Libby Herland, Project Leader
Eastern Massachusetts National
Wildlife Refuge Complex
73 Weir Hill Road
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**Subj: Comments on Monomoy National Wildlife Refuge, Chatham, MA; Draft
Comprehensive Conservation Plan and Environmental Impact Statement
(FWS-R5-R-2013-N265; BAC-4311-K9).**

Dear Ms. Herland:

We appreciate the opportunity to comment on two issues of great importance to the Commonwealth of Massachusetts that are raised by the U.S. Fish and Wildlife Service's (FWS) Draft Comprehensive Conservation Plan and Environmental Impact Statement for the Monomoy National Wildlife Refuge (CCP/EIS): (1) the FWS's assertion that the 1944 Judgment on the Declaration of Taking (Judgment) effected the taking of the Commonwealth's submerged lands; and (2) the FWS's assertion that the 1944 Judgment eliminated the Commonwealth's and the public's rights arising from the public trust doctrine and the Colonial Ordinances of 1641-47. As detailed below, both of the FWS's assertions are legally flawed and we urge the FWS to amend its position in the Final CCP/EIS so that it is consistent with the facts and law at issue here.

The 1944 Judgment on the Declaration of Taking
Did Not Give the United States Title to Submerged Lands

The CCP/EIS describes the western boundary of the Monomoy National Wildlife Refuge (Refuge) as extending to, and being fixed by, the line depicted on a map appended to the 1944 Judgment and including "upland, intertidal flats, and submerged lands and waters." CCP/EIS at 1-1, 1-2 (Map 1.1), 1-27, 2-100. In turn, the CCP/EIS describes the eastern boundary of the Refuge as those areas above "the mean low water line" as that line may meander due to the natural coastal processes of accretion and reliction. *Id.* While the Commonwealth does not take



issue here with the FWS's description of the Refuge's eastern boundary,¹ the Commonwealth does take issue with the FWS's description of the western boundary since that description is inconsistent with the 1944 Judgment and prior litigation that has touched on the issue.

The 1944 Judgment describes unambiguously the lands the United States was taking as “[a]ll those tracts and parcels of land *lying above mean low water*.” Exhibit (Ex.) 1, at Schedule A (emphasis added). The Judgment then goes on to describe the lands encompassed within the scope of that declaration as “including a portion of Morris Island; all of Monomoy Beach, Monomoy Island, and Monomoy Point; Sheeters Island; together with all land covered by the waters of land locked ponds; and all islands, islets, sand bars and tidal flats lying in Nantucket Sound, Chatham Bay, and Stage Harbor.” *Id.* Consistent with the Judgment's defined “lying above mean low water” limit, the description of the lands included within the taking does not explicitly or implicitly refer to any submerged lands lying below (seaward of) the mean low water mark, *see id.*, and the Judgment's reference to “all land covered by waters of land locked ponds” and “tidal flats lying in Nantucket Sound” reinforces that omission. In particular, the “all land covered by waters of land locked ponds” language, which lands would sit within the bounds of the “above mean low water” boundary, demonstrates that where the drafter (the United States) wanted to include submerged lands it said so expressly.² The “tidal flats” language expresses a similar intent, as the terms “tidal flats” and “flats” are terms of art, which both refer to “the area between mean high water and mean low water.” *Arno v. Commonwealth*, 457 Mass. 434, 436 (2010) (citation omitted). Thus, according to its plain and unambiguous terms, the 1944 Judgment effected the taking of only those lands “lying above mean low water.” Ex. 1, at Sched. A.³

¹ Instead, the Commonwealth adopts the position the Town Chatham sets forth in its comments on the CCP/EIS regarding the FWS's assertion that it now holds title to 717 acres of land known as South Beach, including the Town's argument that the *Siesta Properties, Inc. v. Hart*, 122 So.2d. 218, 221 (Fla. Dist. Ct. App. 1960) rule applies to resolve that issue.

² The United States likely deemed the “all land covered by waters of land locked ponds” language necessary because if any of those ponds were of a sufficient size to make them Great Ponds, the Commonwealth would have held title to them, including the submerged lands under them. *See Attorney General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, 364 (1882) (“The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth”).

³ While the interpretation of the 1944 Declaration of Taking and Judgment are determined by federal law, it is well settled that “where there is ‘no clear federal law to apply, federal courts have referred to state law to provide the appropriate rule’” as long as the State law rule is not hostile to the federal interests. *Near v. Dep't of Energy*, 259 F. Supp. 2d 1055, 1059 (E.D. Cal. 2003). Here, the sparse body of federal case law is consistent with Massachusetts law. *Compare United States v. Pinson*, 331 F.2d 759, 760-61 (5th Cir. 1964) (court must consider the “intention of the United States as author of the declaration, to be gathered from the language of the entire declaration and the circumstances surrounding it”), *with General Hospital Corp. v. Mass. Bay Transp. Auth.*, 423 Mass. 759, 764 (1996) (court “must consider the language of the taking order and the circumstances surrounding the taking.”). Where the language in a declaration of taking is unambiguous, it is dispositive. *See Sheftel v. Lebel*, 44 Mass. App. Ct. 175, 179 (1998); *see*

In asserting that the Refuge’s western boundary extends beyond the land taken by the Judgment’s unambiguous language, the FWS relies on the Judgment’s subsequent language describing the “exterior limits” of the taking by reference to longitudinal and latitudinal coordinates and the map appended to the Judgment, *see* CCP/EIS at 2-100; *see also* Ex. 1, at Sched. A & Map, but the later description and map cannot bear the weight that FWS places on them. To the contrary, those coordinates, as the Judgment makes clear, define only the “*exterior limits* of the taking,” not the actual land taken (which is defined by the language that precedes those coordinates), and thus do not bring within the land taken by the Judgment any lands *below* the mean low water line (i.e., submerged lands). *See* Ex. 1, at Sched. A. In other words, the condemned land fell within those boundaries but was not defined by them.⁴ The map appended to Schedule A supports this reading—again, the only one consistent with the Judgment’s text—since the map’s key defines the rectangular box delineated by the coordinates in Schedule A as the “*Limits of Area to be Taken*,” not the “*Area to be Taken*.” *Id.* at Sched. A–Map (emphasis added). Consistent with this fact, the Secretary of the Department of Interior then wrote that the “above-described area (i.e., the land being taken) contains in the aggregate 3,000 acres, more or less,” Ex. 2, at 2, and the FWS has acknowledged that this area “roughly corresponded with the area above mean high water” in 1944. CCP/EIS at 2-100.⁵ While the FWS seeks to elide this fact by dismissing the Secretary’s 3,000 acre description as “not accurate[,]” since the agency’s 2014 interpretation of the land that was taken in 1944 indicates that the area “significantly exceeded that [3,000 acre] amount,” *see* CCP/EIS at 2-100, the Secretary’s 1944 description is the only one that is consistent with the Declaration’s “land above mean low water” text. Ex. 2, at 2 (Declaration of Taking).⁶

also Panikowski v. Giroux, 272 Mass. 580, 583 (1930) (“When the description in a deed or devise is clear and explicit, and without ambiguity, there is no room for construction, or for the admission of parol evidence, to prove that the parties intended something different.”). To the extent there were some ambiguity in the text—and there is none, that ambiguity would be construed against the United States (as the drafter) and in favor of the Commonwealth. 9 NICHOLS ON EMINENT DOMAIN § G.33.04[2] (3d ed. 2014).

⁴ As discussed below, at the time of the taking, the Commonwealth held title to the submerged lands in the bay off of Monomoy’s western shore, and thus the only way the United States could have acquired those lands is if in 1944 it had condemned not just the lands “*above* mean low water” but also lands “*below* mean low water” or “submerged lands” within the coordinate-based limit. *Infra* pp.5-6.

⁵ The fact that the acreage the Secretary described in the Declaration corresponds with the area above mean high water instead of the area above mean low water (i.e., the limit of the land being taken) is consistent with the accepted government surveying practice for coastal areas, which is known as a “meander survey” and “survey[s] the approximate location of the mean high water mark.” 9 NICHOLS ON EMINENT DOMAIN, *supra* note 3, at § G.33.03[3][b]; *see also* GENERAL LAND OFFICE, DEP’T OF INTERIOR, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES § 226, at 216 & § 233, at 221-22 (1931).

⁶ In fact, under the FWS’s modern interpretation, the land taken in 1944 may have been more than *double* the 3,000 acres the Secretary described in the 1944 Declaration of Taking as the “area” “described” by the text. CCP/EIS at 2-100 (stating that in 2000 the sum of the land above

The exterior limits defined by the coordinates and the map, while not defining the extent of the lands taken in 1944, are still relevant to the United States' ability to acquire or lose land after 1944 in accordance with the common law doctrines of accretion and reliction. As to the eastern boundary, the coordinates and the map define the limit of the taking as the mean low water line on the Atlantic Ocean. Ex. 1, at Sched. A. Accordingly, and as FWS asserts, this boundary is ambulatory. In other words, it gives the United States, like any other littoral owner, the benefit of any lands that, through the process of accretion, both extend seaward of the mean low water line in 1944 (i.e., into the Atlantic Ocean) and lie above the mean low water line. See *White v. Hartigan*, 464 Mass. 400, 407 (2013); see also Ex. 1, at Sched. A (stating that the United States was taking "fee simple title to said lands together with all accretion and reliction").⁷ The same is not true as to the *potential* limit of the western boundary, which is defined, not by the mean low water line, but rather by a straight line located in Nantucket Sound that runs northeasterly towards a second landward coordinate. Ex. 1, at Sched. A & Map. Thus, on the Refuge's western side, the line established by the coordinates fixes the *limit* within which the United States acquired (1) any *then* existing lands lying above the mean low water line and (2) any *post* 1944 accreted lands lying above the mean low water line.

The Judgment's different treatment of the eastern and western boundaries was likely the result of several factors. First, unlike the waters off of the Refuge's Atlantic Ocean shore, the waters off of the Refuge's Nantucket Sound shore included "islands, islets, sand bars" lying above mean low water that would have been valuable to the purposes of the taking—the protection of migratory birds—but would also have been very difficult, due to their constantly shifting nature, to delineate precisely with coordinates. See Ex. 1, at Sched. A.⁸ Second, due to tidal and wave action from the Atlantic Ocean, Monomoy was shifting, and continues to shift, westward. Today, for example, overwash and other littoral processes have caused the tidal flats on Monomoy's western side (i.e., the area identified as Common Flats on the 1938 plan) to migrate past the western coordinate-based fixed exterior limit. CCP/EIS at 1-2 (Map 1-1); see also *id.* at 2-100 (acknowledging "geophysical processes" on Monomoy's western side), 2-103 (noting loss of land on Monomoy's southeastern shoreline). Because of this western movement and the common law rules that apply to littoral property, the United States appears to have sought to mitigate the risk that it would lose entirely and too quickly the Refuge to these natural forces by establishing a fixed potential western limit on the Refuge beyond the then existing

the mean low water line and the submerged lands within the rectangular coordinates was 7,604 acres); Ex. 2, at 2 (Decl. of Taking). The notion that this difference was a mistake or inaccuracy is simply implausible. Indeed, if the FWS were correct, it could render the original condemnation void. 9 NICHOLS ON EMINENT DOMAIN, *supra* note 3, at § G.33.02[2].

⁷ Similarly, and as the 1944 Judgment makes clear, the United States, while enjoying the benefit of any accretions, also bears the burden of any lands it loses through reliction (i.e., erosion). *Hartigan*, 448 Mass. at 407; see also *County of St. Clair v. Lovington*, 90 U.S. (23 Wall) 46, 68-69 (1874).

⁸ This point is reflected by maps of the area that predate the 1944 Judgment and show, for example, an area identified as "Common Flat[s]" extending out close to a precursor line to the one on the map appended to the 1944 Judgment. Ex. 3 (1938 Map of the proposed Monomoy Island Migratory Waterfowl Refuge).

mean low water line. See *Lorusso v. Acapesket Improvement Ass'n*, 408 Mass. 772, 781-782 (1990); see also *Hartigan*, 464 Mass. at 407.⁹ Third, and relatedly, the Commonwealth and nearby municipalities, would also likely have wanted to prevent the possibility of the land-based Refuge migrating west, and, by proximity, or actual attachment, impacting existing and future uses on the Commonwealth's landside shoreline.

Even if the language in the 1944 Judgment were not so clear and therefore determinative, the FWS's claim is also inconsistent with the 1996 Supplemental Decree in *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) and the prior finding of the United States District Court for the District of Massachusetts in *United States v. Taylor*, Crim. A. No. 79-319-MC (D. Mass. 1979). While, as the FWS asserts, CCP/EIS at 2-101, the *Maine* Court did hold that Nantucket Sound was not part of Commonwealth's historic inland waters, *United States v. Maine*, 475 U.S. 89, 90, 97-105 (1986), the United States had already *conceded* that the bay formed on Monomoy's western side by a line drawn between Monomoy Point and Point Gammon did. Ex. 4, at ¶ 3.b. (Stipulation in Lieu of Amended Pleadings); see also Ex. 5 (map showing agreed to limits of inland waters and territorial seas). And that concession was incorporated into the *Maine* Court's 1996 Supplemental Decree. Ex. 6, at ¶ 2(d).¹⁰ In other words, contrary to FWS's claim, see CCP/EIS at 2-101, title to the submerged lands within the bay to the west of Monomoy has forever been in the Commonwealth, and the only way the United States could have acquired those lands is if it had taken them in 1944, which, as discussed above, it clearly did not do.¹¹ Prior to the CCP/EIS, the

⁹ As stated in *Lorusso*, "when a parcel of land erodes on one side and forms accretions on another, and the process continues until the original parcel ceases to exist[.]" "the lot owner's proprietary interest in the accreted land mass dissolves." 408 Mass. at 781-782.

¹⁰ Notably, the Stipulation, the Joint Motion for Entry of A Supplemental Decree, and the Supplemental Decree do not except from their scope any submerged lands in the vicinity of Monomoy's western shoreline. Exs. 4 (Stipulation), 6 (Supplemental Decree), 7 (Joint Motion).

¹¹ Since title to the submerged lands to the west of Monomoy was *not* already in the United States at the time of the taking, they also could not have been excepted from section 1311 of the Submerged Land Act, as the FWS suggests. 43 U.S.C. §§ 1311, 1313 (2012); CCP/EIS at 2-101. Even if that were not the case, however, the United States also conceded in the *Massachusetts Boundary Case* that, at a minimum, the Massachusetts coastline was "the ordinary low water mark along the mainland from Cuttyhunk Island to *Monomoy Point* as well as around the various islands south of the two sounds." Ex. 8, at 4 & n.5 (Report of the Special Master (1984) (emphasis added)); see also Ex. 9 (Ltr. from Drew S. Days, III, Solicitor General, U.S. Dep't of Justice, to Francis J. Lorson, Deputy Clerk, Supreme Court of the United States, re *United States v. State of Maine (Massachusetts Boundary Case)*, No. 35 Orig. (Feb. 9, 1996)). Remarkably, despite the resources dedicated to scouring the historical record regarding the Commonwealth's claimed historic title to all of Nantucket Sound and the specific references to Monomoy, nowhere did the United States even remotely suggest that it had acquired, or seek to reserve from the scope of the Court's Decree, the submerged lands lying within the coordinate-based rectangle on the map appended to the 1944 Judgment. Indeed, the FWS's assertion that the United States already held title to those lands and thus did not need to acquire them at the time of the taking would have been an incredibly risky basis on which to proceed in 1944. See CCP/EIS at 2-101.

resolution of this issue was apparently as straightforward as the plain language of the Judgment would make it seem. In *Taylor*, for example, the District Court found Mr. Taylor not guilty of willfully letting his dogs go unleashed on Refuge land because the 1978 incident occurred *below* the mean low water line, i.e., on the Commonwealth's submerged lands, not on federal land, and thus outside of the Refuge's boundary. Ex. 11, at 2 (Finding).¹² Taken together, these authorities clearly countermand the FWS's claim.

The 1944 Declaration of Taking Did Not
Eliminate Permanently Public Trust Rights

In a section of the CCP/EIS labeled as "Issues Outside the Scope of this Analysis or Not Completely Within the Jurisdiction of the Service," the FWS claims that the public rights embodied by the public trust doctrine and the Colonial Ordinances of 1641-47 "were eliminated as a result of the condemnation establishing the refuge." CCP/EIS at 1-42. The Commonwealth requests that the FWS omit the text concerning the public trust doctrine and the Colonial Ordinances from the final CCP/EIS both because, as the label suggests, it is beyond the scope of the analysis and therefore a subject on which the FWS need not opine and because it is inconsistent with settled law, as described below. Alternatively, the Commonwealth requests that the FWS revise the text to reflect the analysis set forth below.

Binding precedent in the District of Massachusetts makes clear that the 1944 Judgment did not permanently eliminate the public's rights protected by the public trust doctrine and the Colonial Ordinances of 1641-47 in the condemned land. The "public trust doctrine," which finds its roots in Roman and English law, denotes the "government's long-standing and firmly established obligation [as trustee] to protect the public's interest in," and use of, tidelands and tidewaters. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663, 676 (2010) (citations omitted); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 90-91 (1851).¹³ Contrary to the FWS's claim, when the federal government takes land subject to the

At that time, the Commonwealth had already asserted its claim to title to the submerged lands within one marine league (three nautical miles) of the Commonwealth's shoreline at low water, *see* Ex. 10 (1859 Mass. Acts 640 ch. 289), and the U.S. Supreme Court had not yet rejected the coastal States' claims that they held (and had never ceded) title to submerged lands within the marginal sea (i.e., the three mile belt). *United States v. Maine*, 420 U.S. 515, 517-28 (1975) (discussing, *inter alia*, *United States v. California*, 332 U.S. 19 (1947), and affirming that *California's* holding applied to the original thirteen Colonies).

¹² *See also Assocs. of Cape Cod, Inc. v. Babbitt*, C.A. No. 00-10549-RMZ, at 12 (D. Mass. May 22, 2001) (stating that the limit of the Refuge's Wilderness Area is the mean low water line (attached as Ex. 12)).

¹³ As regards submerged lands, the Commonwealth holds both title (the *jus privatum*) and the obligation to promote and protect the public's rights of access to, and use of, tidelands and tidewaters (the *jus publicum*) from the historic mean low water line to the seaward limit of the Commonwealth's jurisdiction. *Arno*, 457 Mass. at 454-55. And, as regards tidal flats, following the codification of the Colonial Ordinances of 1641-47, private littoral owners gained conditional

public trust doctrine, it takes title to those lands subject to the same public trust responsibilities as the Commonwealth. *United States v. 1.58 Acres of Land Situated in the City of Boston*, 523 F. Supp. 120, 125 (D. Mass. 1981).¹⁴ That case, *1.58 Acres of Land*, is instructive as it *rejected* the United States’ claim that the U.S. Coast Guard’s condemnation of land bordering on Boston Harbor could eliminate the public trust rights (i.e., the *jus publicum*) in those lands. *Id.* at 121-22, 124-25.¹⁵ Thus, here, as in *1.58 Acres of Land*, the lands that the United States took between the mean high water and low water lines¹⁶ remain subject to the public trust doctrine.¹⁷

Even if the case law were not so clear on the issue, the 1944 Judgment also did not express a clear intention to eliminate the public trust rights from the lands being taken. Instead, the Judgment states only that “the fee simple title to said lands together with all accretion and reliction and all and singular the water rights, riparian rights and other rights . . . thereunto belonging or in any wise appertaining, vested in the United States upon the filing of the said

title to those lands, but the Commonwealth retained the *jus publicum* and the right to determine their use. *See id.* at 436, 454-55, 457.

¹⁴ While the District Court in *1.58 Acres of Land Situated in the City of Boston* spoke specifically to the preservation of the public trust on submerged lands, *see* 523 F. Supp. at 122, it is now well settled that the public trust doctrine applies with equal force to tidal flats, such as those taken by the United States in the 1944 Judgment. *Arno*, 457 Mass. at 450, 452, 455.

¹⁵ *Accord United States v. 32.42 Acres of Land, More or Less Located in San Diego County*, C.A. No. 05-cv-1137, at 11 (S.D. Cal. Apr. 28, 2006) (Ex. 13) (holding that when unfilled tidelands are condemned by the United States, “the United States acquires . . . [those tidelands] subject to the public trust, and it may not later convey . . . [them] to a private party.” (citing *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986)), *acq. in result*, 683 F.3d 1030, 1032-33 (9th Cir. 2012). The District Court’s decision in *Associates of Cape Cod* is not to the contrary, as it held that the public trust doctrine (and the Colonial Ordinances) did not impede the federal defendants’ regulatory, but it did not also address the effect of a federal taking on the *jus publicum* or purport to overrule *1.58 Acres of Land*—a published decision. *Assocs. of Cape Cod*, C.A. No. 00-10549-RMZ, at 12 (Ex. 12).

¹⁶ If the judiciary were, however, to conclude that the scope of the 1944 Judgment did include submerged lands, then this rule would apply to them too.

¹⁷ That does not mean, as the FWS seems to fear, that the agency must give the public unfettered use of Refuge lands between the mean low and mean high water lines. Instead, just like the Commonwealth, the FWS is entitled to, as the trustee of those public rights, to manage and regulate the lands in a manner that it deems necessary and appropriate to fulfill the public purposes of the Refuge. But, if the United States ever decides to sell those lands—something that may seem unimaginable today, but for which we must plan—it may not convey them into private hands free from the public trust rights pursuant to which it now holds them. A contrary conclusion would in fact be remarkable, because it would mean that the United States could sell the lands to a private party who may then be able to develop the lands for its sole and exclusive use, e.g., a private beach resort—something which is assuredly not desirable from either sovereign’s perspective.

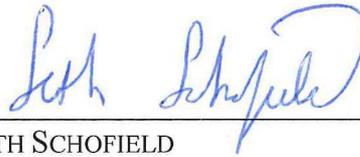
declaration of taking.” Ex. 1, at 1. While this language is admittedly expansive nowhere does it express a clear intent to take or eliminate the public trust rights in the land taken by the 1944 Judgment. *See id.* Under Massachusetts law, public trust rights cannot be eliminated, even in tidal flats—tidelands sitting between the mean high water line and the mean low water line—without, *inter alia*, a clearly expressed intention to do so (e.g., by stating expressly an intent to eliminate “public trust rights.” *Arno*, 457 Mass. at 450, 452, 455.¹⁸ Indeed, where the United States has attempted to take or eliminate public trust rights, it has “explicitly list[ed] ‘any tidelands trust rights’ of the affected State “as part of the estate to be taken” because of this clear statement rule and the special, sovereign nature of the rights. *32.42 Acres of Land, More or Less Located in San Diego County*, 683 F.3d at 1033. Here, as noted above, the 1944 Judgment did not include that required clear statement.

* * *

For the foregoing reasons, the Commonwealth respectfully requests that the FWS’s Final CCP/EIS reflect the facts and the law set forth in this letter.

Sincerely,

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Exhibits:

(1) Judgment on the Declaration of Taking, *United States v. 3,000 Acres of Land, More or Less*, Situated in Barnstable County, Commonwealth of Massachusetts, Misc. C.A. No. 6340 (D. Mass. June 1, 1944);

¹⁸ For this reason, the 1944 Judgment’s vague reference to “other rights” does not constitute a sufficient expression of the United States’ intention to take or eliminate public trust rights in the lands taken.

(2) Declaration of Taking, *United States v. 3,000 Acres of Land, More or Less*, Situated in Barnstable County, Commonwealth of Massachusetts, Misc. C.A. No. 6340 (D. Mass. Feb. 10, 1944);

(3) U.S. Dep't of Agriculture, Bureau of Biological Survey, Division of Land Acquisition, Monomy Island Migratory Waterfowl Refuge, Barnstable County, Massachusetts (Sept. 15, 1938);

(4) Stipulation in Lieu of Amended Pleadings, *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (Apr. 30, 1982);

(5) National Oceanic and Atmospheric Administration (NOAA), Chart 13237, Nantucket Sound and Approaches, showing the closing lines agreed to in the Stipulation in Lieu of Amended Pleadings in the event the Nantucket Sound is adjudged not to be inland waters (Appendix C to Report of the Special Master in *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (1984);

(6) Supplemental Decree, *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (1996);

(7) Joint Motion for Entry of A Supplemental Decree, Memorandum in Support of the Joint Motion, and Proposed Supplemental Decree, *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (Jan. 31, 1996);

(8) Report of the Special Master, *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (1984) (selected pages);

(9) Ltr. from Drew S. Days, III, Solicitor General, U.S. Dep't of Justice, to Francis J. Lorson, Deputy Clerk, Supreme Court of the United States, re *United States v. State of Maine* (*Massachusetts Boundary Case*), No. 35 Orig. (Feb. 9, 1996);

(10) An Act Declaring the Territorial Limits of the Commonwealth, and Establishing the Limits of Certain Counties, 1859 Mass. Acts 640 ch. 289;

(11) Finding, *United States v. Taylor*, Crim. A. No. 79-319-MC (D. Mass. Dec 18, 1979);

(12) *Assocs. of Cape Cod, Inc. v. Babbitt*, C.A. No. 00-10549-RMZ, at 12 (D. Mass. May 22, 2001); and

(13) *United States v. 32.42 Acres of Land, More or Less Located in San Diego County*, C.A. No. 05-cv-1137 (S.D. Cal. Apr. 28, 2006).

Exhibit 1

Judgment on the Declaration of Taking, *United States v. 3,000 Acres of Land, More or Less*, Situated in Barnstable County, Commonwealth of Massachusetts, Misc. C.A. No. 6340 (D. Mass. June 1, 1944)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Petitioner,

v.

3,000 ACRES OF LAND, MORE OR LESS,
SITUATE IN BARNSTABLE COUNTY,
COMMONWEALTH OF MASSACHUSETTS,
SUSIE H. KOSAK, ET AL.,
Defendants.)

MISC. CIVIL NO. 6340

JUDGMENT ON THE DECLARATION OF TAKING

(June 1, 1944.)

HEALEY, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a Judgment on the Declaration of Taking filed herein and upon consideration thereof and of the petition and the declaration of taking filed herein and statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

FIRST, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed for in said petition;

SECOND, that the declaration of taking filed herein contains or has annexed thereto a statement of the authority under which and the public use for which the lands hereinafter described are taken, a description of the said lands taken sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of the Interior of the United States of America, to be just compensation for the land taken in the sum of \$27,560.14 and that said amount has been deposited into the registry of the Court for the use and benefit of the persons entitled thereto;

THIRD, that the said declaration of taking filed herein contains a statement that the Secretary of the Interior of the United States of America, head of the acquiring agency, is of the opinion that the ultimate award of just compensation will be within the limits prescribed by Congress as the price to be paid therefor;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the fee simple title to said lands together with all accretion and reliction and all and singular the water rights, riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, vested in the United States of America upon the filing of the said declaration of taking and the depositing into the

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registry of this Court of the amount of estimated just compensation, which land is situate in the Town of Chatham, County of Barnstable, and Commonwealth of Massachusetts, and more particularly described in Schedule "A" attached hereto and made a part hereof, and defined in map marked Schedule "B" attached to and made a part of the declaration of taking herewith filed.

Said land is deemed to be condemned and taken for the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

This cause is held open for such further and other orders, judgments and decrees as may be necessary in the premises.

Entered this 1st day of June, 1944 at Boston, Massachusetts.

BY THE COURT:

/s/ Joseph J. Duwan

Deputy Clerk

ENTERED:

June 1, 1944

Arthur D. Healey, J.

All that part of Cape Cod in the Town of Chatham, Barnstable County, Massachusetts, more particularly described as being all those tracts or parcels of land lying above mean low water, including a portion of Morris Island; all of Monomoy Beach, Monomoy Island, and Monomoy Point; Sheeters Island; together with all land covered by the waters of land locked ponds; and all islands, islets, sand bars and tidal flats lying in Nantucket Sound, Chatham Bay, and Stage Harbor; all lying within the following described exterior limits: Beginning at the westerly corner of the Chatham Coast Guard Station property on Morris Island, at approximate latitude $41^{\circ} 39' 25''$, longitude $69^{\circ} 57' 30''$, which corner is marked with a U.S.B.S. standard concrete post "2 CUR 1 1940"; thence with the south-westerly boundary of the said Chatham Coast Guard Station, S. $39^{\circ} 40' E.$, 6.36 chains to the southerly corner thereof; thence continuing in the range of the southwesterly boundary of the said Coast Guard Station, S. $39^{\circ} 40' E.$, 2.83 chains to a point on the easterly side of Morris Island at the mean high water line on the Atlantic Ocean shore; thence, S. $39^{\circ} 40' E.$, to the mean low water line on the Atlantic Ocean shore; thence southwesterly with the mean low water line on the Atlantic Ocean shore, along the easterly side of Morris Island, Monomoy Beach, Monomoy Island, and Monomoy Point, to the southernmost extremity of Monomoy Point, at the mean low water line on the Atlantic Ocean Shore, at the entrance to Nantucket Sound; thence westerly in Nantucket Sound, to a point in the said sound, at latitude $41^{\circ} 33'$, longitude $70^{\circ} 02'$; thence northeasterly in Nantucket Sound and Chatham Bay, to a point in Chatham Bay at latitude $41^{\circ} 39' 20''$, longitude $69^{\circ} 59' 20''$; thence continuing in Chatham Bay, southeasterly to a point in the said bay near the mouth of Stage Harbor at latitude $41^{\circ} 39' 05''$, longitude $69^{\circ} 58' 20''$; thence northeasterly in Chatham Bay and Stage Harbor to a point, at the mean low water line on the easterly shore of Stage Harbor, on the westerly side of Morris Island, at approximate, latitude $41^{\circ} 39' 25''$, longitude $69^{\circ} 55' 10''$; thence EAST, to a point at the mean high water line on the shore of Stage Harbor; thence EAST, 0.606 chain to a U.S.B.S. standard concrete post marked "1 1940"; thence on Morris Island EAST, 39.30 chains to the place of beginning. Excepting therefrom, however, all that tract or parcel of land, known as the Old Monomoy Lighthouse site, bounded by the following described lines: Beginning at a stake 360 feet from the high water mark, and running from thence, southwest, 20 rods to a stake; thence northwest 32 rods to a stake; thence northeast 20 rods to a stake; thence southeast 32 rods to the first named stake; the same containing $\frac{1}{2}$ acres, more or less.

A true copy:

ATTEST: /s/ Arthur M. Brown Deputy Clerk.
(Seal)

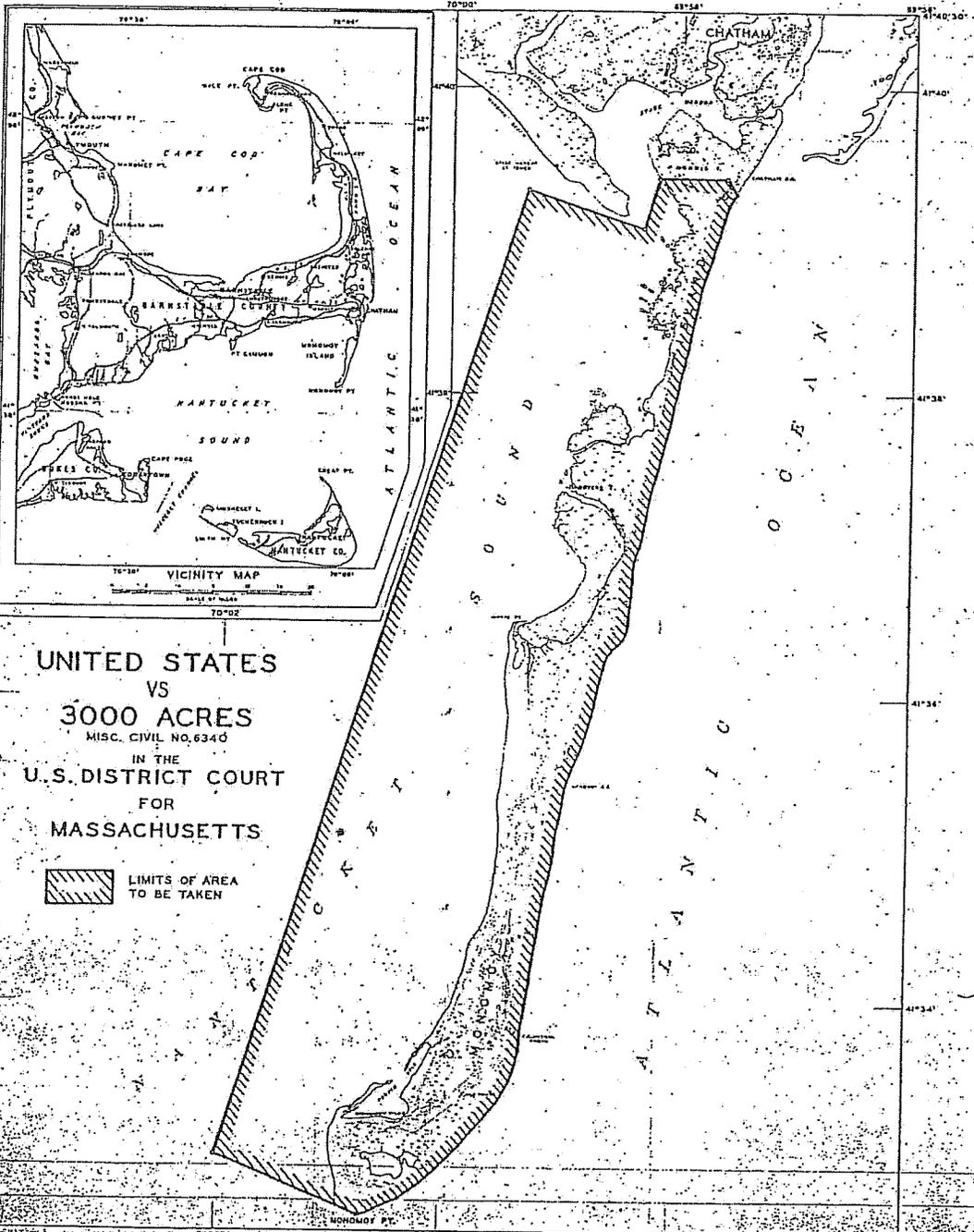
090169

MONOMOY NATIONAL WILDLIFE REFUGE

U.S. DEPARTMENT OF THE INTERIOR

BARNSTABLE COUNTY, MASSACHUSETTS

FISH AND WILDLIFE SERVICE



UNITED STATES
VS
3000 ACRES
MISC. CIVIL NO. 6340
IN THE
U.S. DISTRICT COURT
FOR
MASSACHUSETTS

 LIMITS OF AREA TO BE TAKEN

MADE BY THE DIVISION OF LAND ACQUISITION
FROM SURVEYS BY U.S.G.S.
WASHINGTON, D.C. APRIL 1944
ADDENDUM, FEBRUARY 1944
SCALE 1:50,000
CONTOUR INTERVAL 10 FEET (BASED ON MEAN SEA LEVEL)
NEAR DECLINATION 1944
MAGNETIC DECLINATION 1944
MAGNETIC DECLINATION 1944
MAGNETIC DECLINATION 1944

Exhibit 2

Declaration of Taking, *United States v. 3,000 Acres of Land, More or Less*, Situated in Barnstable County, Commonwealth of Massachusetts, Misc. C.A. No. 6340 (D. Mass. Feb. 10, 1944)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Petitioner

v.

3,000 acres, more or less of land
situate in Barnstable County,
Commonwealth of Massachusetts,
Susie H. Kosak, et al.,
Defendants.

NO. Miscellaneous Civil No. 6340

DECLARATION OF TAKING

I, Harold L. Ickes, Secretary of the Interior of the United States, acting in such capacity, do hereby make and cause to be filed this Declaration of Taking under and in accordance with an Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C. 288a), and declare that:

FIRST: (a) The land hereinafter is taken pursuant to and under authority of an Act of Congress entitled the Migratory Bird Conservation Act approved February 18, 1929 (45 Stat. 1222), and acts supplementary thereto and amendatory thereof.

(b) The said land hereinafter described has been selected by me for acquisition by the United States for use in connection with the Monomoy National Wildlife Refuge, Fish and Wildlife Service, Department of the Interior, and is required for immediate use.

(c) In my opinion, it is necessary, advantageous, and in the interest of the United States that said land be acquired by judicial proceedings as authorized by an Act of Congress approved August 1, 1888, and Acts supplementary and amendatory thereof (25 Stat. 357; 40 U.S.C. 257, 258).

(d) The public uses for which said land is taken are as follows:

The land is necessary for use in connection with the Monomoy National Wildlife Refuge, Fish and Wildlife Service Project, which contemplates the establishment of a refuge for the protection during the nesting season or while on their way to and from their breeding grounds of all those species of wildlife which have been determined as being of great value as a source of food, or in destroying of insects which are injurious to forests and forage plants on the public domain as well as to agricultural crops, but nevertheless in danger of extermination through lack of adequate protection.

SECOND: Pursuant to law, I have selected for acquisition for the purposes of the foregoing Acts of Congress the following described land:

All that part of Cape Cod in the Town of Chatham, Barnstable County, Massachusetts, more particularly described as being all those tracts or parcels of land lying above mean low water, including a portion of Morris Island; all of Monomoy Beach, Monomoy Island, and Monomoy Point; Sheesters Island; together with all land covered by the waters of land locked ponds; and all islands, islets, sand bars and tidal flats lying in Nantucket Sound, Chatham Bay, and Stage Harbor; all lying within the following described exterior limits: Beginning at the westerly corner of the Chatham Coast Guard Station property on Morris Island, at approximate latitude $41^{\circ} 39' 25''$, longitude $69^{\circ} 57' 30''$, which corner is marked with a U.S.R.S. standard concrete post "2 COR 1 1940"; thence with the south-westerly boundary of the said Chatham Coast Guard Station, S. $39^{\circ} 40' E.$, 6.26 chains to the southerly corner thereof; thence continuing in the range of the southwesterly boundary of the said Coast Guard Station, S. $39^{\circ} 40' E.$, 2.83 chains to a point on the easterly side of Morris Island at the mean high water line on the Atlantic Ocean shore; thence, S. $39^{\circ} 40' E.$, to the mean low water line on the Atlantic Ocean shore; thence southwesterly with the mean low water line on the Atlantic Ocean shore, along the easterly side of Morris Island, Monomoy Beach, Monomoy Island, and Monomoy Point, to the southernmost extremity of Monomoy Point, at the mean low water line on the Atlantic Ocean Shore, at the entrance to Nantucket Sound; thence westerly in Nantucket Sound, to a point in the said sound, at latitude $41^{\circ} 33'$, longitude $70^{\circ} 02'$; thence northeasterly in Nantucket Sound and Chatham Bay, to a point in Chatham Bay at latitude $41^{\circ} 39' 20''$, longitude $69^{\circ} 59' 20''$; thence continuing in Chatham Bay, southeasterly to a point in the said bay near the mouth of Stage Harbor at latitude $41^{\circ} 39' 05''$, longitude $69^{\circ} 58' 20''$; thence northeasterly in Chatham Bay and Stage Harbor to a point, at the mean low water line on the easterly shore of Stage Harbor, on the westerly side of Morris Island, at approximate, latitude $41^{\circ} 39' 25''$, longitude $69^{\circ} 58' 10''$; thence EAST, to a point at the mean high water line on the shore of Stage Harbor; thence EAST, 0.606 chain to a U.S.R.S. standard concrete post marked "1 1940"; thence on Morris Island EAST, 39.30 chains to the place of beginning. Excepting therefrom, however, all that tract or parcel of land, known as the Old Monomoy Lighthouse site, bounded by the following described lines: Beginning at a stake 360 feet from the high water mark, and running from thence, southwest, 20 rods to a stake; thence northwest 32 rods to a stake; thence northeast 20 rods to a stake; thence southeast 32 rods to the first named stake; the same containing 4 acres, more or less.

The above-described area contains in the aggregate 3,000 acres, more or less, and is delineated on a map tracing, bearing date, February, 1944, and designated Monomoy National Wildlife Refuge, United States VS. 3,000 Acres, Miscellaneous Civil No. 6340 in the U. S. District Court for Massachusetts, and a print from that tracing is attached hereto and made part hereof, and said area is to be acquired together with all accretioned land and all and singular water and riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

THIRD: The estate taken for said public uses is the full fee simple title.

FOURTH: The sum estimated by me as just compensation for said land with all buildings and improvements thereon and all appurtenances thereunto belonging including any and all interest whatsoever, is TWENTY-SEVEN THOUSAND FIVE HUNDRED SIXTY-DOLLARS AND FOURTEEN CENTS (\$27,560.14), which sum is being deposited in the Registry of this Court for the use and benefit of the parties entitled thereto. I am of the opinion that the ultimate award for said land will probably be within the limits of allocations and allotments made and provided for the purchase of said land.

IN WITNESS WHEREOF, I have signed this Declaration of Taking and caused the seal of the Department of the Interior to be hereto affixed on this tenth day of February A. D., 1944, in the City of Washington, District of Columbia.

/s/ Harold L. Ickes

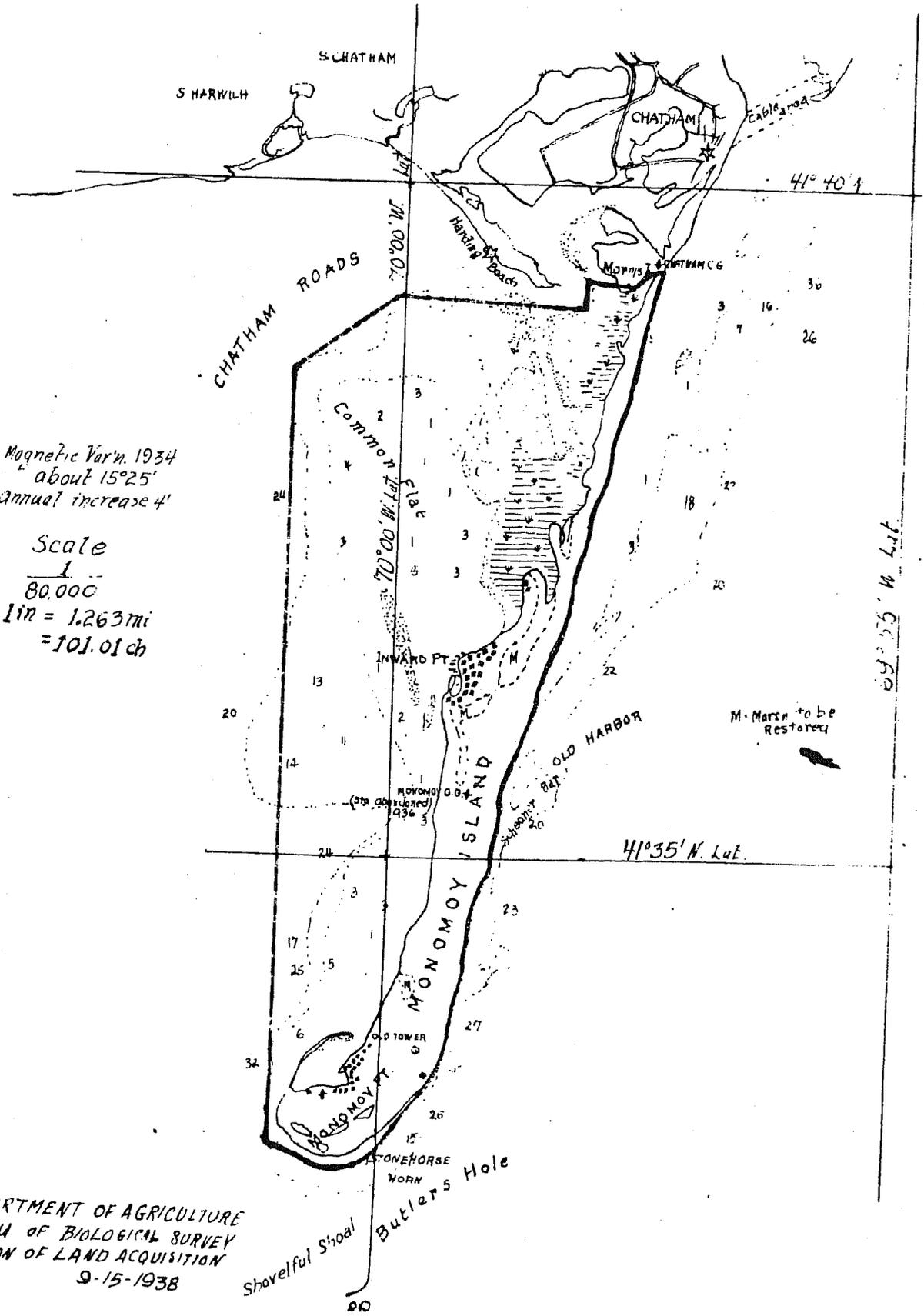
Secretary of the Interior
of the United States of America

Exhibit 3

U.S. Dep't of Agriculture, Bureau of Biological Survey, Division of
Land Acquisition, Monomy Island Migratory Waterfowl Refuge,
Barnstable County, Massachusetts (Sept. 15, 1938)

MONOMOY ISLAND MIGRATORY WATERFOWL REFUGE
 BARNSTABLE COUNTY, MASSACHUSETTS

SECTION OF U.S.C. & G.S. CHART 1209
 Published Nov. 1933.



U.S. DEPARTMENT OF AGRICULTURE
 BUREAU OF BIOLOGICAL SURVEY
 DIVISION OF LAND ACQUISITION
 9-15-1938

Exhibit 4

Stipulation in Lieu of Amended Pleadings, *United States v. Maine*,
U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*)
(Apr. 30, 1982)

IN THE

**SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981**

No. 35, Original

United States of America; Plaintiff

v.

The State of Maine, et al.

(Massachusetts)

BEFORE THE SPECIAL MASTER

STIPULATION IN LIEU OF AMENDED PLEADINGS

As originally framed, these proceedings put at issue numerous segments of the Massachusetts coastline from which the territorial sea is measured. Since that time, the parties have sought to narrow the areas of disagreement and have been partially successful. For the purpose of specifying the remaining issues to be presented to the Special Master, the plaintiff, United States of America, and the defendant, Commonwealth of Massachusetts, by their attorneys, do hereby agree as follows:

1. The sole remaining issues to be considered by the Special Master are whether or not Nantucket Sound and Vineyard Sound are inland waters.
2. If both Nantucket Sound and Vineyard Sound are finally determined to be inland waters, the seaward limit of state ownership shall be the line of the territorial sea of the United States as currently shown on C. & G.S. Chart 1209 (Exhibit "A" to Memorandum in Lieu of Amended Complaint), except where a more seaward line results by projecting a line three geographical miles from the segments of the coastline specified in the Court's Decree of June 15, 1981, and from

the following closing lines: from the southern point of Monomoy (Monomoy Point), being considered a part of the mainland, to the northern point of Nantucket Island (Great Point); from the southwestern point of Nantucket Island to the southeastern point of Esther Island; from the northwestern point of Esther Island to the southern point of Tuckernuck Island; from the northwestern point of Tuckernuck Island to the southeastern point of Muskeget Island (excluding the barrier spit in the southern area of Muskeget Island); from the northwestern point of Muskeget Island to Muskeget Rock; from Muskeget Rock to the southeastern point of Martha's Vineyard (Wasque Point); and from Gay Head on Martha's Vineyard to the southwestern point of Cuttyhunk Island, all as described in paragraphs 15(b) and 15(c) of the Memorandum in Lieu of Amended Answer of Massachusetts and shown on Exhibit "A" thereto.

3. If Nantucket Sound is finally determined not to be inland waters, and regardless of the inland status of Vineyard Sound, the limits of the territorial sea in Nantucket Sound are as shown by the lines of federal/state demarcation on C. & G.S. Chart 1209 (Exhibit "A" to Memorandum in Lieu of Amended Complaint), with the following exceptions:

a. There shall be recognized a bay closing line from a point southeast of East Chop (approximately 41°27'30" N, 70°33'18" W on NOS Chart 13233, 8th Ed.) to a point west of Cape Pogue (approximately 41°25'06" N, 70°27'56" W on NOS Chart 13233, 8th Ed.), on the island of Martha's Vineyard, and, pursuant to the Submerged Lands Act, a three geographical mile seaward extension from said bay closing line, in favor of Massachusetts.

b. There shall be recognized a bay closing line from a point on Point Gammon on Cape Cod (approximately 41°36'36" N, 70°15'40" W, on NOS Chart 13237, 26th Ed.) to the southwesternmost point of Monomoy (approximately 41°33'02" N, 70°00'59" W on NOS Chart 13237, 26th Ed.), and, pursuant to the Submerged Lands Act, a three geographical mile seaward extension from said bay closing line, in favor of Massachusetts.

c. There shall be recognized a bay closing line from a point on the west coast of Great Island (approximately 41°37'08" N, 70°16'15" W, on NOS Chart 13229, 15th Ed.) to a point on Hyannis Point, on Cape Cod (approximately 41°37'27" N, 70°17'34" W, on NOS Chart 13229, 15th Ed.), said bay closing line not affecting the limits of the territorial sea.

4. If Vineyard Sound is finally determined not to be inland waters, the seaward limit of state ownership at the southwestern entrance thereto are the limits of the territorial sea of the United States as shown by the line of federal/state demarcation on C. & G.S. Chart 1209 (Exhibit "A" to Memorandum in Lieu of Amended Complaint).

5. The parties do not believe it necessary, for the purpose of this litigation, to determine the limits of inland waters of Massachusetts other than those already agreed upon or put in issue through this stipulation. This stipulation is not to be taken to represent the position of either party on the location of inland waters other than those specifically enumerated.

The parties severally pray for a decree in accordance with their respective positions as set forth above.

UNITED STATES OF AMERICA, PLAINTIFF

By /s/ Louis F. Claiborne
Deputy Solicitor General of the United States

Dated: April 29, 1982

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT

By /s/ Thomas R. Kiley,
First Assistant Attorney General
*Department of the Attorney General
Commonwealth of Massachusetts*

Dated: April 30, 1982

APPENDIX C

Exhibit 5

National Oceanic and Atmospheric Administration (NOAA), Chart 13237, Nantucket Sound and Approaches, showing the closing lines agreed to in the Stipulation in Lieu of Amended Pleadings in the event the Nantucket Sound is adjudged not to be inland waters (Appendix C to Report of the Special Master in *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (1984))



BUZZARDS BAY

MARTHA'S VINEYARD

S O U N D

NANTUCKET

GENERAL EXPLANATION

LODGE-A

GENERAL EXPLANATION

NOTES ON THIS CHART

1347 1344 1345

LODGE-C

GENERAL EXPLANATION

NOTES ON THIS CHART

9930-3 9930-Y 9930-Z

APPENDIX C
 Portion of Chart 13227
 NANTUCKET SOUND AND APPROACHES

UNITED STATES - EAST COAST
 MASSACHUSETTS

NANTUCKET SOUND AND APPROACHES

Scale 1:60,000 at Lat. 41° 32' 00"
 Sounding in Feet
 at Mean Low Water

United States - Maine (Measurement)
 No. 25, S. C. Original Action
 Before the Special Master
 MEMORANDUM OF SETTLEMENT
 Exhibit 1

The closing lines pencilled on this chart
 approximate the closing lines described in
 Paragraph III(3)(a)-(c) of the Memorandum
 of Settlement.

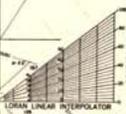


Exhibit 6

Supplemental Decree, *United States v. Maine*, U.S. Supreme Ct.
Original A. No. 35 (*Massachusetts Boundary Case*) (1996)

SUPREME COURT OF THE UNITED STATES

No. 35, Original

**UNITED STATES OF AMERICA, PLAINTIFF *v.*
STATE OF MAINE ET AL.
(Massachusetts Boundary Case)**

**ON EXCEPTION TO THE REPORT OF THE SPECIAL MASTER
[February 26, 1996]**

The joint motion for entry of a supplemental decree is granted.

SUPPLEMENTAL DECREE

The Court having, by its decision of February 25, 1986, adopted the recommendation of its Special Master that Vineyard Sound constitutes historic inland waters and overruled the exception of Massachusetts to the Report of its Special Master herein insofar as it challenged the Master's determination that the whole of Nantucket Sound does not constitute historic or ancient inland waters, and having, to this extent, adopted the Master's recommendations and confirmed his Report:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. For the purposes of the Court's Decree herein dated October 6, 1975, 423 U.S. 1 (affirming the title of the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the three geographic mile zone), the coastline of the Commonwealth of Massachusetts shall be determined on the basis that the whole of Vineyard Sound constitutes state inland waters and Nantucket Sound (with the exception of interior indentations which

are described in paragraphs 2(c), (d) and (e) below) is made up of territorial seas and high seas.

2. For purposes of said Decree of October 6, 1975, the coastline of Massachusetts includes the following straight lines:

- (a) A line from a point on Gay Head on Martha's Vineyard (approximately $41^{\circ}21'10''\text{N}$, $70^{\circ}50'07''\text{W}$) to the southwestern point of Cuttyhunk Island (approximately $41^{\circ}24'39''\text{N}$, $70^{\circ}56'34''\text{W}$);
- (b) A line from a point on East Chop (approximately $41^{\circ}28'15''\text{N}$, $70^{\circ}34'05''\text{W}$) to a point on Cape Cod (approximately $41^{\circ}33'10''\text{N}$, $70^{\circ}29'30''\text{W}$);
- (c) A line from a point southeast of East Chop (approximately $41^{\circ}27'30''\text{N}$, $70^{\circ}33'18''\text{W}$) to a point west of Cape Pogue (approximately $41^{\circ}25'06''\text{N}$, $70^{\circ}27'56''\text{W}$) on the island of Martha's Vineyard;
- (d) A line from a point on Point Gammon on Cape Cod (approximately $41^{\circ}36'36''\text{N}$, $70^{\circ}15'40''\text{W}$) to the southwestern-most point of Monomoy Island (approximately $41^{\circ}33'02''\text{N}$, $70^{\circ}00'59''\text{W}$); and
- (e) A line from a point on the west coast of Great Island (approximately $41^{\circ}37'08''\text{N}$, $70^{\circ}16'15''\text{W}$) to a point on Hyannis Point on Cape Cod (approximately $41^{\circ}37'27''\text{N}$, $70^{\circ}17'34''\text{W}$).

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

JUSTICE SOUTER took no part in the consideration or decision of this motion and supplemental decree.

Exhibit 7

Joint Motion for Entry of A Supplemental Decree, Memorandum in Support of the Joint Motion, and Proposed Supplemental Decree, *United States v. Maine*, U.S. Supreme Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (Jan. 31, 1996)

filed
1/31/96

No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(MASSACHUSETTS BOUNDARY CASE)

ON EXCEPTION TO THE REPORT OF
THE SPECIAL MASTER

JOINT MOTION FOR ENTRY OF A SUPPLEMENTAL
DECREE, MEMORANDUM IN SUPPORT
OF THE JOINT MOTION, AND
PROPOSED SUPPLEMENTAL DECREE

SCOTT HARSHBARGER
Attorney General
WILLIAM L. PARDEE
Assistant Attorney General
Commonwealth of
Massachusetts
Boston, Mass. 02114
(617) 727-2200

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

(MASSACHUSETTS BOUNDARY CASE)

**ON EXCEPTION TO THE REPORT
OF THE SPECIAL MASTER**

**JOINT MOTION FOR ENTRY OF A
SUPPLEMENTAL DECREE**

The United States of America and the Commonwealth of Massachusetts jointly move that this Court enter a supplemental decree in the form and manner of the attached proposed decree. The basis for this motion is explained in the memorandum that follows.

Respectfully submitted.

SCOTT HARSBARGER
Attorney General

WILLIAM L. PARDEE
*Assistant Attorney General
Commonwealth of
Massachusetts*

DREW S. DAYS, III
Solicitor General

JANUARY 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

(MASSACHUSETTS BOUNDARY CASE)

ON EXCEPTION TO THE REPORT OF THE
SPECIAL MASTER

MEMORANDUM IN SUPPORT OF THE JOINT
MOTION FOR A SUPPLEMENTAL DECREE

This joint motion arises from litigation between the United States and the Commonwealth of Massachusetts over whether Vineyard Sound and Nantucket Sound are part of the "internal waters" of Massachusetts. This Court has decided that Vineyard Sound qualifies as internal waters, but Nantucket Sound does not. *United States v. Maine*, 475 U.S. 89 (1986). The United States and Massachusetts have prepared the proposed decree in conformity with the Court's decision.

1. In 1969, the United States brought suit against 13 States to resolve disputes respecting the scope of the federal sovereign interest in the seabed and

submerged lands underlying the Atlantic Ocean. See *United States v. Maine*, 395 U.S. 955 (granting the United States leave to file complaint). The Court appointed a Special Master, 398 U.S. 947 (1970), who submitted a report to the Court, 419 U.S. 814 (1974). The States filed exceptions to the Special Master's report. The Court overruled those exceptions, concluding that the United States has sovereign rights over the seabed and subsoil lying more than three geographic miles seaward from the ordinary low-water mark and from the outer limits of inland coastal waters. 420 U.S. 515 (1975). The Court entered a decree in accordance with that ruling. 423 U.S. 1 (1975).

2. The Court retained jurisdiction to resolve remaining issues respecting the location of the coastline of the States and the seaward boundary between the seabed lands of the States and those of the United States. *United States v. Maine*, 421 U.S. 958 (1975). In 1976, the United States filed a motion for supplementary proceedings to resolve issues respecting portions of the coastlines of Rhode Island and Massachusetts. The Court appointed a new Special Master, 433 U.S. 917 (1977), who severed the Massachusetts dispute from the Rhode Island dispute and allowed New York to intervene in the latter proceeding. See *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 508 (1985).

In the case of the dispute involving Rhode Island and New York, the Special Master submitted a report addressing the status of Block Island Sound and a portion of Long Island Sound. *United States v. Maine*, 465 U.S. 1018 (1984). The United States, Rhode Island, and New York all filed exceptions to the

Special Master's report. The Court overruled those objections, concluding that certain portions of the waters in dispute are "juridical bays" and therefore inland waters of the States. *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985). The Court entered a supplemental decree in accordance with its ruling. 471 U.S. 375 (1985).

In the case of the Massachusetts dispute, the Special Master submitted a report addressing the location of portions of that Commonwealth's coastline in the area between Eastern Point, on Cape Ann, and Race Point, on Cape Cod, and between Gooseberry Neck and Cuttyhunk Island. The parties filed no exceptions to that report, and the Court accordingly entered a supplemental decree adopting the Special Master's determinations. *United States v. Maine (Massachusetts Boundary Case)*, 452 U.S. 429 (1981). The Master separately addressed the question whether Vineyard Sound and Nantucket Sound are inland waters of the Commonwealth. The Master submitted a report recommending that Vineyard Sound constitutes inland waters, but Nantucket Sound does not. *United States v. Maine*, 472 U.S. 1015 (1985). Massachusetts filed an exception respecting Nantucket Sound, but the Court overruled that exception. 475 U.S. 89 (1986).

3. In its decision respecting Nantucket Sound, the Court directed the parties "to prepare and submit a decree conforming to the recommendations of the Special Master." *United States v. Maine*, 475 U.S. at 105. The parties began work in preparing the decree, but as a result of changes in the respective governments' personnel and the press of other government business, the undertaking did not progress for a

considerable period of time. The United States and the Commonwealth of Massachusetts have now resumed and completed that undertaking. The proposed decree describes the location of the Massachusetts coastline in the vicinity of Vineyard and Nantucket Sounds in accordance with this Court's February 25, 1986, decision, the Special Master's report, and agreements reached between the parties.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General

WILLIAM L. PARDEE
*Assistant Attorney General
Commonwealth of
Massachusetts*

DREW S. DAYS, III
Solicitor General

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 35, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(MASSACHUSETTS BOUNDARY CASE)

**ON EXCEPTION TO THE REPORT
OF THE SPECIAL MASTER**

PROPOSED SUPPLEMENTAL DECREE

The Court having, by its decision of February 25, 1986, adopted the recommendation of its Special Master that Vineyard Sound constitutes historic inland waters and overruled the exception of Massachusetts to the Report of its Special Master herein insofar as it challenged the Master's determination that the whole of Nantucket Sound does not constitute historic or ancient inland waters, and having, to this extent, adopted the Master's recommendations and confirmed his Report:

IT IS ORDERED, ADJUDGED AND DECREED
as follows:

1. For the purposes of the Court's Decree herein dated October 6, 1975, 423 U.S. 1 (affirming the title of

the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the three geographic mile zone), the coastline of the Commonwealth of Massachusetts shall be determined on the basis that the whole of Vineyard Sound constitutes state inland waters and Nantucket Sound (with the exception of interior indentations which are described in paragraphs 2(c), (d) and (e) below) is made up of territorial seas and high seas.

2. For purposes of said Decree of October 6, 1975, the coastline of Massachusetts includes the following straight lines:

(a) A line from a point on Gay Head on Martha's Vineyard (approximately 41°21'10"N, 70°50'07"W) to the southwestern point of Cuttyhunk Island (approximately 41°24'39"N, 70°56'34"W);

(b) A line from a point on East Chop (approximately 41°28'15"N, 70°34'05"W) to a point on Cape Cod (approximately 41°33'10"N, 70°29'30"W);

(c) A line from a point southeast of East Chop (approximately 41°27'30"N, 70°33'18"W) to a point west of Cape Pogue (approximately 41°25'06"N, 70°27'56"W) on the island of Martha's Vineyard;

(d) A line from a point on Point Gammon on Cape Cod (approximately 41°36'36"N, 70°15'40"W) to the southwestern-most point of Monomoy Island (approximately 41°33'02"N, 70°00'59"W); and

(e) A line from a point on the west coast of Great Island (approximately 41°37'08"N,

70°16'15"W) to a point on Hyannis Point on Cape Cod (approximately 41°37'27"N, 70°17'34"W).

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

Exhibit 8

Report of the Special Master, *United States v. Maine*, U.S. Supreme
Ct. Original A. No. 35 (*Massachusetts Boundary Case*) (1984)
(selected pages)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF MAINE, et al.
(MASSACHUSETTS BOUNDARY CASE),

Defendants.

REPORT OF THE SPECIAL MASTER

WALTER E. HOFFMAN
Special Master
425 U.S. Courthouse
Norfolk, Virginia 23510

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APPENDIX B — Stipulation in Lieu of Amended
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APPENDIX C — Chart 13237, Nantucket Sound and
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF MAINE, et al.
(MASSACHUSETTS BOUNDARY CASE),

Defendants.

REPORT OF THE SPECIAL MASTER

I. INTRODUCTION

The issue to be decided in this Supreme Court original jurisdiction proceeding is the location of the legal coastline of the United States in the area of Vineyard Sound and Nantucket Sound. The resolution of this issue turns specifically on whether Vineyard Sound and Nantucket Sound are bays under the terms of the Convention on the Territorial Sea and Contiguous Zone.

In January 1977, the United States and the Commonwealth of Massachusetts filed a Joint Motion for Supplemental Proceedings and for Appointment of a Special Master in the case, *United States v. Maine, et al.*, No. 35 Original, to determine the coastline of the Commonwealth of Massachusetts. On

June 29, 1977, the Supreme Court appointed the undersigned to serve as Special Master in this proceeding. 433 U.S. 917 (1977).¹

After the parties submitted pre-trial memoranda setting forth their contentions, hearings took place on October 21, 1982 in Norfolk, Virginia, on November 8 to 10, 1982 in Boston, Massachusetts, on June 5, 1983 in Norfolk, and on July 26 and 27, 1983, also in Norfolk. Following these evidentiary hearings, the parties submitted simultaneous post-trial briefs and post-trial reply briefs. Oral argument took place on June 1, 1984 in Boston, following which Massachusetts submitted a short post-argument memorandum on an issue which the United States raised for the first time in its post-trial reply brief.

The original dispute in this proceeding included the areas of Buzzards Bay and Massachusetts Bay, as well as Vineyard Sound and Nantucket Sound. In 1981, the parties agreed to a partial settlement under which the United States accepted the Massachusetts position in Buzzards Bay and Massachusetts Bay. The Supreme Court entered a supplemental decree to this effect. 452 U.S. 429 (1981)² [Appendix A to this Report].

The sole remaining issue in this proceeding is the proper location of the legal coastline of the United States and the Commonwealth of Massachusetts in the area of Vineyard Sound and Nantucket Sound. The legal coastline, also called the baseline, marks the seaward limit of a state's internal

¹ In December, 1976, the United States moved for supplemental proceedings in *United States v. Maine, et al.*, to determine the coastline of Massachusetts and Rhode Island. The June 29, 1977 order of the Supreme Court referred both disputes to the undersigned. When it became clear that the two disputes involved different issues, the undersigned separated the Rhode Island proceedings from the Massachusetts proceedings. See Report of the Special Master, *United States v. Maine, et al. (Rhode Island, New York)*, No. 35 Original at 1-3 (1984).

² See Appendix A to this report.

waters and separates those waters from the state's territorial sea. Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, coastal states have jurisdiction over a three-mile³ belt of territorial sea seaward of the baseline. See *United States v. Louisiana*, 394 U.S. 11, 22-23 (1969); *United States v. California*, 381 U.S. 139 (1965); see also *United States v. California*, 382 U.S. 448, 450 (1966).

Massachusetts asserts that Vineyard Sound and Nantucket Sound comprise bays and are therefore internal waters of the Commonwealth, closed off by a series of lines beginning at Cuttyhunk Island (the most seaward of the Elizabeth Islands and one terminus for the line closing Buzzards Bay) and ending at Monomoy Point (the southern tip of Monomoy Island, which marks the southern tip of Cape Cod).⁴ The United States denies that the sounds are internal state waters. Instead, the United States contends, the waters of Vineyard

³ To minimize confusion, when this report refers to "miles," it means *nautical* (sea) miles, unless it clearly states the contrary. The length of the internationally recognized nautical mile is 1,852 meters (2,025.73 yards). The other internationally recognized measurement of distance is the geographic mile of 1,855 meters (2,029.03 yards). Both the nautical and geographic miles are appreciably longer than the statute (English or land) mile of 1,609.35 meters (1,760 yards). The other frequently used maritime measurement is the marine league of three nautical miles.

⁴ Massachusetts asserts in its Memorandum (Amended Answer) that the relevant coastline for Massachusetts is represented

- (b) with respect to Nantucket Sound, by closing lines drawn from the southern point of Nauset Beach in Chatham to the northeastern point of Monomoy Island; from the southern point of Monomoy Island (Monomoy Point) to the northern point of Nantucket Island (Great Point); from the southwestern point of Nantucket Island to the southeastern point of Esther Island; from the northwestern point of Esther Island to the southern point of Tuckernuck Island; from the northwestern point of Tuckernuck Island to the southeastern point of Muskeget Island (excluding the barrier spit in the southern area of Muskeget Island); from the northwestern point of Muskeget Island to Muskeget Rock; and from Muskeget Rock to the southeastern point of Martha's Vineyard (Wasque Point);
- (c) with respect to Vineyard Sound, by a closing line drawn from the western point of Martha's Vineyard to the southeastern point of Cuttyhunk Island;

Sound are territorial waters, while those of Nantucket Sound are territorial waters in part and high seas in part. According to the United States, the legal coastline in this area is the ordinary low water mark along the mainland from Cuttyhunk Island to Monomoy Point as well as around the various islands south of the two sounds.⁵

If Massachusetts is correct in asserting that Vineyard Sound and Nantucket Sound are bays, they would be internal state waters and the legal coastline would be that put forward by the Commonwealth. If, on the other hand, the sounds are not bays, their waters would be territorial waters and high seas, and the legal coastline would be that put forward by the United States.⁶ The resolution of this proceeding therefore turns on whether Vineyard Sound and Nantucket Sound qualify as bays under the guidelines set forth by the Supreme Court.

II. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE

The Supreme Court has directed, and the parties to this proceeding agree, that the courts will use the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639 [hereinafter the Convention], to define inland or internal waters. *United States v. Louisiana*,

⁵ The United States submits in its amended complaint that the Massachusetts coastline is "the low water line along the mainland and along the numerous offshore islands which form Nantucket Sound."

⁶ The parties to this proceeding have agreed to a Stipulation in Lieu of Amended Pleadings [Appendix B to this Report]. This Stipulation sets forth an agreement as to the legal coastline of Massachusetts under the following circumstances: (1) if both sounds are determined to be inland waters; (2) if Nantucket Sound is determined not to be internal waters, regardless of the ultimate status of Vineyard Sound; and (3) if Vineyard Sound is determined not to be internal waters. The only issue the stipulation does not settle is the appropriate closing line for the northeastern entrance of Vineyard Sound if it is determined to be internal waters, but Nantucket Sound is not.

394 U.S. 11, 17-35 (1969); *United States v. California*, 381 U.S. 139, 161-67 (1965). The Supreme Court has concluded that the Convention provides "the best and most workable definitions available" for defining the extent of inland waters, including bays. *United States v. Louisiana*, 394 U.S. at 21; *United States v. California*, 381 U.S. at 163-65. These decisions also indicate that the Convention is the only valid mechanism for defining inland waters and the legal coastline to insure that the United States will have a single coastline for both domestic purposes and international relations. *United States v. Louisiana*, 394 U.S. at 34-35; *United States v. California*, 381 U.S. at 165. The Special Master will therefore apply the Convention to resolve the issues raised in this proceeding.

A. DELIMITATION OF BASELINES UNDER THE CONVENTION

1. The Normal Baseline

The Convention establishes straightforward rules for locating the normal baseline, or legal coastline. Article 3 defines the normal baseline as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal states." In case of rivers flowing directly into the sea, Article 13 allows the baseline to be a straight line drawn "across the mouth of the river between points on the low tide of its banks."

Article 10(1) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high-tide." Article 10(2) provides that islands have baselines measured in accordance with the same provisions as a mainland.

Article 11 provides that, under certain circumstances, a "low-tide elevation" may have a territorial sea of its own, to be aggregated to that of nearby bodies of land. A low-tide elevation is "a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide." If such an elevation is located "wholly or partly

Exhibit 9

Ltr. from Drew S. Days, III, Solicitor General, U.S. Dep't of Justice,
to Francis J. Lorson, Deputy Clerk, Supreme Court of the United States,
re United States v. State of Maine (Massachusetts Boundary Case), No.
35 Orig. (Feb. 9, 1996)



U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

February 9, 1996

FEB 13 1996

Mr. Francis J. Lorson
Deputy Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: United States v. State of Maine (Massachusetts Boundary Case), No. 35 Orig.

Dear Mr. Lorson:

On January 31, 1996, the United States and the Commonwealth of Massachusetts submitted a proposed decree in the above-captioned case, which involves a controversy over the location of certain portions of the Massachusetts coastline. I am writing in response to your inquiry concerning the proposed decree's use of "approximate" coordinates in resolving that controversy.

The Submerged Lands Act, 43 U.S.C. 1301 et seq., defines the term "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." 43 U.S.C. 1301(c). The dispute in this case centered principally on whether Vineyard Sound and Nantucket Sound are "inland waters" for purposes that definition. See Report of Special Master, No. 35, Orig. (O.T. 1984), at 1-4.

The Special Master concluded that Vineyard Sound comprises inland waters, but Nantucket Sound does not. Report of Special Master, No. 35, Orig. (O.T. 1984), at 68-69, 70. In addition, the parties entered into a stipulation resolving the status of three other areas as inland waters. See id. at 4 n.6, 68; see also App. B (reproducing stipulation); App. C (map of the pertinent areas). The Court overruled Massachusetts' exception to the Special Master's recommendation and directed the parties to prepare a proposed decree. United States v. Maine, 475 U.S. 89 (1986).

The proposed decree effectuates the decision of the Court, the recommendation of the Special Master, and the stipulation of the parties by describing the location of the coastline (viz., the "seaward limit of inland waters," 43 U.S.C. 1301(c)) at issue in this litigation. The proposed decree sets out five straight lines that provide:

- (a) the southwestern closing line for Vineyard Sound;
- (b) the northeastern closing line for Vineyard Sound;
- (c) a closing line for inland waters along the eastern portion of Martha's Vineyard;
- (d) a closing line for inland waters along the southeastern portion of Cape Cod;
- (e) a closing line for Hyannis Harbor and Lewis Bay.

See Proposed Decree para. 2. In each case, the closing line is located between pertinent points on the coastline (such as natural entrance points) in accordance with established principles, including those set forth in the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1607. The proposed decree identifies the pertinent points by their "approximate" coordinates of latitude and longitude because those points, like other points on the coastline, are ambulatory physical features.

The use of approximate coordinates is consistent with the practice followed in previous decrees specifying the location of a coastline. See United States v. Maine (Rhode Island and New York Boundary Case), 471 U.S. 375 (1985); United States v. Maine (Massachusetts Boundary Case), 452 U.S. 429 (1981). The use of approximate coordinates would not be appropriate in decrees that seek to establish a fixed boundary. See, e.g., United States v. Louisiana (Alabama and Mississippi Boundary Case), 507 U.S. 7 (1993).

For your convenience in locating the described closing lines, I am transmitting with this letter a nautical map of Nantucket Sound. The Attorney General of Massachusetts has authorized me to state that Massachusetts concurs in the explanation provided herein.

Sincerely,

Drew S. Days, III
Solicitor General

Exhibit 10

An Act Declaring the Territorial Limits of the
Commonwealth, and Establishing the Limits of Certain Counties
1859 Mass. Acts 640 ch. 289

remove the same, as is given to the board of health in the tenth and eleventh sections of the twenty-first chapter of the Revised Statutes: *provided, however*, that nothing in this section shall be construed as affecting any remedy already given in the preceding section.

Proviso.

Repeal.

SECTION 3. The act entitled "An Act for the regulation of wooden buildings in the city of New Bedford," approved March twenty-fourth, in the year eighteen hundred and fifty-five, is hereby repealed. *Approved November 22, 1859.*

Chap. 288 AN ACT TO INCORPORATE THE PROPRIETORS OF THE SHAWMUT AVENUE BAPTIST SOCIETY, IN BOSTON.

Be it enacted, &c., as follows :

Corporators.

SECTION 1. J. W. Parker, Benjamin Smith and John K. Deane, and their associates and successors, are hereby made a corporation by the name of the Shawmut Avenue Baptist Society; with all the powers and privileges, and subject to all the duties, restrictions and liabilities, set forth in the twentieth and forty-fourth chapters of the Revised Statutes; with power to tax pews according to the provisions of "An Act relating to Religious Societies," passed March twenty-fifth, in the year one thousand eight hundred and forty-five.

Name.
Privileges, re-
strictions, &c.

Annual meeting,
when to be held,
&c.

SECTION 2. The annual meeting of said religious society shall be held on any day in April in each year, Sunday excepted; and at said meeting there shall be chosen by ballot a moderator, clerk, treasurer, collector, and a standing committee, consisting of seven persons; all of whom shall continue in office one year, and until others are chosen and qualified in their stead.

SECTION 3. This act shall take effect from and after its passage. *Approved November 29, 1859.*

Chap. 289 AN ACT DECLARING THE TERRITORIAL LIMITS OF THE COMMONWEALTH, AND ESTABLISHING THE LIMITS OF CERTAIN COUNTIES.

Be it enacted, &c., as follows :

Limits, how far
extending to sea.

SECTION 1. The territorial limits of this Commonwealth extend one marine league from its sea-shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is declared to be equivalent to the shore line. The boundaries of counties bordering upon the sea shall extend to the line of the State as above defined. The jurisdiction of counties separated by waters within the jurisdiction of the State shall be concurrent.

SECTION 2. This act shall take effect from its passage.

Approved December 16, 1859.

Exhibit 11

Finding, *United States v. Taylor*, Crim. A. No. 79-319-MC
(D. Mass. Dec 18, 1979)

this young woman was employed by the refuge by reason of her uniform and the patch on her shoulder, and yet he insisted on her producing her identification. She showed him the identification and conceded to him that she had no law enforcement authority. Mr. Taylor did not thereafter leash the dogs. He was at the area in which he was encountered by Ms. Schuster from about 10:00 a.m. until approximately 11:15 a.m. He then left. Ms. Schuster conceded readily that she could not pinpoint the exact spot on the map or on the photograph, where Mr. Taylor and the dogs were located at the time. She did not recall it being "far from the mainland." I find, therefore, that this incident occurred just to the north of the breach in Monomoy which was created by the blizzard of February, 1978. The incident did not happen on one of the sandbars in the delta which now exists. It occurred on the island itself but, by reason of the exceptionally low tide, it happened below the low mean water mark. At least, I am required to find on the evidence that it has not been established beyond reasonable doubt that it happened above low mean water mark. It is for the court to interpret Exhibit No. 1 (Judgment on Declaration of Taking), and the Schedule "A". The limits of the refuge are described aptly on the map which was entered into evidence, but the boundaries of the refuge are described in Schedule "A". Those boundaries include those tracts or parcels of land lying above mean low water, including Monomoy Island (and I cannot find the incident occurred on land lying above low mean water); land covered by waters of land-locked ponds (not involved in this dispute); and "all islands, islets, sandbars and tidal flats lying in Nantucket Sound, Chatham Bay and Stage Harbor." The defendant must be, and is, found not guilty.

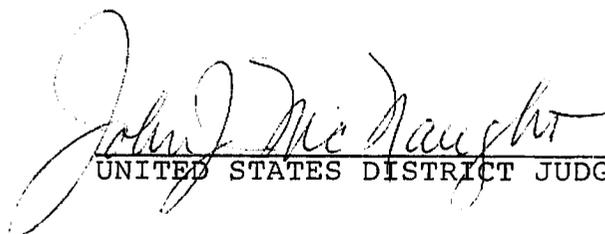

UNITED STATES DISTRICT JUDGE

Exhibit 12

Assocs. of Cape Cod, Inc. v. Babbitt, C.A. No. 00-10549-RMZ
(D. Mass. May 22, 2001)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-10549-RWZ

ASSOCIATES OF CAPE COD, INC. and JAY HARRINGTON

v.

BRUCE BABBITT, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE DEPARTMENT OF INTERIOR, et. al.

MEMORANDUM OF DECISION

May 22, 2001

ZOBEL, D.J.

Plaintiffs, Associates of Cape Cod, Inc. ("ACC") and Jay Harrington, seek to enjoin defendants, the U.S. Fish & Wildlife Service ("FWS") and the National Park Service ("NPS"),¹ from prohibiting the harvesting of horseshoe crabs by plaintiffs in the Monomoy National Wildlife Refuge ("Monomoy") and the Cape Cod National Seashore ("Seashore"). They also request a declaratory judgment that defendants' actions violate federal and state law. All parties filed cross motions for summary judgment.

I. Introduction

The horseshoe crab traces its ancestry back over 400 million years. NPS Vol. VI, K, 90.² A horseshoe crab takes about ten years to reach sexual maturity, and larger

¹ Defendants also include Bruce Babbitt, in his official capacity as the United States Secretary of Interior; Maria Burks, in her official capacity as Superintendent of the Cape Cod National Seashore; and Bud Oliveira, in his official capacity as Manager of the Monomoy National Wildlife Refuge.

² Citations to the administrative record specify the agency, volume number, section number, and page number[s], in that order.

females lay about 100,000 eggs each season. Id. at 90-91. Plaintiff ACC uses the blood of horseshoe crabs to manufacture limulus ameobocyte lysate ("LAL"), a substance that tests for dangerous impurities in health care products. The FDA mandates biomedical companies to perform such testing and ACC is one of only four companies in the country with a license from the FDA to manufacture LAL. The horseshoe crabs are collected, bled, and, within 30 hours of their removal, returned to the water. The studies that were in the administrative record at the time of the agencies' decisions found about a 10-15% mortality rate for horseshoe crabs after bleeding.³

For the past 25 years, plaintiff Jay Harrington has collected horseshoe crabs for ACC from Monomoy and the Seashore. In 1999, the horseshoe crabs collected from these two areas accounted for sixty-two percent of all horseshoe crabs used by ACC and eighty-two percent of horseshoe crabs it collected from Massachusetts waters. Harrington derives ninety percent of his income from gathering horseshoe crabs for ACC.

Plaintiffs earlier requested that defendants be preliminarily enjoined from prohibiting the harvesting of horseshoe crabs by plaintiffs in Monomoy and the Seashore. On May 18, 2000, plaintiffs' request for a preliminary injunction was allowed

³ Plaintiffs submitted recent studies that find only a 2% mortality rate. However, since they were not a part of the record before the agencies, they are not properly considered by this Court. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (reviewing court should only consider administrative record in existence at the time of the agency decision). Even if this information is considered, defendants contend that it merely demonstrates conflicting expert views; the defendants do not act arbitrarily by choosing to rely on the other studies. See Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989) (finding that when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts).

as to the Seashore and the previously open areas of Monomoy, and denied as to the previously closed area of Monomoy. Plaintiffs and defendants then filed cross-motions for summary judgment on all claims concerning both Monomoy and the Seashore, which are addressed below.

II. Statutory Framework

Under the Administrative Procedure Act, 5 U.S.C. § 701, agency decisions can be set aside only if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2)(A). If a statute is silent or ambiguous on a certain issue, the court only needs to determine if the agency’s answer is based on a permissible construction of the statute. See Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Considerable deference should be given to administrative interpretations. See id. at 844. The agency must, however, examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. See Motor Vehicle Mfrs. Assoc. of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and quotation marks omitted).

Normally, it will be arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Id. When an agency’s technical expertise is involved, the court should defer to it. The court should consider the administrative record in existence at the time of the decision. See Florida Power & Light, 470 U.S. at 743-44.

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III. Monomoy National Wildlife Refuge

A. Background on Monomoy

Monomoy was created in 1944 by a Declaration of Taking and is owned by the FWS in fee simple. Monomoy is governed by the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd (“the Refuge Act”). Under the Refuge Act, a refuge is closed to all uses unless specifically permitted, and a use is only permitted if it is found to be compatible with the purposes of the refuge. 16 U.S.C. § 668dd(c), (d)(1), (d)(3)(A)(i). The actions of the FWS, however, have been inconsistent with the law. In 1991, the FWS closed one section of North Monomoy; if the entire refuge was presumptively closed to all uses unless permitted, there would not have been any need for closing this small area. Harrington was successively issued a special use permit (yearly from 1991-1999) to gather horseshoe crabs in the closed area. The FWS, however, did not require a permit to harvest crabs in the remaining “open” areas of Monomoy.⁴ In 1994, the FWS issued a compatibility determination (“CD”) finding that Harrington’s activities were compatible with the purposes of the refuge. In the fall of 1999, the FWS closed the remainder of Monomoy to horseshoe crab harvesting on the basis that such areas were always supposed to be closed and, on March 7, 2000, it refused to reissue Harrington a permit to gather horseshoe crabs anywhere in Monomoy. On April 4, 2000, the FWS found that the 1994 CD, in favor of Harrington,

⁴ In a letter dated May 14, 1991 from the refuge manager to a horseshoe crab bait fisherman, the refuge manager explained that only Harrington was permitted to gather horseshoe crabs (for biomedical purposes) in the closed area of Monomoy, but “[y]ou will still be able to conduct your horseshoe crab bait operation as you have in the past with the exception that you will not be permitted to take crabs” from the closed area. FWS, Vol. 2, A, 8. Other evidence also demonstrates that the FWS was both aware of, and gave permission for, horseshoe crab harvesting in “open” areas of Monomoy.

was no longer valid.⁵ On July 28, 2000, the Acting Regional Director of the FWS denied Harrington’s appeal in the agency’s final administrative action.

Essentially, all public uses are prohibited on Monomoy unless they are specifically permitted through a CD. Therefore, special use permits are entangled with compatibility determinations and the two must be addressed together.⁶ The guidelines for issuing special use permits parallel the law on CDs; special use permits are issued for specialized uses, such as economic/commercial activities, when they are both compatible with the purposes of the refuge and consistent with refuge objectives, applicable laws, and other policies.⁷ FWS Vol. 1, C, 269 (citing 5 RM⁸ 17.6); 50 C.F.R. § 27.97 (prohibiting commercial uses unless authorized by special use permit). Once a use is determined to be compatible, it still may be prohibited if it is a “clear violation of law or policy.” FWS Vol. 1, C, 304 (citing 5 RM 20.11). Compatibility findings generally *precede* considerations such as compliance with federal and state laws. *Id.* at 305 (citing 5 RM 20.11(A)).

⁵ “Compatibility determinations in existence on October 9, 1997 shall remain in effect until and unless modified.” 16 U.S.C. § 668dd(d)(3)(A)(iv). The FWS takes the position, and I have proceeded under the assumption, that the April 4, 2000 memorandum from Bud Oliveira to Sherry Morgan, the Geographical Assistant Regional Director, invalidated (i.e., “modified”) the 1994 CD.

⁶ The administrative proceedings below illustrate the connection between CDs and special use permits. In the final administrative action, the Acting Regional Director of the FWS stated that “Refuge Manager Oliveira concluded that he was precluded by law from issuing a special use permit for the commercial harvesting of horseshoe crabs because he could not affirmatively find that it would be compatible with the purposes for which Monomoy NWR was established.” FWS Addendum at 145. The FWS is therefore incorrect in its argument that only the permit issue is before me, and not the decision to overturn the 1994 CD.

⁷ The Refuge Manual also contains other factors to consider when issuing special use permits, such as, the refuge’s capacity for the activity and the proper assessment of permit fees. FWS Vol. 1, C, 290 (citing 5 RM 17, Ex. 6).

⁸ “RM” refers to the Refuge Manual. Defendants assert that “[t]he compatibility requirements of the Refuge Act are implemented through FWS regulations and its Refuge Manual.” (Defs.’ Mem. Supp. M. S.J. at 7).

B. Compatibility Determination

The first step, therefore, is to examine the FWS's decision to overturn the 1994 CD. The FWS overturned the 1994 CD for the following stated reasons: (1) a 10-15% mortality rate from the bleeding of horseshoe crabs is consumptive, (2) the effect of the mortality rate is unknown since the FWS lacks information about the population of horseshoe crabs in Monomoy, the effects of the bleeding process on the breeding activities of the horseshoe crabs, and whether migratory birds in Monomoy eat horseshoe crab eggs, and (3) the 1994 CD failed to consider the Wilderness Act's general prohibition of commercial activities.

The plaintiffs argue that the decision to overturn the 1994 CD was arbitrary and capricious because it was based on the same information that was considered in the 1994 CD. See, e.g., Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) ("Our only task is to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made.") (citation omitted); Penobscot Air Servs. Ltd. v. FAA, 164 F.3d 713, 719 (1st Cir. 1999) (same). Plaintiffs also assert that the FWS's actions are extreme and irrational; simply prohibiting bait fishermen from harvesting would dramatically raise the horseshoe crab population at Monomoy.⁹ The FWS defends its decision to overturn the 1994 CD. It argues that it had new information about declining horseshoe crab populations on the Atlantic seaboard (in areas outside of Monomoy), as well as evidence of increased horseshoe crab harvesting (for bait) in Monomoy. Moreover, in order to

⁹ Estimates indicate that, not including the biomedical industry, about 260,000 horseshoe crabs were harvested at Monomoy in 1999, almost exclusively by bait harvesters who kill 100% of the horseshoe crabs they harvest. FWS Addendum at 130; FWS Vol. III, C, 161. By contrast, Harrington harvested a total of about 10,000 horseshoe crabs from Monomoy in 1999 with about a 10% mortality rate (i.e., 260,000 horseshoe crabs killed as compared to 1,000).

issue a positive CD, the FWS contends that it must make an *affirmative* finding of compatibility¹⁰ and it simply does not have enough information to do so.

The FWS also argues that agencies have a right to alter their policies “with or without a change in circumstances” as long as they provide a reasoned analysis for why they have done so. Motor Vehicle, 463 U.S. at 57 (quotation marks and citation omitted). The FWS claims that the *potential* impact on migrating birds at Monomoy is enough to preclude an affirmative finding of compatibility. Other unknowns include the effects of biomedical harvesting on the hormonal levels and breeding cycles of female horseshoe crabs. And the FWS argues that, regardless, it “has no obligation to grant any person a specialized use [permit].” FWS, Vol. 1, C, 267 (citing 5 RM 17.3). While that may be true, its decision to grant or deny a permit is subject to judicial review, especially since the permit decision is enmeshed with the compatibility determination, which is certainly subject to such review. While the FWS has no obligation to issue anyone a permit, the decision to grant or withhold permission cannot be arbitrary or capricious.

The FWS’s decision to reverse the 1994 CD was not based on any new information. The 1994 CD found the same mortality rate to be non-consumptive, assumed that horseshoe crab eggs “provide an important source of food” for migratory birds at Monomoy, and stated that “[t]his low-profile harvest technique does not impact

¹⁰ Defendant claims that it can neither find plaintiffs’ use compatible or incompatible with the purposes of the refuge. While the Refuge Act requires an affirmative finding of compatibility, the Refuge Manual directs the manager to find either compatibility or incompatibility. “After completion of the steps described, the refuge manager should be able to declare the proposed use to be either compatible or incompatible and to list any stipulations that may be required to ensure compatibility. This decision must be supported by adequate justification.” FWS Vol 1, C, 302 (citing 5 RM 20.8(E)).

the wilderness character of the island.”¹¹ In addition, there is no evidence that birds at Monomoy eat horseshoe crab eggs¹² or that horseshoe crab populations at Monomoy are declining. The FWS’s “factual premises [are] disconnected, unsubstantiated, and inconclusive.” Atlantic Fish Spotters Assoc. v. Daley, 8 F. Supp. 2d 113, 116-17 (D. Mass. 1998) (reversing agency decision partly based on the “dearth of data proffered by the Secretary in support” of the decision).

While the agency decision need not be the one a federal judge would have made, the APA record review process is designed “to insure a fully informed and well-considered decision.” Vermont Yankee Nuclear Power Co. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978), quoted in National Audubon Soc’y v. Hester, 801 F.2d 405, 408 (D.C. Cir. 1986). The FWS’s decision to overturn the 1994 CD simply does not measure up to this standard; it is uninformed and based on unsubstantiated speculation. The FWS’s change in position was arbitrary and capricious. There was no connection between the facts that the FWS found and the choice that it made. See, e.g., Motor Vehicle, 463 U.S. at 43. The 1994 CD finding that plaintiffs activities are compatible with the purposes of the refuge, therefore, remains in effect.

Because the FWS denied Harrington’s permit application based upon its position that compatibility was lacking, this decision was also arbitrary and capricious. Until and

¹¹ The 1994 CD states that the purposes of Monomoy are: (1) the perpetuation and protection of migratory birds and (2) the preservation of the wilderness character of Monomoy. The Wilderness Act provides that each agency administering wilderness areas “shall be responsible for preserving the wilderness character of the area” and “[c]ommercial services may be performed within the wilderness areas . . . to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” 16 U.S.C. § 1133(b), § 1133(d)(5).

¹² While the FWS submitted articles about certain types of birds eating horseshoe crab eggs in other areas, it has no information on birds at Monomoy. It’s not even clear if the same types of birds in the articles are found at Monomoy. The FWS was trying to collect information on the diet of Monomoy birds in the summer of 2000. FWS Addendum at 168-78.

unless the FWS either (1) makes a valid determination that the plaintiffs' activities lack compatibility with the purposes of the refuge, or (2) has another valid reason for denying plaintiffs a permit,¹³ the FWS is enjoined from prohibiting the harvesting of horseshoe crabs by plaintiffs in the manner described in the 1994 CD. This injunction applies to all areas of Monomoy, with the exception of the wilderness areas, which are addressed below.

C. Compliance With Other Laws and Authority, i.e. the Wilderness Act

The Wilderness Act is not properly considered in the CD. "It should be remembered that the compatibility determination process is merely a preliminary screening of a proposed use to assess its adherence to the legal mandates of compatibility. . . . A positive determination of compatibility should not be viewed as the final word on whether a particular use will be permitted. The proposal must still be evaluated in terms of various other factors" including "compliance with federal and state laws and other applicable authorities." FWS Vol. 1, C, 302-05 (citing 5 RM 20.8(E); 5 RM 20.11). Whether a use is prohibited under another law is irrelevant to whether that use is compatible with the purposes of the refuge. Therefore, the Wilderness Act should be considered after the compatibility determination, not as part of it, especially considering that not all of Monomoy is wilderness area.

Even though the 1994 CD remains in effect and plaintiffs' activities are deemed compatible with the purposes of Monomoy, they can still be prohibited in the wilderness

¹³ While the FWS may deny a permit for other reasons (including failure to comply with the terms of a current permit), the reason it denied Harrington's permit (i.e., supposed lack of compatibility) was arbitrary and capricious. The FWS makes the disingenuous argument that it also denied the permit based on Harrington's failure to fulfill the terms of the 1998 and 1999 permits. Not only does the FWS fail to demonstrate Harrington's noncompliance with the previous permits, but the administrative record makes it clear that the permit was denied based upon lack of compatibility, and nothing else. FWS Addendum at 145.

areas if they are not in compliance with the Wilderness Act. FWS Vol. 1, C, 305 (citing 5 RM 20.11). With respect to the parts of Monomoy designated as "wilderness areas," the Wilderness Act's general prohibition on commercial activities must be examined.

Commercial activities "which are proper for realizing the recreational or other wilderness purposes of the areas" are excepted from this prohibition. 16 U.S.C. § 1133(d)(5). The FWS does not believe that the plaintiffs' activities fall within this exception. And while the 1994 CD states that they will not "impact the wilderness character" of the refuge, that does not mean that they are "proper for realizing" its wilderness purpose. Congress defines "wilderness" in the following manner.

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

Considering the Wilderness Act's provisions, the FWS's refusal to issue plaintiffs a permit is not arbitrary or capricious. The plaintiffs fail to demonstrate that the FWS acted unreasonably in deciding that their activities are not "proper for realizing" the wilderness purposes of the area. Therefore, the FWS's decision to prohibit plaintiffs' activities *in the wilderness areas only* will not be disturbed.

D. Treating Similar Groups Differently

Plaintiffs point out that the FWS permits many other types of commercial activity

in the wilderness areas of Monomoy,¹⁴ including guided boat tours and other types of shellfishing. Specifically, the FWS allows the commercial harvesting of softshell clams (yielding a wholesale value of \$2,387,800 in 1998) and quahogs (averaging \$50,000 annually). This commercial activity is permitted notwithstanding the fact that seabirds feed on shellfish. Plaintiffs argue that treating two similar groups differently without rationale is arbitrary and capricious. See Atlantic Fish Spotters Assoc. v. Daley, 8 F. Supp. 2d 113 (D. Mass. 1998). Other shellfishing activities, however, are not before me. The administrative record contains almost no information on these other types of shellfishing. Besides, none of the FWS's decisions below concerned anything but plaintiffs' harvesting of horseshoe crabs, and this court is limited to the review of those decisions.

If plaintiffs are arguing that FWS acted arbitrarily by failing to consider its authorization of other types of commercial activities, they fail to demonstrate the similarity between those activities and horseshoe crab harvesting. Certainly, guided boat tours fall into an entirely different category of activity. The similarities between harvesting different types of shellfish and horseshoe crabs also is not clear. The cases plaintiffs cite to support their position are distinguishable and involve virtually identical groups. In Atlantic Fish Spotters, the court found that the agency acted arbitrarily by banning the use of spotter planes for fishermen holding one type of Bluefin Tuna permit, but not for those holding a different type. However, all permits involved were for harvesting the same type of fish, the Atlantic Bluefin Tuna, and the agency failed to offer a rational reason for the dissimilar treatment of different permit holders. See Atlantic Fish Spotters, 8 F. Supp. 2d at 114, 116-118. See also Hilo Coast Processing Co. v.

¹⁴ Because I find that the 1994 CD remains in effect, similar arguments by the plaintiffs with respect to the non-wilderness areas of Monomoy are moot.

United States, 7 Cl. Ct. 175 (1985) (addressing differential treatment of *similarly situated* growers of cane and beet sugar).

Plaintiffs' argument might be compelling if the FWS treated other horseshoe crab harvesters (engaged in the same activity as plaintiffs) in a different manner, but that is not the case.¹⁵ The record makes it clear that, while horseshoe crabs may technically be "shellfish" under FWS regulations, they are quite distinct from other types of shellfish. Plaintiffs have therefore failed to demonstrate that the FWS improperly treated similar groups in a different manner.

E. Boundaries of Wilderness Areas¹⁶

All parties agree that the boundary for the wilderness areas lies above the mean low water line ("MLW").¹⁷ Plaintiffs do, however, challenge the wilderness boundary recently drawn by the FWS and derived from a Global Positioning System ("GPS") survey performed by Mark Nelmes. Because the FWS adhered to these new boundaries in its final administrative decision, this issue is properly before me. FWS Addendum at 139.

Plaintiffs criticize the FWS surveyor and particularly dispute the location of the MLW. It is clear from Mr. Nelmes's deposition taken to supplement the administrative record first, that Mr. Nelmes mistakenly believed the western boundary of the wilderness

¹⁵ Indeed, plaintiffs vigorously argue that they should be treated differently from horseshoe crab *bait* harvesters, who kill 100% of the horseshoe crabs they collect. Plaintiffs, therefore, have taken the position that the agency may engage in differential treatment of groups that may share some similarities.

¹⁶ The dispute over the boundaries of the non-wilderness areas of Monomoy is now moot because plaintiffs' activities are permitted there.

¹⁷ Low water is the minimum height reached by a falling tide. The mean low water line represents the intersection of the land with the water surface at the average of all low water heights.

area was the edge of Nantucket Sound, rather than the MLW. Nelmes Depo. at 81. Second, many measurements taken by him were not at MLW. Nelmes Depo., Ex. B, Tab 2. Third, because the surveying crew was having difficulty with the ground equipment, it relied partially on aerial photographs, even though plaintiffs claim that the ground data would have been far more accurate. Nelmes Depo., Ex. B, Tab 3. Fourth, he relied on these aerial photographs to draw many of the contours of the MLW, although he acknowledged that the tide on the day the photographs were taken was not representative of MLW. Nelmes Depo. at 97, 114-15. Plaintiffs also point to other alleged errors, including the failure to factor in known margins of error, the lack of confirmation through biological surveys, and Mr. Nelmes's lack of expertise in the field of tides and in measuring MLW. Nelmes Depo. at 41-42, 50, 85, 90-91.

The FWS does not defend or specifically address the problems plaintiffs raise with the survey. While they do not offer an alternative surveyor, plaintiffs argue that the proper boundary is the one drawn on the maps accompanying the annual permits issued by the FWS. The FWS does not provide any evidence that the boundaries drawn on its own annual permits are inaccurate. Although there is no evidence of any infirmities in the survey, because plaintiffs' allegations are sufficiently serious, pending review by the agency, the permit boundaries should be adhered to (rather than the new survey boundaries).¹⁸ Therefore, until the FWS's review, the boundaries for the wilderness areas are those drawn on the maps accompanying the annual permits issued to Harrington from 1991-1999.

¹⁸ The timing of the survey results made it impossible for the agency to address plaintiffs' specific problems with the way the survey was conducted.

IV. Cape Cod National Seashore

A. Background

In 1961, the Seashore was established as a unit of the National Park System in order to “preserve the nationally significant and special cultural and national features, distinctive patterns of human activity, and ambience that characterize the Outer Cape, along with the associated scenic, cultural, historic, scientific, and recreational values.” NPS Vol. II, D, 8 (citing General Management Plan for the Seashore); see also 16 U.S.C. § 459b-6(b)(1). “In order that the [S]eashore shall be permanently preserved in its present state, no development or plan for the convenience of visitors shall be undertaken therein which would be incompatible with the preservation of the unique flora and fauna.” 16 U.S.C. § 459b-6(b)(1). The NPS oversees the Seashore and may use its authority “for the conservation and management of national resources.” Id. § 459b-6(a). “All aspects of the propagation and taking of shellfish,” however, is reserved to town management. Id. § 459b-6(c). “Shellfish” is not defined by the NPS or any of the Seashore’s authorizing legislation.

Harrington has been collecting horseshoe crabs in the Seashore for 25 years; he has been clearly visible and has even taken a park ranger on his boat to show him his operation. It appears from the record that, up until year 2000, the NPS considered horseshoe crabs to be shellfish, although it never took that official position. Staff members of the Seashore, however, made statements indicating that the NPS did not have jurisdiction over the horseshoe crab.¹⁹ In 1999, the State of Massachusetts Department of Marine Fisheries began issuing permits for the collection of horseshoe crabs; prior to that time, Harrington annually obtained a commercial lobster license to

¹⁹ Such statements came from the Seashore Superintendent and several members of Cape Cod National Seashore Advisory Commission. NPS Vol. III, E, 40, 61, 64.

collect crabs in the Seashore. Harrington Affidavit at 5-6. Starting in 1987, the Town of Orleans issued Harrington a license to hold horseshoe crab pens in Seashore waters. Id. at 5.

In 2000, when concerns about horseshoe crab populations were escalating, the NPS began to classify horseshoe crabs as “wildlife” rather than “shellfish” in order to assert jurisdiction over them. See 36 C.F.R. § 2.2 (prohibiting the taking of wildlife). “Wildlife” is any member of the animal kingdom except fish, and “fish” are any member of various subclasses (that do not technically include horseshoe crabs), or any mollusk or crustacean found in salt water. NPS Vol. I, B, 158. Scientifically, horseshoe crabs belong to their own subclass, Merostomata, whose closest living relatives are spiders and scorpions. Both the Atlantic Marine Fisheries Commission (“ASMFC”) and the Commonwealth of Massachusetts consider the horseshoe crab to be a marine fishery resource (rather than “wildlife”) and thus subject to local control.

Commercial activities are prohibited in the Seashore unless authorized by permit, contract, or other written agreement. Activities authorized by permit must be appropriate to the “mission of the park, particularly with regard to resource protection.” 36 C.F.R. § 1.6(a). The Secretary of Interior issued a directive prohibiting the NPS from approving an action unless it determines that “the activity will not lead to an impairment of park resources and values” and “when there is an unavoidable conflict, conserving those resources and values is predominant.” NPS Vol. III, E, 54. On February 17, 2000, Harrington applied for a permit; and, at a meeting on March 20, 2000, the NPS informed Harrington that his application was denied. On April 11, 2000, the NPS issued a final agency action denying Harrington a permit because of its duty to preserve and protect the ecosystem. The decision explained that “our concerns regarding horseshoe crabs

first arose as a result of information we received on their role as an important avian food source and recent concerns about overharvesting and population losses in the Northeast.” NPS Vol. III, F, 204.

B. NPS’s Jurisdiction Over Horseshoe Crabs: Shellfish or Wildlife?

Plaintiffs assert that the NPS acted arbitrarily when it reclassified horseshoe crabs as wildlife, rather than shellfish. Because this interpretation conflicts with its earlier one, plaintiffs argue that it is entitled to less deference. See INS v. Cardoza-Fonseca, 480 U.S. 421, 445 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”) (citations and quotation marks omitted). An administrative agency acts arbitrarily when it departs from precedent without good reason. See Northern California Power Agency v. Federal Energy Regulatory Comm’n, 37 F.3d 1517, 1522 (D.C. Cir. 1994) (citations omitted). NPS counters that it had simply never considered the issue before; it never took an official position either way. Moreover, NPS claims that its current position is supported by adequate rationale.

The Commonwealth of Massachusetts submitted an amicus brief arguing that it interprets shellfish to include horseshoe crabs and believes that it has jurisdiction over them, not the NPS. In support of this position, it is argued that the court should try to determine Congress’s likely common-sense understanding of shellfish. Because shellfish is not defined in the enabling legislation or in the NPS regulations, plaintiffs argue that it should be given its ordinary, common-sense meaning. See Perrin v. United States, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”); Amoco Prod. Co. v. Southern Ute Indian Tribe, 526

U.S. 865, 873-74 (1999) (“The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910.”).

In 1961, when the Seashore was established, the dictionary defined shellfish as “an aquatic invertebrate animal having a shell.” This definition would include the horseshoe crab. Moreover, because the FWS regulations contain the same definition of shellfish (as the dictionary), plaintiffs argue that the NPS acts arbitrarily when it refuses to take guidance from or adopt the FWS’s definition.²⁰ See 50 C.F.R. § 10.12 (FWS regulation defining shellfish as “an aquatic invertebrate animal having a shell, including but not limited to, (a) an oyster, clam, or other mollusk; and (b) lobster or other crustacean”). Plaintiffs also assert that it is irrational to apply wildlife and hunting regulations, which are largely land based, to the horseshoe crab.

The NPS counters that, when a statute does not contain a definition, the court need only determine whether the agency’s interpretation is based on a permissible construction of the statute. Chevron, 467 U.S. at 842-43. The cases cited by plaintiffs (that use common-sense definitions) are distinguishable because they do not involve challenges to agency interpretations; the Administrative Procedures Act demands a different standard that gives deference to reasonable agency interpretations. The NPS further argues that even in 1961, when the Seashore was established, scientists classified horseshoe crabs in a taxonomic class by themselves, not as shellfish. Moreover, when a statute contains “technical words or terms of art” courts should “explain them by reference to the art or science to which they are appropriate.” Corning

²⁰ Plaintiffs emphasize the close connection between Monomoy and the Seashore: only a narrow inlet separates Monomoy from the Seashore, and Monomoy’s decision to close its waters to horseshoe crab gathering influenced the Seashore to do the same. Plaintiffs also claim that the FWS is “more familiar with aquatic matters” than is the Seashore.

Glass Works v. Brennan, 417 U.S. 188, 201 (1974) (citations and quotation marks omitted). The NPS further maintains that the FWS's regulations are completely irrelevant; it has no obligation to adopt another agency's definition of shellfish. As long as the NPS's interpretation is reasonable, it should be upheld, even if the court would have interpreted it differently. And there is no dispute that, technically, horseshoe crabs are not shellfish.

While the NPS does not admit that it ever considered horseshoe crabs to be shellfish, it claims that any prior position it might have taken is legally irrelevant, regardless. See, e.g., United States v. Flemmi, 225 F.3d 78, 85 (1st Cir. 2000) ("As a general rule, doctrines such as estoppel and apparent authority are not available to bind the federal sovereign."), cert. denied, ___ U.S. ___, 121 S. Ct. 1137 (2001). "Certainly, an agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone.'" FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156-57 (2000) (finding discussion of agency's change in position relevant only to provide the context for Congress's reaction to the agency and subsequent legislation) (citations omitted). The NPS adds that toads and turtles, which both live in the water, are also subject to protection under the "wildlife" regulations.

Plaintiffs also argue that there was a long history of people gathering horseshoe crabs in Cape Cod prior to the establishment of the Seashore²¹ that constituted a "distinctive pattern of human activity" and was part of the "Cape Cod way of life."

²¹ The administrative record contains some evidence about the historical gathering of horseshoe crabs both for recreation and for use as fertilizer and livestock food. FWS Vol. 4, A, 233, 255. Plaintiffs fail, however, to make any connection between that information and Congress's intent in creating the Seashore. There is no indication that Congress meant to protect the gathering of horseshoe crabs as a "distinctive pattern of human activity." Regardless, Congress certainly would not have considered the large-scale commercial bleeding of horseshoe crabs for the manufacture of LAL, since it did not exist at the time of the Seashore's creation.

Plaintiffs claim that, in creating the Seashore, Congress clearly intended to protect these types of activities by leaving “shellfish” to local control. The NPS points out that regulations of the Commonwealth and local town (promulgated prior to 1961) do not include horseshoe crabs in their definitions of “shellfish.” These definitions contain lists of shellfish, such as clams, conchs, mussels, oysters, etc. It can be inferred that Congress was aware of these definitions and meant to maintain them. Plaintiffs dispute that the local and state shellfish definitions contain exhaustive lists. Moreover, the Commonwealth has recently adopted a regulation specifically regarding the collection of horseshoe crabs. See 322 C.M.R. § 6.34. Such recent legislation, however, does not shed light on Congress’s original intent.

It is difficult to discern Congress’s intent because the statute and legislative history do not mention horseshoe crabs. It does not seem that Congress had any opinion about the designation of horseshoe crabs and whether or not they should be classified as shellfish. Given this ambiguity, the NPS’s decision to adopt a technically scientific definition of “shellfish” was not arbitrary or capricious. While the NPS could have used a common-sense definition of shellfish, the technical interpretation that it chose is a permissible construction of the statute. See Chevron, 467 U.S. at 843 (holding that when a statute is silent or ambiguous the court need only determine if the agency’s answer is based on a permissible construction of the statute). The NPS’s assertion of jurisdiction over the horseshoe crab, therefore, will not be disturbed.

C. NPS’s Denial of Permit to Plaintiffs

Plaintiffs argue that, even if the NPS has jurisdiction over the horseshoe crab, it acted arbitrarily when it denied plaintiffs’ permit application. See 36 C.F.R. § 1.6(a) (“[T]he superintendent may issue a permit to authorize an otherwise prohibited or

restricted activity” if it is “consistent with applicable legislation, federal regulations and administrative policies, and based upon a determination that public health and safety, environmental or scenic values, natural or cultural resources, scientific research, implementation of management responsibilities, proper allocation and use of facilities, or the avoidance of conflict among visitor use activities will not be adversely impacted.”). Plaintiffs again point to the dearth of evidence about the horseshoe crab population in the Seashore. They reiterate the argument that gathering horseshoe crabs is a “distinctive pattern of human activity” designed to continue at the Seashore.²²

Commercial uses at the Seashore are prohibited unless specifically permitted. 16 U.S.C. § 459b-4(b). The regulations prohibit the taking of wildlife; the feeding, touching, or intentional disturbing of wildlife nesting, breeding or other activities; and possessing unlawfully taken wildlife or portions thereof. See 36 C.F.R. § 2.2(a). In order to issue a special use permit for commercial activities, the activities “must be appropriate to the mission of the park particularly with regard to resource protection.” NPS, Vol. I, B, 158. The NPS maintains that its refusal to grant a permit was justified and supported by adequate rationale. The NPS is charged with “permanently preserv[ing]” the Seashore “in its present state” and allowing no visitation that is “incompatible with the preservation of the unique flora and fauna” at the Seashore. 16 U.S.C. § 459b-6(b)(1). It is also unlawful for a person to possess, destroy, injure, deface, remove, dig, or disturb fish or wildlife within the Seashore. See 36 C.F.R. § 2.1(a)(1). Considering the Seashore’s mission and the NPS’s duty to protect its resources, the refusal to issue plaintiffs a

²² While plaintiffs assert that it is irrational for the NPS to allow clamming and lobstering at the Seashore and not horseshoe crab harvesting, the NPS classifies both clams and lobsters as shellfish. It, therefore, lacks jurisdiction over those commercial activities. Because the NPS has jurisdiction over horseshoe crabs (i.e., they are not shellfish), its treatment of other kinds of shellfish is irrelevant. And, again, other types of shellfishing are not before me now.

permit was not unreasonable.²³ Because that decision was not arbitrary or capricious, it will not be disturbed.²⁴

V. The Authority of the NPS and FWS

Plaintiffs argue that the FWS and NPS lack the authority to control horseshoe crab harvesting in either Monomoy or the Seashore, respectively. Plaintiffs claim that their jurisdiction is curtailed by the Colonial Ordinance of 1641-1647 and other state authority. These arguments are not persuasive. The Secretary has authority over Monomoy and the Seashore under the Property Clause of the U.S. Constitution which supercedes plaintiffs' arguments. See United States v. San Francisco, 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations."). The Supreme Court has affirmed Congress's assertion of power under the Property Clause in the context of a federal agency's jurisdiction over wildlife on federal lands. See Hunt v. United States, 278 U.S. 96 (1928).

Federal statutes also confer this authority on the Secretary of Interior, and, in turn, the FWS and NPS. See 43 U.S.C. § 1201; 16 U.S.C. § 668dd(a)(2) (conferring authority for National Wildlife Refuge System); 16 U.S.C. § 3 (conferring authority for National Park Service); see also, e.g., Boesche v. Udall, 373 U.S. 472, 476 n.6 (1963) (recognizing authority of Secretary to execute duties with respect to public lands). The state authority cited by plaintiffs is also superceded by federal law under the Supremacy Clause of the U.S. Constitution.

²³ Note that the NPS's position is distinguishable from that of the FWS. First, unlike the FWS, the NPS never decided the issue in the first place (i.e., it never issued a compatibility determination or similar finding specifically allowing plaintiffs' activities). Second, the NPS and FWS have different standards for issuing permits. Third, the mission and purpose of the Seashore are different from those of Monomoy.

²⁴ The NPS also correctly determined that the plaintiffs did not fit under a research exception which would allow them to harvest with a special collection permit. See 36 C.F.R. § 2.5(a).

Plaintiffs also claim that defendants should support the actions of the ASMFC since federal law instructs that the “Secretary of the Interior shall develop and implement a program to support the interstate fishery management efforts of the Commission.” 16 U.S.C. § 5103. This additional statutory responsibility does not, however, affect the administration of national parks and wildlife refuges, but rather separately directs the Secretary “to support and enhance State cooperation in collection, management, and analysis of fishery data; law enforcement; habitat conservation; fishery research, including biological and socioeconomic research; and fishery management planning.” Id. These several responsibilities are not inconsistent and, in any event, defendants do not violate the statute by offering more protection to horseshoe crabs than does the ASMFC.²⁵

VI. Summary

Accordingly, plaintiffs and defendants motions for summary judgment are allowed in part, and denied in part. Plaintiffs’ motion for summary judgment is allowed, and defendant FWS’s motion is denied, with respect to all areas of Monomoy, with the exception of the designated wilderness areas. Defendant FWS’s motion for summary judgment is allowed, and plaintiffs’ motion is denied, with respect to the designated wilderness areas of Monomoy. Defendant FWS is therefore enjoined from prohibiting plaintiffs’ activities in all of Monomoy except the wilderness areas. Plaintiffs’ motion for summary judgment is allowed with respect to the boundaries for the wilderness areas.

²⁵ Plaintiffs also claim, and defendants dispute, that the FWS and NPS improperly expanded the administrative record after their administrative decisions were made. Defendants vehemently deny such allegations. It is difficult for plaintiffs to prove that defendants did not consider the record they submitted. See Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993) (“[T]he designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity” and “[t]he court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.”). Because plaintiffs fail to offer evidentiary support for their contention of impropriety, I have considered the entire administrative record in rendering this decision.

Pending agency review of the survey, the boundaries of the wilderness areas are those drawn on the maps attached to the annual permits issued to Harrington from 1991-1999.

Defendant NPS's motion for summary judgment is allowed, and plaintiffs' motion is denied, with respect to all areas of the Seashore. The NPS therefore has jurisdiction over the horseshoe crab and may prohibit plaintiffs' activities in the Seashore. The preliminary injunction issued on May 18, 2000 is hereby vacated. The parties shall submit an agreed form of judgment within 10 days of this decision.

May 27, 2000
DATE

Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

Exhibit 13

United States v. 32.42 Acres of Land, More or Less Located in San Diego County, C.A. No. 05-cv-1137 (S.D. Cal. Apr. 28, 2006)

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FILED
APR 28 2006
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

32.42 ACRES OF LAND, MORE OR LESS
LOCATED IN SAN DIEGO COUNTY
STATE OF CALIFORNIA; SAN DIEGO
UNIFIED PORT DISTRICT; OTHER
INTERESTED PARTIES; AND
UNKNOWN OTHERS,

Defendants.

CASE NO. 05cv1137 DMS (WMc)

**ORDER: (1) OVERRULING
DEFENDANT SAN DIEGO
UNIFIED PORT DISTRICT'S
OBJECTIONS TO THE UNITED
STATES' TAKING OF PROPERTY
BY EMINENT DOMAIN; AND (2)
DENYING DEFENDANT
CALIFORNIA STATE LANDS
COMMISSION'S MOTION FOR
SUMMARY JUDGMENT**

[Doc. Nos. 15, 16]

On May 31, 2005, the United States of America ("United States") filed a Complaint in Condemnation on behalf of the United States Navy ("Navy"), seeking to condemn 32.42 acres of land ("Subject Property") owned by the San Diego Port District ("Port"). Presently before the Court are two motions. First, the Port has filed objections to the United States' taking of the Subject Property. Second, the California State Lands Commission ("Commission") has filed a motion for summary judgment, challenging the United States' authority to extinguish the public trust rights in the land.

The Court heard oral argument on April 14, 2006. Marc. E. Gordon, Esq. and Joseph P. Price, Jr., Esq. appeared on behalf of Plaintiff, Dennis W. Daley, Esq. appeared on behalf of the Port, and

24 - 1 -

1 Alan V. Hager, Esq. appeared on behalf of the Commission. For the reasons discussed below, the
2 Court overrules the Port's objections and denies the Commission's motion for summary judgment.

3 **I.**

4 **FACTUAL AND PROCEDURAL HISTORY**

5 The United States seeks to condemn 32.42 acres of tide and submerged lands located at the
6 south side of North Harbor Drive at Nimitz Boulevard on the San Diego Bay in San Diego, California.
7 The State of California ("California") acquired the Subject Property as an attribute of its sovereignty
8 upon its admission to the Union in 1850. At the time California entered the Union, the entire parcel
9 of land was located below the Ordinary High Water Mark ("OHWM"). Subsequently, much of the
10 lands were filled as part of the expansion of the Navy's San Diego Naval Training Station. At present,
11 27.54 acres of the lands are filled and are above the OHWM, and the remaining 4.88 acres are within
12 the bulkhead line but remain tidelands. The Subject Property is currently the site of the Navy's Fleet
13 Anti-Submarine Warfare Training Center ("ASW").

14 In 1911, California granted the Subject Property to the City of San Diego ("City"), subject to
15 the public trust and the terms of the granting statute. Thereafter, in 1949, as part of a comprehensive
16 exchange agreement between the United States and the City, the Navy received a long-term lease of
17 the Subject Property for 50 years with a right of renewal for an additional 50 years. Under the terms
18 of the lease, the United States was given the right "to make alterations, attach fixtures, and erect
19 additions, structures or signs in or upon the premises. . . ." (See 1949 Lease, Exhibit 1, attached to
20 Port's Objections, at ¶ 5.)

21 In 1963, the City conveyed its interest in the Subject Property to the Port. The Port remains
22 the successor in interest in the property.

23 On December 5, 1996, the Navy exercised its option to extend the lease for an additional 50
24 years. The Port and the Commission opposed the extension on grounds that the lease was invalid.
25 Thereafter, the United States brought a condemnation action to confirm its title and rights in the lease.
26 In March 2000, the Honorable Thomas Whelan issued an Order granting summary judgment in favor
27 of the United States. See *United States v. 32.38 Acres of Land*, Case No. 99cv1622 (S.D.Cal. 2000).
28 However, the case later settled and Judge Whelan's Order was subsequently withdrawn as part of the

1 settlement. Pursuant to the terms of the settlement, the United States was given a leasehold interest
2 in the Subject Property through August 8, 2049.

3 On May 31, 2005, the United States filed a Complaint in Condemnation and Declaration of
4 Taking together with an estimated just compensation of \$237,500, to acquire the subject property in
5 fee simple. The Complaint alleges:

6 The authority for the taking is under and in accordance with the Act of Congress
7 approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. § 258a, recodified at § 3114)
8 and acts supplementary thereto and amendatory thereof, the Act of Congress approved
9 August 1, 1888 (25 Stat. 357, 40 U.S.C. § 257, recodified at § 3113), pursuant to 10
10 U.S.C. § 2672, and under further authority of the Act of Congress approved September
11 September 30, 2003 (Public Law 108-87), which appropriated funds for the fiscal year ending
12 September 30, 2004, for military functions administered by the Department of Defense,
13 and for other purposes

14 (United States' Complaint in Condemnation at ¶2; see Exhibit "B," Schedule "A," attached to the United
15 States' Opposition to the Port's Objections.) In addition, the Complaint alleges that "[t]he public uses
16 for which the property is taken are for military purposes as a Fleet Anti-Submarine Warfare Training
17 Center, and for such other uses as may be authorized by Congress or by Executive Order" (United
18 States' Complaint in Condemnation at ¶ 3.)

19 On January 6, 2006, the Port filed its objections to the United States' condemnation of the
20 Subject Property. On January 9, 2006, the Commission filed a separate motion for summary judgment,
21 challenging the United States' authority to extinguish the public trust rights in the land. The United
22 States filed Oppositions to the Port's objections and the Commission's motion for summary judgment
23 on March 3, 2006. Thereafter, both parties filed Replies.

24 II.

25 STANDARD OF REVIEW

26 The role of the federal courts to review condemnations is limited to whether the purpose for
27 which the property is taken is a congressionally authorized public use and whether there has been just
28 compensation. See *United States v. 416.81 Acres of Land*, 514 F.2d 627, 631 (7th Cir. 1975). It is the
role of the legislature to evaluate and decide the manner in which the public purpose shall be best
accomplished and the courts may not second guess the legislature in this regard. See *Berman v.*
Parker, 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954) ("[T]he means of executing the project are

1 for Congress and Congress alone to determine, once the public purpose has been established.”); see
 2 also *United States v. 0.95 Acres of Land*, 994 F.2d 696, 699 (9th Cir.1993) (courts are not authorized
 3 to review the power of Congress to authorize acquisition of land). However, where an administrative
 4 decision to condemn property is so arbitrary, capricious or in bad faith as to render it unreasoned, the
 5 administration is without authority and the courts may intervene. See *United States v. Carmack*, 329
 6 U.S. 230, 243, 67 S.Ct. 252, 91 L.Ed. 209 (1946); *Puget Sound Power & Light Co. v. Public Utility*
 7 *Dist. No. 1 of Whatcom County*, 123 F.2d 286, 290 (9th Cir. 1941).

8 Pursuant to Fed.R.Civ.P. 71A(e), “[i]f a defendant has any objection or defense to the taking
 9 of the property, the defendant shall serve an answer within 20 days after the service of notice upon the
 10 defendant.” “Trial of all issues shall otherwise be by the court.” Fed.R.Civ.P. 71A(h).

11 III.

12 DISCUSSION

13 A. The Port's Objections

14 The Port raises three objections to the United States’ taking of the Subject Property.¹ First,
 15 the Port contends that California law governs the present dispute and as such, the United States may
 16 not condemn the property because it does not have any plans for use of the property within seven years
 17 of the date of the filing of its Complaint. See CAL.CIV.CODE § 1240.220(a). Second, the Port objects
 18 to the taking on grounds that the United States’ decision to condemn the Subject Property is arbitrary,
 19 capricious, or made in bad faith. Finally, the Port contends the United States may not condemn the
 20 Subject Property because they have failed to prepare an environmental impact statement as required
 21 by the National Environmental Policy Act (“NEPA”). The Court addresses the Port’s objections in
 22 turn.

23
 24
 25 ¹ The brief that was filed by the Port was not denominated as either a motion to dismiss or
 26 as a motion for summary judgment, but rather, as “Objections to Plaintiff United States of America’s
 27 taking of Property by Eminent Domain.” Pursuant to Local Rule 7.1(f)(1), “[e]ach motion or other
 28 request for ruling by the court shall be accompanied by a separate motion and notice of motion and
 another separate document captioned ‘Memorandum or Points and Authorities in support of [the
 motion].’” However, the United States does not object to the Court’s adjudication of the issues raised
 by the Port’s brief. Accordingly, based on the undisputed facts before the Court, the Court finds the
 issues raised in the Port’s objections appropriate for summary adjudication.

1 1. *Choice of Law*

2 The Port first argues that federal eminent domain power should be exercised through the laws
3 of the state in which the acquisition is sought and therefore “it is incumbent on this Court . . . to apply
4 the appropriate and substantive eminent domain law of this state.” (*See* Port’s Objections the United
5 States’ Taking at 6.) As such, the Port argues that pursuant to § 1240.220(a) of the California Code
6 of Civil Procedure, the United States may not condemn the Subject Property because it does not have
7 any plans pertaining to the military purposes for which it seeks to acquire the property.² Specifically,
8 the Port contends the United States has “full, complete, and undisturbed” rights under the lease (which
9 do not expire until August 8, 2049) to improve the property, and thus, “[n]othing in the lease prohibits,
10 deters, or undermines the United States’ use of the subject property for its current use as a [ASW] or
11 for any improvements to be done on the property.” (*Id.* at 8.) Accordingly, “there is no ‘reasonable
12 probability’ that the subject fee interest will be put to use within the next 43 years, let alone the next
13 seven years. Therefore, the attempted condemnation . . . is contrary to California substantive law
14 which places limits on condemnation for future need.” (*Id.*)

15 The United States responds that federal eminent domain law governs the present dispute
16 because “only federal law is applicable to the determination of the substantive right of the United
17 States to acquire property through condemnation.” (*See* United States’ Response to Port’s Objections
18 at 10.) Thus, according to the United States, § 1240.220(a) does not apply because the statute affects
19 the substantive right of the United States to acquire property through eminent domain. The United
20 States further argues that application of California law to this dispute would violate the Supremacy
21 Clause of the United States Constitution.³ A review of the relevant statutory and case law authority
22 leads this Court to conclude that federal law governs the present dispute.

23 _____
24 ² Section 1240.220(a) provides: “Any person authorized to acquire property for a particular
25 use by eminent domain may exercise the power of eminent domain to acquire property to be used in
26 the future for that use, but property *may be taken for future use only if there is a reasonable probability
that its date of use will be within seven years from the date the complaint is filed or within such longer
period as is reasonable.*” West Ann. Cal. C.C.P. § 1240.220(a) (emphasis added).

27 ³ *See* U.S. CONST. ART. 6, cl. 2 (“This Constitution, and the Laws of the United States which
28 shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority
of the United States, shall be the supreme Law of the Land.”).

1 “Where essential interests of the Federal Government are concerned, federal law rules unless
2 Congress chooses to make state laws applicable.” *United States v. 93.970 Acres of Land*, 360 U.S.
3 328, 332-33, 79 S.Ct. 1193, 3 L.Ed.2d 1275 (1959); *see also Winooski Hydroelectric Company v. Five*
4 *Acres of Land*, 769 F.2d 79, 82 (2d Cir. 1985). With respect to eminent domain actions, the United
5 States Supreme Court has held that, “[i]f the United States have the power [of eminent domain], it
6 must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State
7 prescribe the manner in which it may be exercised.” *Kohl v. United States*, 91 U.S. 367, 374, 23 L.Ed.
8 449 (1875); *see also United States v. Miller*, 317 U.S. 369, 379-80, 63 S.Ct. 276, 87 L.Ed. 336 (1943).
9 However, in limited circumstances, state law may be applied to ancillary matters which do not
10 infringe on the Federal government’s right to acquire property. *See Milens of California v. Richmond*
11 *Redevelopment Agency*, 665 F.2d 906, 909 (9th Cir. 1982).

12 This dispute, however, does not involve ancillary matters which do not infringe on the United
13 States’ right to acquire property. To the contrary, this dispute directly involves the right of the United
14 States to acquire property through eminent domain. Section 1240.220(a) — which the Port contends
15 is applicable to this dispute — prohibits a party from acquiring property unless they establish a
16 reasonable probability that the date of use will be within seven years from the date the complaint is
17 filed. It is clear, thus, that application of California law to this dispute would limit the substantive
18 right of the United States to acquire the Subject Property. The power of the United States’ to acquire
19 property through eminent domain, however, “can neither be enlarged or diminished by a State. Nor
20 can any State prescribe the manner in which it may be exercised.” *Kohl*, 91 U.S. at 374. Accordingly,
21 federal law governs the present dispute.

22 2. *Whether the United States’ Decision to Take the Subject Property is Arbitrary,*
23 *Capricious, or Made in Bad Faith*

24 The Port also objects to the taking on grounds that the United States’ decision to acquire the
25 subject property is arbitrary, capricious or made in bad faith. The Port raises three arguments in
26 support of this argument: (1) the decision to condemn the subject property was made without regard
27 to California substantive law involving eminent domain powers; (2) the United States does not have any
28 plans for the Subject Property that requires new title; and (3) no recommendation or report concerning

1 the taking was presented to Congress or any other administrative agency. None of these arguments
2 support the Port's contention that the United States' decision to condemn the Subject Property
3 is arbitrary, capricious or made in bad faith.

4 So long as an administrative decision is based on a reasonable deliberative process or good-
5 faith exercise of judgment, it will not be deemed capricious or arbitrary. *See United States v.*
6 *Acquisition of 0.3114 Cuerdas of Condemnation Land*, 753 F.Supp. 50, 55 (D.C. Puerto Rico 1990);
7 *see also U.S. v. Certain Parcels of Land in Peoria County, Ill.*, 209 F.Supp. 483, 491 (D.C.Ill. 1962).
8 The landowner's standard of what is needed to fulfill the public purpose is not to be substituted for
9 the standard prescribed by Congress. *See United States v. 80.5 Acres of Land*, 448 F.2d 980, 983 (9th
10 Cir. 1971). If the taking is "rationally related to a conceivable public purpose," it must be upheld.
11 *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

12 With respect to the Port's first argument, for the reasons discussed in the previous section (*See*
13 Discussion III(A)(1)), the United States is not bound by state law in making its decision to acquire
14 property through eminent domain. Therefore, even assuming that the United States failed to regard
15 California law in making its decision to condemn the Subject Property — that fact is insufficient to
16 establish that the United States' decision to condemn the property is arbitrary, capricious or made in
17 bad faith.

18 Moreover, the United States is not required to produce evidence indicating plans of future use
19 in order to acquire property by eminent domain. "There is no judicial review of whether the property
20 acquired is actually necessary for the public project as long as there is both Congressional
21 authorization and a rational relationship to a public purpose." *United States v. 729.773 Acres of Land*,
22 531 F.Supp. 967, 973 (D.Haw. 1982). "The necessity of taking . . . private property for public use is
23 legislative in nature and one over which the courts lack jurisdiction." *Id.* (citations omitted). Thus,
24 once the United States establishes that its taking is for a public purpose, its decision to condemn the
25 property is not subject to judicial review.

26 The Port nonetheless argues that the taking is not for a valid military purpose, but rather, for
27 land banking or real estate speculation, which are not authorized purposes for taking of property by
28 eminent domain. (*See Port's Reply at 2.*) However, pursuant to 10 U.S.C. § 2672, the United States

1 is authorized to take *any* land which it deems necessary for military purposes. Moreover, the Port does
2 not dispute that the Navy's current use of the property for the ASW constitutes a valid public purpose.
3 *See City of Oakland v. United States*, 124 F.2d 959, 964 (9th Cir. 1942). In addition, according to the
4 United States' declaration of taking, the condemnation of the Subject Property is "for military purposes
5 as a Fleet Anti-Submarine Warfare Training Center, and for such other uses as may be authorized by
6 Congress or by Executive Order." (United States' Complaint in Condemnation at ¶ 3.) Accordingly,
7 as the United States has established that its taking of the Subject Property is for a public purpose, the
8 Court may not review whether the property is actually necessary for its stated purpose.

9 Finally, the Port's argues that the United States is barred from taking the Subject Property
10 because it failed to present recommendations or reports before Congress or any other administrative
11 agency before making its decision to condemn the property. Section 2672, however, does not require
12 that the Secretary of a Military Department present reports or hold hearings before Congress or an
13 administrative agency before making its decision to acquire property. A plain reading of § 2672
14 establishes that the decision to condemn property is left to the *sole* discretion of the Secretary: "[t]he
15 Secretary of a military department may acquire any interest in land that . . . the *Secretary determines*
16 is needed in the interest of national defense[.]" 10 U.S.C. § 2672(a)(1) (emphasis added).
17 Accordingly, the United States' failure to present reports or to hold hearings before Congress or any
18 other administrative agency does not establish that the United States' decision to condemn the Subject
19 Property is arbitrary, capricious or made in bad faith.

20 3. *Non-Compliance with NEPA*

21 Finally, the Port objects to the taking on grounds that the United States failed to prepare an
22 environmental impact statement as required by NEPA. The Port, however, fails to provide any
23 authority which establishes that completion of the NEPA process is a prerequisite to the condemnation
24 of property by eminent domain. Moreover, "NEPA cannot be used as a defense to a condemnation
25 action." *0.95 Acres of Land*, 994 F.2d at 699; *see also United States v. 255.25 Acres of Land*, 553 F.2d
26 571, 572 n.2 (8th Cir. 1977); *United States v. 178.15 Acres of Land*, 543 F.2d 1391, 1391 (4th Cir.
27 1976). As such, the Port fails to argue persuasively that the United States' failure to comply with
28 NEPA constitutes a valid defense to the taking of the Subject Property.

1 **B. State Lands Commission's Motion for Summary Judgment**

2 The Commission raises only one objection to the United States' taking of the Subject Property.
 3 It argues that while "[t]he United States unquestionably has the right to take public trust lands for
 4 public use under its power of eminent domain[,]" it does not have the "power to extinguish
 5 permanently the public's rights to use [the Subject Property] for trust purposes, which rights are
 6 absolute under the state's title it received in trust under the Constitution." (State Lands Commission's
 7 Motion for Summary Judgment at 7-8.)

8 The United States argues that in condemning the remaining leased fee interest and the State's
 9 public trust interest in the lands, it takes *all* interests in the property and extinguishes all previous
 10 rights. According to the United States, "[t]here is no exception for the State's public trust easement."
 11 (United States' Opposition to State Lands Commission's Motion for Summary Judgment at 1.) Thus,
 12 the issue presented is whether the United States' condemnation of land extinguishes California's
 13 public trust easement in the Subject Property.

14 *1. Public Trust Doctrine*

15 When California attained statehood in 1850, it acquired title to the State's tidelands as an
 16 incident of sovereignty. *See Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 15-16, 56 S.Ct.
 17 23, 25-26, 80 L.Ed 9 (1935). Each state holds title to its tidelands "in trust for the people of the State
 18 that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of
 19 fishing therein freed from the obstruction or interference of private parties." *Illinois Central Railroad*
 20 *v. Illinois*, 146 U.S. 387, 452, 13 S.Ct. 110, 118, 36 L.Ed. 1018 (1892). In *People v. California Fish*
 21 *Co.*, 166 Cal. 576, 596 (1913), the California Supreme Court held that

22 The only practicable theory is to hold that all tide land is included, but that the public
 23 right was not intended to be divested or affected by a sale of tide lands Our
 24 opinion is that . . . the buyer of land under these statutes receives the title to the soil,
 25 the *jus privatum*, subject to the public right of navigation, and in subordination to the
 right of the state to take possession and use and improve it for that purpose, as it may
 deem necessary. In this way the public right will be preserved and the private right of
 the purchaser will be given as full effect as the public interests will permit.

26 *Id.* Thus, even after private conveyance, the public retains the right to use the land for navigation,
 27 commerce and fishing. *See Marks v. Whitney*, 6 Cal.3d 251, 259 (1971).

28 ///

1 2. *Nature of the Lands in Question*

2 In *City of Long Beach v. Mansell*, 3 Cal.3d 462 (1970), the California Supreme Court held
3 that lands subject to the action of the tides at the date of the adoption of the Constitution in 1850
4 remain tidelands for purposes of the public trust restrictions even after they have been filled. *Id.* at
5 486-87. Only the State Legislature may free tidelands from the public trust. *See Marks*, 6 Cal.3d
6 at 261 (1971).

7 Here, the parties do not dispute that the entire parcel of the Subject Property was located below
8 the OWHM at the time California entered the Union. It is also undisputed that the California
9 legislature has never freed the Subject Property from the public trust. Thus, at the time of
10 condemnation, all of the lands in dispute remained subject to the public trust.

11 3. *Whether Condemnation of the Subject Property Extinguishes California's Public Trust*

12 The exercise of eminent domain is a proceeding *in rem*. *See A.W. Duckett & Co. v. United*
13 *States*, 266 U.S. 149, 151, 45 S.Ct. 38, 69 L.Ed. 216 (1924). “A condemnation proceeding founds a
14 new title and obliterates all previous interests.” *City of Alameda v. Todd Shipyards Corp.*, 635 F.Supp.
15 1447, 1450 (N.D.Cal. 1986) (citation omitted). By condemnation, the United States acquires both the
16 *jus privatum* (the bare ownership interest) and the *jus publicum* (the public trust interest) in the land.
17 *See Id.* “[A]ll easements and other interests, whether legal or equitable, are extinguished, unless the
18 United States permits otherwise.” *United States v. 11.037 Acres of Land*, 685 F.Supp. 214, 216-217
19 (N.D.Cal. 1988) (emphasis added). When the United States condemns property, it acquires sole
20 trusteeship of the land along with the public trust, “as though no party had held an interest in the land
21 before.” *Alameda*, 635 F.Supp. 1450. In other words, by condemnation, the United States takes the
22 entire parcel of land in full fee simple title — *without* the burden of a public trust.

23 The Commission argues that “[t]he ‘public trust attribute’ is to be treated differently because
24 the public trust doctrine does not permit the abdication by the sovereign, holding these lands in trust,
25 of the public’s rights to use these lands for purposes consistent with the trust.” (*See State Lands*
26 *Commission’s Motion for Summary Judgment* at 10.) The Court in *11.037 Acres of Land*, however,
27 considered and rejected this very argument:

28 ///

1 The State of California's argument that the public trust is an attribute of sovereignty
2 upon which the United States may not infringe is of little force. Indeed, *title* to the
3 tidelands itself is an attribute of state sovereignty. (Citation omitted.) It is undisputed
4 that the United States may take *title* to these tidelands through eminent domain
proceedings. No reason exists for treating the "public trust attribute" of sovereignty
different than the "title attribute."

5 *11.037 Acres of Land*, 685 F.Supp. at 217 (emphasis in original). Moreover, in rejecting the State's
6 argument, the court noted that under the Supremacy Clause, the State may neither frustrate nor limit
7 the United States' power of eminent domain. *Id.* at 217. This Court agrees with the reasoning in
8 *11.037 Acres of Land*. Therefore, when the United States acquires property by eminent domain — as
9 in this case — the taking extinguishes *all* interests in the land, *including* the public trust interests held
10 by the State, unless the United States permits otherwise.

11 The Court notes, however, that while the United States' condemnation of property by eminent
12 domain extinguishes the *state's* public trust, it is nonetheless subject to its own *federal* public trust.
13 In *Alameda*, the Court set forth the following rule: when the portion of condemned land is subject to
14 the action of the tides, the United States acquires this portion subject to the public trust, and it may not
15 convey this portion to a private party. However, when the portion of the condemned land is *not* subject
16 to the action of the tides, the United States acquires this portion of the land free of public trust
17 restrictions, and the United States may convey this portion to a private party. *See Alameda*, 635
18 F.Supp. 1450. As applied to this dispute, with respect to the 27.54 acres of lands which are filled and
19 are not subject to the tidelands, the United States takes the lands free of any public trust restrictions.
20 As to the remaining 4.88 acres which are within the bulkhead line but remain tidelands, the United
21 States acquires the property subject to its own federal trust.⁴

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27 ⁴ The Court therefore rejects the United States' argument that when it condemns the Subject
28 Property, it takes the *entire* parcel of land free of *any* public trust. As noted by the court in *Alameda*,
with respect to the lands that are subject to the tides, the United States does not have the power to
destroy the federal public trust which it acquires upon taking the property. *See Alameda*, 635 F.Supp.
at 1450.

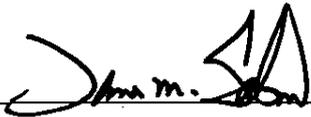
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IV.
CONCLUSION

For these reasons, the San Diego Unified Port District's objections to the United States' taking of the Subject Property are **OVERRULED** and the California State Lands Commission's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

Dated: 4-28-06



DANA M. SABRAW
United States District Judge

CC: ALL PARTIES
JUDGE McCURRINE