REPORT OF THE

FALSE CAPE STATE PARK

SUBCOMMITTEE

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 3

COMMONWEALTH OF VIRGINIA
RICHMOND
1982

MEMBERS OF SUBCOMMITTEE

Joseph T. Fitzpatrick, Chairman
William E. Fears
Wiley F. Mitchell, Jr.

HISTORICAL BACKGROUND OF THE SUBCOMMITTEE

In 1966, the Virginia General Assembly authorized the acquisition of several thousand acres of land fronting on the Atlantic Ocean for use as a state park. This $8.5 million purchase was funded jointly by the Commonwealth and the federal government. The tract of land is bordered on the east and west by bodies of water, on the south by North Carolina, and on the north by the Back Bay National Wildlife Refuge. At the time the park was proposed, both state and federal officials intended to provide access to it through the Wildlife Refuge. Measures taken by the federal government in the 1970's, however, reversed this decision, leaving state officials with no vehicular access road to the park.

Attempts at reaching a compromise with the federal government so that some means of vehicular access could be provided were unsuccessful. Consequently in 1979, Senator Howard P. Anderson, Chairman of the Senate Committee on Agriculture, Conservation and Natural Resources, appointed a subcommittee to study ways of gaining public access to False Cape State Park. Members of the Subcommittee are Senators Joseph T. Fitzpatrick of Norfolk, Chairman, William E. Fears of Accomac, and Wiley F. Mitchell, Jr., of Alexandria.

The Subcommittee has met a number of times during the past two years in an attempt to find a solution to this access problem. During much of this time, N. Bartlett Theberge of the Virginia Institute of Marine Science has served as a consultant to the

Subcommittee. Mr. Theberge has prepared a report on title and other legal research he has done with respect to the provision of access into False Cape State Park. The Subcommittee presents Mr. Theberge's findings to the Governor and General Assembly as its report.

A REPORT TO THE
SENATE SUBCOMMITTEE
ON FALSE CAPE

ON

STATE CLAIMS TO LANDS
WITHIN THE BACK BAY
NATIONAL WILDLIFE REFUGE

from

Professor N. Bartlett Theberge
The College of William & Mary

September 10, 1981

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I. ABSTRACT

I. Lands subject to state claims of ownership did exist prior to to 1938 in what is now known as the Back Bay National Wildlife Refuge. The origins of state claims are varied:

A. A strip of state land known as a commons ran along the entire length of the Refuge beach extending 907 feet above the high water mark and was entered into public record in the late 1860's. There is no record of this land ever being lawfully conveyed. Deeds and other records making references to public lands or commons in this area date back to 1621.

B. A grant along the seashore appears to have been made after the passage of state legislation precluding the grant of the shores of the sea after 1873. (Approximately one-fourth of the Refuge beachfront was conveyed after 1873.)

C. Large areas of the Refuge were ungranted state lands at the time of the condemnation. The northern three-fourths of the Refuge beach and most of the inland portion of the barrier beach associated with it appear to fall within this category and comprise more than 1,046 acres.

D. A small marsh island of eight acres was conveyed after the passage of an 1888 statute prohibiting the granting of marshes on the eastern shore of Virginia (Emphasis added. The Act as originally enacted did not capitalize the words eastern shore. Code revisors first capitalized the words in 1948.)

II. Although Federal Condemnation operates in rem and would as a general rule vest valid title in the federal government,

A. Proper notice to potential claimants is required; and

B. Under the federal Migratory Bird Conservation Act state consent is required.

III. Based on analysis of the federal Migratory Bird Conservation Act of 1929 and state statutes, Virginia consented to the condemnation of private and corporate lands but not state lands.

IV. Research indicates that the federal government's title search produced evidence of potential state claims within the Refuge requiring the state be given notice as an adversary party in the condemnation proceedings.

V. Virginia was not given required notice.

VI. A. The federal government in the condemnation suit in 1938 either deliberately or through a higher order of negligence masked a state claim to 1,046 acres of what appears to be ungranted state land at the time of the condemnation by taking much smaller privately owned tracts located elsewhere in the area and depicting them as occupying the 1,046 acre area subject to state claim.

B. Other lands were subject to state claim by virtue of being (1) state owned commons or by being (2) seashores protected from grant by the Virginia statute of 1873 or by being (3) marshes possibly protected from grant by the Virginia statute of 1888.

VII. The state may argue that:

A. The state granted consent only to the taking of private and corporate lands under the state consent statutes of 1930, 1936 and 1938 thereby rendering the condemnation invalid as to state land and/or

B. Regardless of consent the title examination records of the federal government disclose potential state claims triggering a due process requirement to notify the state of such claims in the condemnation proceedings. (1)Negligent omission of this duty would lead to a just compensation award to the state. (2) Fraudulent omission of this duty would at least lead to the condemnation being invalid as to state lands.

VIII. Other potential arguments have been assessed and found lacking:

A. Prescriptive Easement,

B. Implied Dedication,

C. Public Trust,

D. Custom.

IX. Potential defenses either present no barrier to state claims or can be countered by reasonable arguments.

II. ACKNOWLEDGMENTS

The research on which this report is based has largely been the product of a team of law and science students employed as Interns in the Environmental Law and Marine Affairs Program operated under the auspices of the School of Law and the School of Marine Science at the College of William and Mary. Many of the researchers came to this project after having been previously involved in related research. The following individuals devoted either partial or full effort to this project over a three and one-half month period:

Professor N. Bartlett Theberge, B.S., J.D., LL.M., member of the Faculties of the Schools of Law and Marine Science at the College of William and Mary; Coordinator, Environmental Law and Marine Affairs Internship Program.

Susan W. Carter, Research Specialist, School of Marine Science, College of William and Mary.

Michael J. Casey, Law Intern.

Glenn R. DeLaney, Marine Science Intern.

James A. Lofton, Law Intern.

Kurt Pomrenke, Law Intern.

Michael A. Robusto, Law Intern.

Robert E. Croonenberghs, Marine Science Intern.

E. Roy Hawkens, Law Intern.

Micheal L. Hern, Law Intern.

Andrew W. Zacherle, Marine Science Intern.

Special debts of appreciation are owed to the following individuals:

Senator Joseph T. Fitzpatrick, the Chairman of the Senate Subcommittee on False Cape, for aiding us in securing documents and for generally facilitating the research; the Clerk of the Court of Virginia Beach, J. Curtis Fruit and his staff for aiding us in our research; the staff of the State Archives Division of the State Library for their aid; Dave Carlson, Office of the Governor, for his aid; Bruce B. Meador, Programs Supervisor of the Department of Conservation and Economic Development, for handling the financial aspects of the project; Donald Budlong of the Office of the Secretary of Commerce and Resources for his insights; Paul V. Koehly, Internal Auditor of the College of William and Mary for guiding the project through the bureaucratic shoals; Roger Chaffe of the Attorney General's Office and John Daniel of the Division of Legislative Services for their advice at various stages of the project; Katherine Tyler, former owner of Virginia Title and Mortgage Corporation for her information regarding the condemnation; Marvin Bowling of Lawyers Title Insurance Corporation for his efforts to locate title information within company records; the Personnel of the Department of Interior's Real Estate Division for their support; and finally, the Art Department of the School of Marine Science for not only the quality but also for the speed in which they prepared our artwork.

III. INTRODUCTION

Since the early 1970's the Department of Ocean and Coastal Law at the Virginia Institute of Marine Science, the School of Marine Science of the College of William and Mary has been carrying out research into the nature of private and public rights and ownership of riparian, subaqueous and coastal lands; Smolen, Theodore F. "Historical Overview of Lands Known as Common", Virginia Institute of Marine Science, 1974; Theberge, N. B., 1975. "An Investigation into the History and Ownership of Starling's Island", Virginia Institute of Marine Science, prepared pursuant to Senate Joint Resolution No. 153; Theberge, N. B., 1976. "An Investigation into the History and Ownership of Adam's Island", Virginia Institute of Marine Science, prepared pursuant to Senate Joint Resolution No. 57. Evidence, information, and theories resulting from departmental research have found its way into litigation and legislation. Coupland v. Morton, 7 ERC 1965 (1975); Commonwealth of Virginia v. The Nature Conservancy and Bradford, Record No. 79-1320; Public Beach Conservation and Development Act, Va. Code Ann. § 10-215 et seq. (1978 Repl. Vol.). On the basis of our past association with questions pertaining to governmental, private and public rights in coastal lands, we were requested to examine state law, federal law, and the history of state, private and federal ownership in the area of the Back Bay National Wildlife Refuge (Appendix 1, Figure 1) in order to determine what rights of public access might exist in this area.

IV. STATEMENT OF FACTS

A. COMMONS CONCEPTS

Although commons concepts developed independently in many cultures, the origins of the commons concepts embodied in Virginia law can be traced to England. In cultures of Germanic peoples such as the Angles and the Saxons who inhabited England, common property and common rights were well known. The Roman conquerors of these peoples also accepted the concepts of common property and common rights. Under Roman civil law at the time of Emperor Justinian, 438 - 565 A.D., no one was forbidden access to the seashore. An interesting parallel existed between early Roman civil law of the fifth and sixth centuries and pronouncements made by the Privy Council and the House of Commons regarding the rights to the shores of the sea in the new colony of Virginia in the seventeenth century (1621). In Justinian's time, public use of the seashore was recognized as a part of the "law of nations" and certain rights such as hauling nets and drying them -- rights that could only be exercised on lands above the ebb and flow of the tide -- were codified. Seventeenth century English statements are strikingly similar to the Roman espression of rights above the ebb and flow of the tide existing in Justinian's time. The pronouncements of the Privy Council and Parliament referred to public rights in the shores of the sea to haul nets, boats, collect wood, build fires and carry out other activities associated with fishing.

The Norman conquest of England in 1066 A.D., introduced significant changes in concepts of property ownership. Under

the Normans the sovereign owned all land and lesser individuals held land only with the sovereign's acquiescence. It is unclear how Germanic tribal customs, Roman civil law and Norman concepts may have affected the evolution of commons. The signing of the Magna Carta, however, in 1215 gave some indication that the rights to the shores were a source of conflict less than 150 years after the Norman conquest. Prior to the Magna Carta, English Kings had exercised the rights to grant exclusive fisheries in tidal areas. The Magna Carta assured greater recognition of public rights in such areas. J. Angell, The Rights of Property in Tide Water and in the Soil and Shores Thereof, pp. 23-25, (2d. ed., 1847).

Inherent to the commons concept, is the problem of private usurpation of such lands or rights. This has been a problem of long standing in Great Britain and only recently was a Royal Commission appointed to deal with the loss of common lands and common rights. Virginia shares not only the legal inheritance of the commons concepts but also the problems attendant to those concepts.

Commons in Virginia are state owned lands subject to certain common rights. (They may also be private lands over which are imposed certain common rights -- Appendix 2.) State owned lands which were specifically declared to be common may exist within the Back Bay National Wildlife Refuge. Evidence of commons can be found early in the Colonial period (Appendix 3). In April of 1621 the House of Commons in England passed an "Act for the Freer Liberty of Fishing" addressing conflicts over fishing rights off the coasts of Newfoundland, New England and Virginia.

This act sets forth the rights of "his majesties subjects" to freely use the sea shore of the aforementioned places for the purposes of taking, drying, salting and otherwise processing fish, gathering of wood for fuel and repairs, and for the purposes of performing any other activities necessary for the maintenance of their fishery operations.

In June of 1621 the Privy Council of England issued a similar statement regarding freedom of fishing. In this document the Council ordered that "the people of the Colonies . . . should have freedom of the shore for drying of their nets, and taking and saving of their fish and to have wood for their necessary uses . . . ." These documents establish at an early date that the shore lands in the Colonies of Newfoundland, New England and Virginia were to be used as a common.

About 1770 a petition was filed with the President of the Colony of Virginia requesting that certain lands along the Atlantic Beaches of Princess Anne County be withheld from grant as these lands comprised a commons. The petition stated ". . . for many years past a Common Fishery hath been carried on by many of the Inhabitants of said county and others on the Shore of the Ocean and Bay aforesaid . . . ." J. Wharton, The Bounty of The Chesapeake, p. 50, (1957). Apparently in response to such concerns the new government drafted an act in 1780 which protected from any future grants those "unappropriated lands on the bay, sea and river shores, in the eastern parts of this commonwealth [which] have been heretofore reserved as a common to all the citizens thereof . . . ." 10 Hening 226. (Appendix 4). The lands along the Atlantic

shoreline in Princess Anne County were apparently protected from grant by the 1780 act.

In 1867, J. P. Hale applied for grants to four tracts of land comprising the barrier beach in Princess Anne County. These tracts totaled over 9,000 acres extending from the North Carolina line to Cape Henry including the area which is now the entire Atlantic shore of the Back Bay National Wildlife Refuge. When the application for these lands was received, the County Clerk noted the common nature of the shore lands in this area. The Clerk stated in one document that any grant for the land requested was to exclude "all fishing shores and privileges which were reserved as a common to all the people of the state by the Act of 1780 . . . ." Surveyor's Book, Princess Anne County, 1850-1904. In another document that referred specifically to the shore land now comprised within the limits of the Back Bay National Wildlife Refuge the Clerk states that any grant "is not intended to include the fishing shores which are reserved as a common to all of the people of the state . . . ." Surveyor's Book, Princess Anne County, 1850-1904. As a result, the accompanying surveys demonstrate in graphic detail what was considered to be the common shore lands in 1869. The shoreline strip of common land is shown to extend 13 chains, 75 links, or 907 feet landward of "ordinary high water mark". This strip runs parallel to the high water mark and includes what is now the Atlantic shoreline of the Back Bay National Wildlife Refuge. (Appendix 1, Figure 2).

Hale's application for a grant to these lands was never finalized. Nevertheless, it is clear that the Atlantic shore lands within the Back Bay National Wildlife Refuge were a common of long standing and that the 1780 Act was indeed utilized to protect these lands from grant. After the War Between the States, the Act of 1780 was repealed by legislation enacted in 1866. By virtue of that legislation common lands and any other state land could be legally conveyed until this legislation was repealed in 1873. However, none of the common lands within the refuge were ever granted during this period.

In April of 1873, the General Assembly passed an act which states that "all the beds of the bays, rivers and creeks, and the shores of the sea within this Commonwealth and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the state for the purposes of fishing and fowling and taking and catching of oysters and other shellfish." (Appendix 5). This statute exists at Va. Code Ann. § 62.1-1 (1973 Repl. Vol.).

At least as late as 1887 a U.S. Fish and Wildlife Service review of the fisheries of the United States indicated that the Atlantic shores of Princess Anne County were still maintained as a fishery.

In 1888, the General Assembly passed an act to prevent the granting of unappropriated marsh or meadow lands on the eastern shore of Virginia. Apparently this Act was necessary to further

clarify the language found in the 1873 Act as it states that: "all unappropriated marsh or meadow lands lying on the eastern shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this state, shall continue as such common, shall remain ungranted, and no land warrant shall be located upon the same. That any of the people of this state may fish, fowl, or hunt on any such marsh or meadow lands." (Appendix 6). The text of the 1888 act presently exists in the Va. Code Ann. § 41.1-4 (1981 Repl. Vol.). However, contrary to the original legislation, the present Code contains the phrase "eastern shore" in a capitalized form. This change was the result of work done by Code revisors in 1948 and not by legislative action. Therefore, the 1888 legislation may apply to all marshes on the eastern seaboard of Virginia rather than only to those in Accomack and Northampton Counties.

The commons doctrine occupies an important position with respect to the title to the Back Bay National Wildlife Refuge. By virtue of the operation of statutes and the common law, the State of Virginia may have been the owner of land in Back Bay at the time of the 1938 condemnation. The significance of this doctrine will be more apparent in the title analysis which follows.

B. TITLE

1. Princess Anne Club Tract

a) Colonial Grants and Early Conveyances, 1647-1858:

The Princess Anne Club Tract as condemned by the United States in 1938 totaled 3,113.52 acres of land. The club tract was comprised of three land areas: Long Island, Little Island and the seaboard

tract. These lands were originally granted to individuals during the late 17th and early 18th centuries.

(i) Long Island

Long Island is situated in Back Bay. It contains 1,167 acres and is comprised of high lands, marsh lands and islands. It is bordered on the north by Shipp's Bay; on the west by the Great Narrows and Red Head Bay; on the south by Little Narrows; and on the east by the waters of Buck Island Bay which separates Long Island from the seaboard tract.

The Long Island tract was in continuous private ownership from colonial grants to the time of the condemnation in 1938. There are acreage discrepancies from conveyance to conveyance and numerous chains of title end. Differences in the total acreage estimates of Long Island vary from 1,381 acres (colonial land grants), to 1,545 acres (acquisitions by Edgar Burroughs), and finally to 1,167 acres (1938 federal condemnation). This can only be explained by assuming that prior to the condemnation in 1938, surveys of Long Island inaccurately estimated acreage totals. An examination of the land descriptions in the grants and deeds to Long Island prior to 1938 leave no doubt that they are the same lands described in the condemnation proceedings.

The entirety of Long Island by 1858 was owned by Edgar Burroughs, a County Commissioner for Princess Anne County.

(ii) Little Island

Located in Back Bay, Little Island contains 200 acres of land and marshes situated between Long Island and the Atlantic Ocean.

Although once an island, it is now physically a part of the seaboard tract. Because its title devolves along a separate and distinct chain of title from that of the remainder of the seaboard tract, Little Island is abstracted separately. Both Little Island and the seaboard tract have the same beginning in ownership under Edward Lamount around the year 1700. An unbroken chain of title exists for the 200 acres of Little Island beginning with Edward Lamount's conveyance to Lewis Conner (1,775 acres of the seaboard tract in 1708) through the possession by Edgar Burroughs in 1853.

Today, this tract no longer carries the name of Little Island. Rather, reference to Little Island is found north of the Back Bay National Wildlife Refuge on the seaboard side and pertains to the Little Island Life Saving Station. No information exists in the title abstract that related the Life Saving Station to the 200 acres of island marsh owned by Edgar Burroughs in 1853.

(iii) The Seaboard Tract

The seaboard tract is that strip of land bordered on the east by the Atlantic Ocean on the west by the waters of Buck Island Bay and Back Bay. Ownership of this tract began in the late 17th century through colonial grants issued by the Governor of Virginia. These grants are referenced in the 1708 Edward Lamount to Lewis Conner deed of 1,775 acres of the seaboard tract. The Lamount/ Conner deed describes the southern boundary of the tract as bordering on the land patented by John Fulcher from the Governor of Virginia. The Fulcher border is slightly northeast of the

northern tip of Ragged Island; therefore, the adjacent Lamount/ Conner tract contains the entire seaboard tract of the Wildlife Refuge.

Title to this 1,775 acres of land was quickly divided among many individuals. By 1800, however, most of the chains of title inexplicably ended. Except for the Little Island tract of 200 acres which can be traced back to Edward Lamount, there is no other land in the seaboard tract from the Lamount/Conner deed which can be traced to Edgar Burroughs, or any other individual in the 1850's.

The discontinuity in title to the seaboard tract has been verified by the records of the 1938 condemnation. Among these records is the title abstract compiled in 1938 by James Mills of the Virginia Title and Mortgage Corporation. This abstract contains no record of title to the seaboard tract after the very early 1800's.

Any attempt to explain why the chains of title to the seaboard tract disappeared is largely supposition. One plausible theory involves a Virginia Act of Assembly passed in May of 1779 entitled An act concerning escheats and forfeitures from British subjects. 10 Hening's Statutes at Large 66, 1779-1881. This act provided that all property, real and personal, which belonged to any British subject at the time of its enactment would be vested in the Commonwealth by way of escheat. There is evidence that at least one of the landowners of the seaboard tract was a British subject from Liverpool, England. In light of the low dollar value of the lands in Back Bay and the anti-British sentiment at that time, many landowners may simply have abandoned their land.

From the landmark case of Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813), it is apparent that this Act was used often and validly between its enactment in 1779 and the signing of the Jay Treaty in 1794. The Jay Treaty confirmed the titles of British subjects owning land in Virginia at the time of its signing. The full effect of the treaty on the Virginia statute was not immediately apparent, however, as evidenced by the need for the Fairfax ruling in 1813.

Regardless of why the title ended, there is no doubt that the State of Virginia acquired ownership by virtue of an automatic forfeiture of the lands for non-payment of taxes. The earliest Virginia statute on the subject appears to be a 1790 Act which declared lands to be forfeited absolutely for non-payment of taxes. This Act, passed on December 27, 1790 (Sess. Acts of 1790, Ch. 5 § 1) § 1) declared if the tax on any tract of land should not be paid for the space of three years, the right of such lands should be forfeited and title vested in the Commonwealth.

Although the procedures of forfeiture underwent some slight modifications, the basic statute remained in effect until repealed by an Act of February 9, 1814 (2 Rev. Code 1819, p. 555). The Act repealed all forfeiture statutes and made it possible for land previously forfeited to be reclaimed. No forfeiture could have occurred until the passage of the Act in 1835. Levasser v. Washburn, 52 Va. (11 Gratt.) 572 (1854). The 1835 Act was interpreted by the court in Levasser:

> The act . . . declaring that lands which had been omitted from the books of the commissioners of the revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same except such as might be released by law, was intended by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding or finding of any kind in order to consummate it. It was perfectly within the competence of the legislature to declare such forfeiture and divest the title by the mere operation of the act itself, and the whole legislation upon the subject of delinquent and forfeited lands plainly manifests the intention to exercise its power in this form. Id. at 581.

An Act in March 1836 (Session Acts, p. 7) provided additional time, until November 1, 1836, to comply with the provisions of the February 27, 1835 Act. This was the time requirement for owners of omitted lands to enter those lands on the books. If the owners failed to comply, the forfeiture became absolute from and after November 1, 1836.

The Virginia courts construed these statutes as making the forfeiture complete as of November 1, 1836, and as requiring no judicial proceedings of any kind to consummate such forfeiture. Lennig v. White, 1 Va. 873, 20 S.E. 831 (1894); Wild's Lessee v. Serpell, 51 Va. (10 Gratt.) 405 (1853); Staats v. Board, 51 Va. (10 Gratt.) 400 (1853); Usher's v. Pride, 56 Va. (15 Gratt.) 190 (1858). As late as 1898 the Virginia Supreme Court in a case involving omitted lands reaffirmed that:

> the forfeiture becomes absolute and complete by the failure to enter the lands upon the books of the commissioner of the revenue, and to pay the taxes, etc. in the manner prescribed by the Act of February 27, 1835, and that no judgment or decree, inquest of office or other matter of record, is necessary to consummate and perfect the forfeiture.
>
> Matney v. Ratcliff, 96 Va. 231, 235 (1898).

Unfortunately, records of forfeiture and escheat were rarely kept. It is therefore impossible to identify the exact date when the land in this chain was forfeited. Nevertheless, Virginia eventually became the owner of the land in this chain of title. Virginia had granted these lands in the 1600's and again in the late 1800's. This could only have occurred by escheat to the state in the interim period.

The conclusion to be drawn from the evidence is that during the 18th and 19th centuries the State of Virginia obtained title to the entire seaboard tract that lies within the Wildlife Refuge, with the exception of Little Island. Private ownership of Little Island was uninterrupted from the colonial grants to the 1938 ownership by the Princess Anne Club.

b) Later Conveyances, 1858-1938

(i) Long Island, Little Island, Seaboard Tract

By 1858 Edgar Burroughs held title to the lands of Long Island and Little Island. Using the acreage totals determined by the survey used in the 1938 condemnation proceedings, Edgar Burroughs owned 1,367 acres of land on Long Island and Little Island. In contrast, acreage in the deeds to the tracts of land held by Edgar Burroughs totaled 1,745 acres. Acreage estimates used during the period of the 1850's through the early 1900's by those claiming ownership to lands later condemned in Back Bay are therefore highly suspect. What they may indicate, however, are attempts to conceal unlawful acquisitions of lands on the seaboard tract by eastward expansion of valid title on Long Island and Little Island. Title examination

reveals that Edgar Burroughs had no interest in any lands on the seaboard tract other than the 200 acre Little Island tract. There are no conveyances or grants to Edgar Burroughs which would have given him title to other land on the seaboard tract. Furthermore, the descriptions of the deeds to lands on Long Island and Little Island show that his interests on the seaboard tract were limited to Little Island.

In 1866, John J. Burroughs, executor of the estate of Edgar Burroughs, sold to Benjamin Wood "all those several tracts and parcels of land, marshes and sand beach known by the name of 'Long Island' and 'Little Island' hereinbefore described containing in the whole about nineteen hundred acres." Deed Book 48, page 283. Though the acreage total had increased to 1,900 acres, Benjamin Wood's interest is limited to Long Island and Little Island. (Appendix 1, Figure 3). Ten years later in 1876 Benjamin Wood sold his interest in the lands of Back Bay. In the intervening years of 1866 through 1876, Wood unsuccessfully attempted to purchase the lands of the seaboard tract from the Board of Public Works of the Commonwealth of Virginia.

Robert E. Nash, who had been earlier commissioned in 1866 by the Board of Public Works of Virginia to survey all waste and unappropriated lands in Back Bay, represented Benjamin Wood before the Board of Public Works. On four occasions during the year of 1870, Nash petitioned the Board to approve "the purchase of certain state land for the Hon. Benj. Wood". (Emphasis added). Letter of July 5, 1870, from Nash to Board of Public Works. Nash went on to describe the land he wished to purchase for Wood in his letter to the Board;

> Beginning at a place known as 'Sand Bridge' which is about five miles southwardly from Rudee and running along the Ocean line of the state survey southwardly to the . . . N. Carolina line, thence along said Carolina line West to Back Bay, thence North Westwardly along said Bay and the line of the state survey to the Sand Bridge road to the Beginning supposed to contain six hundred acres.

Nash offered $600 to the Board for this seaboard tract as agent for Wood. (Nash had earlier estimated this same area to contain 6,000 acres which closely approximates the actual acreage today.)

On July 28, 1870, Nash petitioned Mr. DeWitt, Secretary of the Board of Public Works, to gain approval for a purchase of what he now estimated to be 650 acres for the benefit of Benjamin Wood. Nash offered $650 and stated that though he "thought it better the Board should retain possession of this land to go with Back Bay," (emphasis added) the land was of little value and the state would benefit more by the sale.

On September 10, 1870, W. W. Forbes, an agent of Benjamin Wood, petitioned the Board of Public Works to sell "a certain quantity of land lying in Back Bay, which belongs to the State of Virginia. I offer 650 dollars, estimating the quantity of land to be 650 acres. (Emphasis added).

The letters to the Board of Public Works during 1870 unquestionably indicate state ownership of the seaboard tract. In addition, a survey of the waste and unappropriated lands in Back Bay prepared in 1867 by Robert Nash, official surveyor for the Board of Public Works, certified the State of Virginia's ownership of the seaboard tract. Documents based on the Nash survey were officially certified in 1871 by the Princess Anne County Clerk, the Magistrate for the City of Norfolk and the Surveyor for Princess Anne County.

Despite the efforts of Nash and Forbes, Benjamin Wood was never able to purchase these lands from the State of Virginia. In 1876 Benjamin Wood conveyed his 1,900 acres of Long Island and Little Island to Jacob Travis, stating that it is "the same premises conveyed by John J. Burroughs, Executor of Edgar Burroughs, to said Benjamin Wood." Deed Book 52, page 280. However, in the deed to Travis, the description encompassed more than the tract conveyed by Burroughs to Wood. It now included the area which begins on the Atlantic Ocean, runs due west to the northern tip of Long Island, follows the Great Narrows and the Little Narrows to the southern tip of Long Island, and then proceeds due east to the Atlantic Ocean. Wood sold not only Long Island and Little Island (Appendix 1, Figure 3), but also the entirety of the seaboard tract which lay east of Long Island without ever having these lands validly conveyed to him. (Appendix 1, Figure 4). Wood had received compensation for an additional 1,046 acres to which he had no title.

Princess Anne Club acreage condemned in 1938	3,113 acres
less 1911 Barbour conveyance to Princess Anne Club	- 700 acres
Total acreage Wood conveyed to Travis	2,413 acres
less actual acreage owned by Wood	- 1,367 acres
Ungranted state lands claimed by the Princess Anne Club at the time of the condemnation	1,046 acres

In 1894 Travis sold this "1,900 acre" tract (in actuality containing 3,113 acres) to the Kimballs who in 1896 conveyed the same land to the Princess Anne Club. Throughout these conveyances, the same acreage total of 1,900 acres was used to refer to the

three tracts (Long Island, Little Island, Seaboard Tract). Also, the identical description used by Wood in his conveyance to Travis in 1876 was used in these subsequent conveyances (described as encompassing the lands from the Atlantic Ocean, to the Great Narrows, to the Little Narrows and back to the Atlantic Ocean).

Reviewing the land assessment figures for the Princess Anne Club as contained in the Virginia Beach Land Books (see following exhibit) demonstrates that the land acreage totals were incorrect. From the period of 1903 to 1914, the Princess Anne Club was assessed with 1,900 acres on "Long Island". In 1914 when the Princess Anne Club acquired 700 acres from William Barbour, the 700 acres were referred to as "Back Bay". This land assessment remained essentially the same through 1926. At that time the land descriptions were changed to Little Island and Long Island; however, the acreage totals were not changed. The tax advantage that the Princess Anne Club enjoyed by the acreage discrepancy is apparent. But furthermore, the 1926 change effectively concealed the earlier loss of Virginia's property rights on the seaboard tract. The land ownership of the seaboard tract was labeled as "Little Island", which is the small 200 acre area on that tract, where in reality the Princess Anne Club occupied an additional 1,046 acres on that seaboard tract.

EXHIBIT

Virginia Beach Land Books Tax Assessment

					bearing from courthouse	miles
	1903	P.A. Club	Long Island	1,900 acres	S.E.	14
	1903	Wm. Barbour & Geo. Tenney	Back Bay	1,400 acres	S.E.	18
	1910	P.A. Club	Long Island	1,900 acres	S.E.	14
	1910	Wm. Barbour & Geo. Tenney	Back Bay	1,400 acres	S.E.	18
*	1914	P.A. Club	Long Island	1,900 acres	S.	15
		P.A. Club	Back Bay	700 acres	S.E.	20
	1914	J.E. Barbour	Back Bay	700 acres	S.E.	20
	1916	P.A. Club	Long Island	1,900 acres		
			Back Bay	700 acres		
	1917	P.A. Club	Long Island	1,900 acres		
			Back Bay	700 acres		
*	1918	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1919	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1920	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1921	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1922	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1923	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1924	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
	1925	P.A. Club	Long Island	1,900 acres		
			Back Bay	694 acres		
*	1926	P.A. Club	Little Island	419 acres		
			Little Island	1,481 acres		
			Long Island	694 acres		

EXHIBIT (continued)

1927	
1928	
1929	
1930	
1931	
1932	Remains Unchanged
1933	
1934	
1935	
1936	
1937	
1938	

According the the Land Books in Princess Anne County, the Princess Anne Club owned 1,900 acres as "Long Island" in 1910.

In the same year William Barbour is assessed with 1,400 acres as "Back Bay", bearing southeast, 18 miles from the courthouse. It is known that this 1,400 acres is on the seaboard tract, with the upper half being within the Refuge.

According to the Deed Books in Princess Anne County, William Barbour and J. E. Barbour agreed to a partition of the 1,400 acres in 1911. William Barbour took the northern 700 acres, J. E. took the southern half. In the same year William Barbour sold his 700 acres to the Princess Anne Club (P.A. Club).

The Land Books of 1914 reflect these transactions. The Princess Anne Club is assessed with 1,900 acres as "Long Island" and with 700 acres as "Back Bay". The 700 acres bears southeast 20 miles from the courthouse. William Barbour is no longer a land owner in this district and J. E. Barbour has 700 acres as "Back Bay". J. E. Barbour's land bears southeast 20 miles from the courthouse.

It is, therefore, evident that the 700 acres assessed to the Princess Anne Club in 1914 is the same 700 acres previously owned by William Barbour and not part of the tract, further north, which the Princess Anne Club acquired from Laura Kimball.

2. The Barbour Hill Tract

The Barbour Hill Tract was located on the oceanfront barrier beach partially within the area condemned for the Back Bay National Wildlife Refuge. It was bounded on the east by the Atlantic Ocean, west by Back Bay, north by a line due east from the Little Narrows, and south by land granted to Otis Ewell.

This tract was comprised of three separate Virginia land grants, all made after 1873. According to the original grants these parcels contained 278.2 acres in all.

The earliest grant was made to George W. Dawley on May 8, 1880. This grant was said to involve 195 acres bounded on the east by a narrow strip of "sand land" and on the west by Back Bay. (Appendix 1, Figure 8).

The second grant was made to James M. Malbone, et al. on August 26, 1885. This grant was said to involve an 82-acre parcel adjoining Dawley's grant to the east. The land in the Malbone, et al. tract therefore represented the narrow strip of "sand land" described above, and was described as "lying on the Atlantic Ocean." (Appendix 1, Figure 8).

William Barbour acquired three-fourths interest in the Dawley and Malbone, et al. tracts by 1900. He then received the third grant along with George W. Tenney on March 14, 1902. This grant involved only 1.2 acres bordering Back Bay on the west.

Although the sum total of the grants was said to involve only 278.2 acres, William Barbour conveyed an interest in the same lands as 1,300 acres in May of 1902. His count was much more accurate than the 278.2 figure. The Malbone, et al. parcel, for example, contained at least three times the acreage reported in the grant.

In 1909, William Barbour, et al. recorded a dividing line agreement made with the Princess Anne Club, owners of property to the north. The parties to the agreement set Barbour's northern boundary as a line running east from Little Narrows to the Atlantic Ocean. In November of 1911 William Barbour and John E. Barbour recorded a partition agreement dividing the Barbour Hill Tract in half, east to west. John took the southern portion and William took the northern part.

William Barbour sold his portion to the Princess Anne Club in December of 1911. (The club then acquired the remaining one-fourth interest in 1938 from the heirs of George Tenney). This portion was later condemned by the United States. The partition line between William and John Barbour's land therefore formed part of the southern boundary of the Wildlife Refuge.

It is impossible to determine the actual acreage of the condemned portion using only the deeds of conveyance. The 1911 Barbour/Princess Anne Club conveyance does, however, allow for a reasonable approximation. Barbour conveyed 6,646 feet of oceanfront to the Princess Anne Club. By using this length measurement and estimating the width by scale, the northern end appears to be about 5,000 feet wide extending from the Atlantic Ocean to Back Bay. This calculation results in an acreage total of between 700 and 750 acres in the portion condemned. This figure is verified by the tax assessment books in the Clerk's Office of Virginia Beach. William Barbour was assessed with 700 acres in Back Bay after the 1911 partition.

The discrepancy between the state's total acreage (278.2) in the grants and the actual acreage (1,400) cannot be explained by the information available. Despite the growth in acreage totals the descriptions remain the same throughout the chain of title. Therefore, the three grants (Malbone, et al., Dawley, Barbour) made by the State of Virginia comprised the land that William Barbour eventually acquired.

There are some serious problems with the title to the Barbour Hill Tract. The "82 acre" grant to James M. Malbone, et al. in 1885 appears to have been in violation of the 1873 statute. (Appendix 1, Figure 5). According to that statute, "all the beds of the bays, rivers and creeks, and the shores of the sea" within the State of Virginia would remain in the property of the Commonwealth and could be used as a common by its people for fishing and fowling. (Appendix 7). The "sand land" described in the grant to Malbone, et al. would seem to qualify as "the shores of the sea". Moreover, the Dawley tract was granted five years earlier, leaving unappropriated this strip of "sand land" along the ocean to the east. Perhaps this exclusion was made to comply with the 1873 statute.

The "195 acre" Dawley grant may have been in violation of the 1873 statute as a grant of the bed of Back Bay. The actual western boundary of the land in this tract follows the meanders of the shore of Back Bay. The boundary described in the grant however is a straight line just off the shore suggesting that a part of the bed of the bay has been included in the grant.

3. Ragged Island Tract

The Ragged Island Tract is comprised of 800 acres of islands and marsh lands in Back Bay bounded on the east by East Bay; on the west by Red Head Bay; on the north by Little Narrows; and on the south by Cedar Island Gap.

Original colonial grants to these lands totaled 801 acres: 50 acres granted in 1690 to Joseph Perry; 250 acres granted in 1733 to Edward Hack Mosely, Henry Holmes, and John Jemason; and 551 acres granted in 1738 to Edward Hack Mosely. The early history of the title to Ragged Island is extremely fragmented, yet ownership of the 800 acres of Ragged Island remained with private individuals until the acquisition of these lands by the United States in 1938.

Through a complicated series of devises and conveyances during the 1850's and 1860's, title to the 800 acres became uncertain and a suit was brought in 1889 to establish absolute title to this land. Ivers Adams v. Tenney, Woodbury, Knowlton and Franklin, Deed Book 60, page 620. Specific allegations in the suit are not clear because the records of the case cannot be located at the Virginia Beach Clerk's Office. The title examiner hired by the United States for purposes of the condemnation in 1938 also found these records to be missing. In the 1938 title report by the Senior Attorney for the Bureau of Biological Survey it was noted that although the suit was only prima facie evidence of the passage of title, "under the provisions of § 6306 of the Virginia Code it would be impossible at this late day to disturb the title because of any defects arising out of that suit." Opinion and Report: Ragged Island Club, Inc., prepared by Ralph J. Luttrell, Senior Attorney, Bureau

of Biological Survey, March 22, 1938. Va. Code Ann. § 8.01-113 (1977 Repl. Vol.) (referred to by Mr. Luttrell as § 6306) states:

> If a sale of property be made under a decree or order of a court, and such sale be confirmed, the title of the purchaser at such sale shall not be disturbed unless within twelve months from such confirmation, the sale be set aside by the trial court or an appeal be allowed by the Supreme Court of Appeals, and an order or decree be therein afterwards entered requiring such sale to be set aside but there may be restitution of the proceeds of sale to those entitled.

The chancery court in the above mentioned suit of Adams v. Tenney, et al. ordered in 1891 that all lands in Ragged Island be sold by Special Commissioners at a public auction. The highest bidder was the Ragged Island Club, Inc. The Club therefore took absolute title to the 800 acres by virtue of Va. Code Ann. § 8.01-113 (1977 Repl. Vol.) as there was never any motion to have the commissioners sale set aside. Some 47 years later the Ragged Island Club, Inc. conveyed by general warranty deed the 800 acres of Ragged Island to the United States.

The chain of title to Ragged Island presents, therefore, no basis for formulating a legal claim by the State of Virginia against the United States.

4. Back Bay Gunning Club Tract

The Back Bay Gunning Club Tract identifies all of the land within the Back Bay National Wildlife Refuge which is located west of the Great Narrows. It consists of several irregular, predominantly marsh, islands.

Land grants were made of this area as early as 1840. The majority of the land was patented to Luke Hill and Peter Land.

Title descended from these and other grantors until 1898 when Joseph Seelinger initiated his acquisition of the entire tract.

By 1912 Seelinger had bought and sold all of the privately owned land in Back Bay west of the Great Narrows. In December of 1899 he combined two tracts of land which were originally described as containing 582 acres and 100 acres. His description of these two tracts totaled 1,000 acres when he conveyed his remaining two tracts, of 77 acres and 140.2 acres, to the Club.

The Gunning Club received a land grant from the State of Virginia in 1905. This involved an eight-acre marsh island adjacent to Deep Creek Cove near the western shore of Back Bay. (Appendix 1, Figure 6). The addition of this grant to the conveyances from Seelinger made the Club the sole owner of the land in this entire tract.

In May of 1930, the Back Bay Gunning Club sold all of its interest in this area to Charles McVeigh, who was associated with the Princess Anne Club. McVeigh and the Princess Anne Club owned this tract at the time of the federal government's condemnation. According to the government's survey, this tract contained only 663 acres. The discrepancy between the government's acreage total and the 1,225 acres conveyed by the Back Bay Gunning Club can be explained in part by Seelinger's actions. His conveyance of 1899 to the Back Bay Gunning Club added over 300 acres to the actual total involved. Explanation of the remaining 250 acre discrepancy can be only supposition. This difference may be due to inaccuracies in land surveys made prior to 1840.

The potential problem with the Club's title involves the eight-acre grant in 1905. This was a grant of marsh land on the eastern shore of Virginia made after the 1888 statute possibly precluding such grants. According to that statute "all unappropriated marsh or meadow lands lying on the eastern shore of Virginia, which have remained ungranted, and which have been used as a common by the people . . . shall remain ungranted." (Appendix 6). In light of this, the 1905 grant to the Back Bay Gunning Club may have been invalid. If so, the State of Virginia owned the eight acres at the time of the condemnation. (Appendix 1, Figure 6).

C. FEDERAL PURCHASES AND CONDEMNATIONS

In order to facilitate an understanding of the events leading up to and culminating in the condemnation of the Back Bay National Wildlife Refuge, major events have been set out chronologically below. A discussion of the key areas follows:

1929 - Congress passed the Migratory Bird Conservation Act.

1930 - The Virginia Legislature passed the first of three statutes relating to the acquisition of state lands.

1936 - The Virginia Legislature passed the second consent-related statute.

12/17/1936 - The United States reached a purchase agreement with the Princess Anne Club for 4,479 acres in Back Bay.

5/25/1937 - The United States Department of Agriculture Bureau of Biological Survey completed and certified a map of the Princess Anne Club Tracts showing state and colonial grants. State grants on the barrier beach are grossly in error.

10/29/1937 - The Virginia Title and Mortgage Corporation certified a title search of the Princess Anne Club Tracts for the United States.

- Lawyers Title Insurance Corporation of Richmond, Virginia issued two certificates of title to the United States for the Princess Anne Club Tracts.

12/22/1937 - A declaration of taking was filed by the United States for Princess Anne Club tract lands east of the Great Narrows, 3,113.52 acres.

2/25/1938 - Title was vested in the United States to 3,113.52 acres east of the Great Narrows by virtue of condemnation.

3/1/1938 - A Purchase Agreement was made between the United States and the Ragged Island Club for 812 acres in Back Bay at a cost of $55,000.

3/12/1938 - A letter from the U.S. Attorney General stated that the condemnation proceedings were conducted regularly and that title to the 3,113.52 acres was vested in the United States.

3/31/1938 - The Virginia Legislature passed the third consent-related statute.

4/28/1938 - B. P. Holland executed a quit-claim deed to Charles McVeigh, selling all interest he might have had to land within the area to be condemned. (He claimed an interest to land in the 663 acre tract.)

5/16/1938 - In a letter to the U. S. Attorney in Richmond, the U.S. Attorney General relayed a recommendation that a final judgment of condemnation be had as a quit-claim deed from B. P. Holland would not clear up all technical difficulties with the title.

5/17/1938 - Title was vested in the United States to Ragged Island by virtue of a deed of bargain and sale.

8/18/1938 - Title was vested in the United States to land west of the Great Narrows. (663.24 acres by virtue of condemnation.)

11/4/1938 - A letter from the U.S. Attorney General stated that the condemnation proceedings were conducted regularly and that title to the 663.24 acres was vested in the United States.

1939-1941 - Bailey v. Holland - B. P. Holland brought suit against the manager of the Refuge claiming an interest in the western portion of Back Bay. Holland did not prevail.

10/16/1939 - Largely in response to claims such as Holland's the Presidential Proclamation was issued on this date redefining the boundaries of the Refuge and closing the waters therein.

When Congress passed the Migratory Bird Conservation Act, 16 U.S.C. § 715 et seq. in 1929, it authorized the purchase or rental of areas for use as sanctuaries. The act requires explicit state consent to such acquisitions:

> [N]o deed or instrument of conveyance shall be accepted by the Secretary * * * under this Act unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State. Id. at § 715f.

Allowing the state a right of consent in federal acquisitions by condemnation is a unique departure from the general rule and should be accorded great weight.

In 1930 the General Assembly "assented" to the "provisions and requirements of the said Migratory Bird Conservation Act in so far as is necessary for the purpose of such conveyance, acceptance and acquisition . . . ." The Commission of Game and Inland Fisheries was "authorized, empowered and directed to do all things necessary to bring about the establishment of a bird sanctuary under the provisions of said act . . . " (Emphasis added). Sess. Acts., 1930, Ch. 272. (Appendix 9). "Assent" has been held to differ from "consent". Consent implies some positive action while assent means mere passivity or submission which does not include consent. People v. Perez, 108 Cal. Rptr. 474, 510 P.2d 1026 (1973). A fair reading of the 1930 Act would seem to indicate it was qualified or conditional in nature.

The apparent reserved "assent" given by the Virginia General Assembly in the 1930 Act contrasts markedly with language incorporated

by the statutes of at least four other states clearly giving state consent for the acquisition of land for the establishment of federal wildlife refuges. (Appendix 10). The uniformity of language found in the statutes of these states was due to efforts by the Department of Agriculture immediately following enactment of the Migratory Bird Conservation Act in 1929. The Department sent to each state a model draft of a consent provision which complied with the consent requirement of the Migratory Bird Conservation Act (16 U.S.C. § 715f). Pers. Comm., Walter McCallister, Secretary, Migratory Bird Commission and Chief, Division of Realty, Fish & Wildlife Service. Apparently most states adopted the model draft. Virginia did not.

In 1936, two years prior to the condemnation, the General Assembly spoke again and more clearly on the issue of state consent to federal condemnation.

The Act referred to as the 1936 Act (March 28, 1936) had as its preamble: "An Act to amend and re-enact Sections 18 and 19 of the Code of Virginia relating to the acquisition of lands by the United States of America, . . ." (Appendix 11). The amending of section 18 is irrelevant for the purposes of this report. The 1936 Act, however, made several significant changes in section 19.

First, the original section 19 began "The consent of the State is hereby given to the acquisition by the United States, . . ." The same line appears in the 1936 act as "The conditional consent of the Commonwealth of Virginia is hereby given . . . "

Second, the General Assembly in the original section 19 consented to acquisitions by "purchase, lease, condemnation or otherwise . . ." The 1936 Act read: " . . . by purchase, lease, or in cases where it is appropriate that the United States exercise the power of eminent domain, then by condemnation."

Clearly, this change sought to lessen the number of situations where the state would consent to the United States acquiring land in Virginia by condemnation.

The third and perhaps most important change involved which lands may be taken. The General Assembly in the original section 19 consented to land acquired " . . . from any individual, body politic or corporate . . . for the conservation of the forests or natural resources of the State . . . " The 1936 Act only named "land in Virginia from any individual, firm, association or private corporation . . . for the conservation of the forests or natural resources . . ."

By dropping the term "body politic or corporate" which applied to municipalities, counties, and states, by any adding "private corporation(s)" the legislature made its intent clear. It sought to remove from the possibility of acquisition by the United States all state owned or public lands.

Of course, when the United States seeks to condemn land, the state legislature may not burden or restrict it without federal consent to do so. U.S. Const. art. VI, cl. 2; United States v. Crary, 1 F. Supp. 406 (W.D. Va. 1932). In the case of the Migratory Bird Conservation Act such consent was given.

Therefore, the 1936 enactment of the General Assembly could only have been addressed to acquisitions under federal act such as the Migratory Bird Conservation Act which specifically requires state consent. To assume otherwise would be to construe the state Act as unconstitutional on its face. And ". . . statutes should be construed whenever possible so as to uphold their constitutionality." United States v. Vuitch, 402 U.S. 62 (1971).

On March 28, 1936 this state legislation came into force. The last sentence of this Act reads: "An emergency existing in that lands in Virginia are constantly being acquired by the United States, this act shall be in force from its passage." Nine months later on December 17, 1936 the federal government initiated procedures to acquire the Back Bay National Wildlife Refuge.

In 1938 after title had vested in the federal government for part of the Refuge, the General Assembly enacted a statute releasing "all rights and authority which the Commonwealth of Virginia may have or possess concerning wildlife except fish and oysters . . ." Sess. Acts, 1938, Ch. 388, (Appendix 12) in the areas comprising the Refuge. The General Assembly specifically provided in section 2 of this enactment that the ceding of state jurisdiction was governed by section 19-a, Ch. 382 of the Acts of Assembly of 1936, the act giving consent for condemnation of lands other than those owned by the state. The 1938 Act, by specifically dealing with the Back Bay National Wildlife Refuge condemnation and specifically ceding jurisdiction under the terms of the 1936 statute, further supports the argument that state consent has to be measured by the 1936 statute of the General Assembly. Ch. 382,

Acts of Assembly, 1936. Measured by that statute, no consent was given for the condemnation of state lands.

There is evidence to suggest that, at the time of the condemnation, the United States knew or should have known that the State of Virginia had an interest in lands in Back Bay.

In 1936 the United States and the Princess Anne Club engaged in a Purchase Agreement for the lands within the Princess Anne Club tract. Clause eight of that agreement provided that:

> . . . if the Attorney General determines that the title to said lands or any part thereof should be acquired by judicial proceedings, either to procure a safe title or to obtain title more quickly, or for other reason, then the compensation to be claimed by the owners . . . shall be upon the basis of the purchase price herein provided.

Unlike Ragged Island, which was purchased after such an agreement, the Princess Anne Club tract was later acquired by judicial proceedings (condemnation). In light of clause eight it would appear that the United States was not satisfied with the title to the Princess Anne Club tract.

At first glance it would appear that the United States was concerned only with the interest of B. P. Holland in the Princess Anne Club tract. This however was not the case. At the time of the Refuge acquisition, Holland claimed an interest in some of the lands west of Great Narrows. In April of 1938, the Princess Anne Club in an effort to clear their title, received a quit-claim deed from B. P. Holland. The quit-claim conveyed all right, title and interest "in and to land in Princess Anne County, Virginia which the United States seeks to acquire for the

establishment of the Back Bay Migratory Waterfowl Project . . . and particularly . . . in and to the lands shown as tracts Numbers 39a-t, 39Aa, 39b, 39c and 39d . . ." Book 192, page 229 - Virginia Beach. Despite this deed the United States opted to condemn the land.

Additional evidence suggesting that the United States was concerned with more than just Holland's claim can be found in a letter of May 1939 from the Assistant U.S. Attorney General to the U.S. Attorney in Richmond. The U.S. Attorney was informed that

> A copy of your letter was furnished the Solicitor, Department of Agriculture, for his information and his office has informally advised this Department they they feel that a verdict should be had in the proceedings determining compensation and a final judgment of condemnation entered based on the verdict as a quitclaim deed from B.P. Holland and his wife, Emily G. Holland, will not clear up all technical difficulties in the title. (Emphasis added).

This letter does not explain just what the technical difficulties were.

A letter from the Acting Secretary of the Interior to the U.S. Attorney General in June of 1940 provides further evidence of the existence of "technical difficulties." The letter, relating to the Holland v. Bailey case, 126 F.2d 317 (4th Cir. 1942) gives a brief history of the Refuge condemnation. In so doing the writer mentioned that "[t]he Bureau of Biological Survey caused the land described within the option to be surveyed and had an abstract of title thereto made. The title, after examination, was found to be unsatisfactory." He did not explain why. Our examination of the

existing evidence and the abstract of title indicates that the only possible claimant to lands claimed by the Princess Anne Club was the State of Virginia.

The evidence mentioned thus far suggests that the United States had knowledge of problems with the Princess Anne Club's title. The major piece of evidence which suggests that the United States should have known of the state's interest on the seaboard tract is also the most perplexing. (See the section on the title to the Princess Anne Club tracts, supra.) That evidence is a 1937 map labeled "Princess Anne Club Tracts" to which the Bureau of Biological Survey added the location of state and colonial grants. This map was contained in the official records of the condemnation.

According to this map the entire seaboard tract was granted by the state from the northern to the southern boundaries of the Refuge. This representation is incorrect. The federal map misrepresents the location of the Malbone, et al. and Dawley tracts.

First, it is clear from glancing at the map (Appendix 1, Figure 7) that the 82 acre Malbone, et al. tract is much larger than the 195 acre Dawley tract. Although these tracts contained much more than their originally alleged acreage, they were proportional in size.

Second, the Malbone, et al. and Dawley tracts (hereinafter Barbour tract) as placed on the federal map are located too far north on the seaboard tract. When Laura Kimball sold the seaboard tract to the Princess Anne Club, the southern boundary was a line

due east from the Little Narrows to the ocean. The Barbour tract used this line as its northern boundary. In other words the Barbour tract, as depicted on this map, has as its southern boundary what actually should be its northern boundary. Further evidence of the true location of these tracts can be found in the dividing line agreement between William Barbour and the Princess Anne Club of 1909, Deed Book 82, page 385, Virginia Beach. The line set there runs almost due east through the Little Narrows. The land which William Barbour eventually conveyed to the Princess Anne Club is 6,646 feet of ocean front from the dividing line south. The federal government acknowledged the existence of this dividing line agreement on a "Tract Ownership Data" form made in reference to the purchase agreement with the Princess Anne Club in 1936.

Third, the 1880 Dawley grant as depicted on this map encompassed Little Island. This cannot be correct since a chain of title to Little Island has been established back to a colonial grant, and at no time did it involve George Dawley.

Fourth, the land which the map depicted as the "Barbour tract" was the same land owned by Jacob Travis. If the government map was correct, Jacob Travis would have held title to the same land granted by the state to Dawley and Malbone, et al. in the 1880's.

Fifth, in a 1937 report labeled "Description of the Boundary of the Princess Anne Club Tract (39)" (contained in the condemnation records), the Assistant Cadastral Engineer for the Bureau of Biological Survey described this Princess Anne Club tract as "Being all of the . . . Malbone, [et al.] 82 acre grant dated August 26, 1885, [and] the George W. Dawley 195 acre grant dated May 8, 1880

. . . ." (Emphasis added). From the United States' own title abstract (prepared by Virginia Title and Mortgage Corp.), it is clear that the Princess Anne Club never acquired all of the Malbone, et al. and Dawley grants. Rather, they bought approximately one-half of the land involved in each grant which would mean that these tracts would be cut approximately in half by the southern boundary of the Refuge. (Appendix 1, Figure 8).

It is important to note that the area on this map labeled George W. Dawley 195 acres and James Malbone 82 acres is the same area (excepting Little Island) which was wrongfully claimed by virtue of the Wood to Travis conveyance. This area was never granted by the State of Virginia. The map prepared by the Bureau of Biological Survey depicted these tracts incorrectly as to size and location with the result that these two tracts covered the exact area to which the State of Virginia has a claim. Reference is made in a letter dated February 10, 1938, from the Secretary of Agriculture to the U.S. Attorney General to the enclosure of two certificates of title issued by Lawyers Title Insurance Corporation of Richmond on October 29, 1937. To date the two certificates of title have not been located. They could not be found in the records of the Department of Interior, Department of Justice or the Regional Office of the Fish and Wildlife Service. The Regional Director of the Fish and Wildlife Service, Robert Miller, has given Lawyers Title permission to make public the certificates of title, and Lawyers Title has agreed to search their records for the certificates. The certificates are significant in that they may help explain why the Princess Anne Club's title was deemed unsatisfactory.

V. POTENTIAL STATE CLAIMS

A. SUBSTANTIVE THEORY

1. Due Process of Law

a) Claim to Compensation

Eminent domain is the power of a sovereign to take property for public use without the owner's consent. Nichol's, The Law of Eminent Domain, (3d. ed., 1981), § 1.11. The powers which are vested in the federal government by the Constitution require for their exercise the acquisition of lands in all states. Kohl v. United States, 91 U.S. 367 (1875). However, the Constitution places limitations upon the federal government's acquisition of land through the Fifth Amendment: "No person . . . shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." The guaranty of the due process clause inures to the benefit of a state, Wyoming v. United States, 255 U.S. 489 (1921), while under the just compensation clause, the public property of a state is "private property," thereby disallowing any taking without compensation. Nahant v. United States, 136 F. 873 (1st Cir. 1905); Wayne County v. United States, 53 Ct. Cl. 417 (1918), aff'd., 252 U.S. 574 (1920).

The title examination prepared for the United States for the purposes of condemnation in 1938 showed the questionable nature of the title held by the Princess Anne Club. That Virginia, and only Virginia, could make a legitimate claim against the Princess Anne Club is evident from these title records. That the United States

was aware or should have been aware of Virginia's claim in 1938 is evident from an examination of condemnation records. Many references to the inadequacy of the title held by the Princess Anne Club exist within these records. Furthermore, the map prepared by the federal government is remarkable for either being an intentional masking of the Commonwealth's claims or for being an example of a higher order of negligence. Such evidence is thoroughly detailed in the section of this report on the Federal Condemnation, Section III, C, supra.

Since the 1936 Acts of the Virginia Assembly specifically barred the acquisition of state-owned lands by the federal government, the United States was put on notice that it had no authority to acquire such lands. Where a potential state claim was apparent from the abstract of title, the United States as condemnor had the duty to give Virginia notice of this claim to allow Virginia the right to a hearing on compensation. The in rem nature of the condemnation proceeding could not relieve the United States of the necessity of providing notice to the state which had an interest in the land. As Circuit Judge Phillips noted in his opinion in the case of Fulcher v. United States, 287 F.2d 278, 287 (4th Cir. 1980), "it simply is no longer the law that the existence of in rem jurisdiction 'over the property itself' relieves of any necessity to give more than fictive notice to persons having interests in the property, in order to extinguish those interests."

The constitutional standard requiring notice to interested parties was promulgated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 214 (1950).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

The Supreme Court in the case of Walker v. City of Hutchinson, 352 U.S. 112 (1956), followed the Mullane decision where it held that a landowner was entitled to notice of the condemnation proceedings against his property because he was a resident whose address was known to the condemnor. Notice by only newspaper publication was not sufficient to satisfy due process of law. Justice Black writing for the Court referred to the Mullane decision as establishing "the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interest." Id. at 115. See, Schroeder v. City of New York, 371 U.S. 208 (1962), (notice of a condemnation which was limited to newspaper publication where the diversion of a river would affect the owner's land, violated due process where name and address of owner was readily ascertainable.)

Therefore, Fifth Amendment due process standards required that Virginia, as a claimant to the lands in Back Bay, be notified of the hearing on compensation where its interests would be adversely affected. Mere publication of notice was not sufficient notice to foreclose the State of Virginia's claims to Back Bay. If proper notice had been given in 1938 to the State of Virginia, it would have had the options to contest the proposed taking of state owned lands, to insist on compensation for the taking, or

merely to acquiesce in the taking of such state-owned lands by the federal government. However, the option belonged to the State of Virginia to decide how best to control these lands in Back Bay and when the United States foreclosed Virginia's consideration of such options by not giving proper notice of its claim, the subsequent acquisition by the United States was violative of due process of law.

b) Claim to Title

Procedural defects in notice to condemnation proceedings give rise to actions seeking just compensation. The Fifth Amendment due process clause preserves for the aggrieved parties the right to a hearing on compensation, but the in rem nature of the proceeding effectively vests title in the condemnor. See, Schroeder v. City of New York, 371 U.S. 208 (1962). However, the Fourth Circuit in the case of United States v. Chatham, 323 F.2d 95 (4th Cir. 1963), held that notice which did not meet the standards of Mullane not only permitted a claim for just compensation but also permitted a claim to the title of the condemned land. See also, United States v. 88.28 Acres of Land, 608 F.2d 708 (7th Cir. 1979) (want of adequate notice allowed an attack on a government condemnation title in a quiet title action under § 2409a).

In the Chatham case there was only notice by publication. Relying on Mullane, the court easily found a due process right to notice of a hearing on compensation and stated that "service by publication is not an adequate substitute for actual notice, when giving actual notice to identified parties is neither impossible, impractical, nor unreasonable." Chatham at 98. But the government

in its published notice inaccurately described the land intended for condemnation. The court noted that "if each of the . . . [land owners] . . . with a lawyer at his elbow, had read the published notice, they would not have surmised that their lands were involved." Id. at 99. The court in Chatham concluded that notice was so deficient in its description of the land to be condemned, that it was "positively misleading". Therefore the condemnation court, whose jurisdiction was based solely on the defectively published notice, could not have acquired in rem jurisdiction over the land. Judge Haynsworth writing for the court in Chatham stated that "when no reader of the notice could have understood that the proceedings were directed to this land, it cannot be an adequate foundation for an exercise of an in rem jurisdiction over this land." Id. at 100. The Chatham court held that the absence of actual notice and the gross misdescription of the land in the published notice together were sufficient to find title remaining in the private owners of land.

Though the facts in the Chatham case are not wholly comparable to that of the case at hand, the principles embodied in the court's decision are extremely pertinent. The federal government's misdescription of the lands rendered the condemnation court in Chatham without in rem jurisdiction over the proceeding. Similarly, it can be argued that the condemnation of state-owned lands in the present case, which were specifically reserved by the 1936 Virginia Act of Assembly, rendered the court in the 1938 Back Bay condemnation without in rem jurisdiction over such state-owned lands.

As argued in Section IV A. 2. of this report, infra, state-owned lands could not be acquired by the federal government. The qualified consent by the State of Virginia became embodied in the Migratory Bird Conservation Act, thereby limiting the United States' authority to acquire Refuge lands. Not only would any title acquired by the United States in state-owned lands be void and inoperative, but also a declaration of taking of such lands would serve as an inadequate foundation for an exercise of in rem jurisdiction.

Furthermore, the Chatham court found the entire condemnation procedure to have been a "gross deception" which formed the basis for divesting the United States of any claim to title. Similarly, in the case at hand, the federal government which should have at least been aware of Virginia's claim, pursued the condemnation in 1938 without any attempt to notify Virginia. And where potential questions may have arisen during the condemnation proceedings regarding Virginia's claim as evident in the abstract of title, a map was drawn and included in the condemnation record which effectively concealed all of Virginia's claim on the seaboard tract. The descriptions were no less offensive here as in the Chatham case.

Thus, the Fifth Amendment principles of due process as promulgated in Mullane and later refined by Chatham required the invalidation of any claim of title by the United States to state-owned lands. Where the federal government, whether knowingly or unknowingly, had deceptively misled interested parties from

acquiring notice of condemnation proceedings against their land, the condemnation court lacked in rem jurisdiction and title to the land remained with the private owner.

2. Statutory Interpretation/Section 715f Consent

The authority with which lands are acquired for use by the United States derives entirely from Congress. Under an Act of Congress, 41 U.S.C. § 14, "no land shall be purchased on account of the United States, except under a law authorizing such purchase." Therefore, any conveyance of lands to the United States without Congressional approval is void and inoperative. United States v. Tichenor, 12 F. 415 (C.C.D. Ore. 1882).

The authority for the acquisition of lands in Back Bay was derived from the Migratory Bird Conservation Act, 16 U.S.C. § 715 et seq. Under § 715f of the Act, consent of the state legislature to the federal acquisition of land is made an express condition of the United States' acceptance of such land. United States v. Carmack, 329 U.S. 230, rehearing den., 329 U.S. 834 (1946); Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967). The authority of the federal government to condemn lands for the purpose of establishing a wildlife refuge is therefore conditional on the consent of the state, and that consent may impose a limitation on the type of lands which may be acquired for a refuge.

The testimony during the public hearings held in 1928 prior to the passage of the Migratory Bird Conservation Act lend credence to this aspect of a state's right to give a qualified consent to the acquisition of land by the United States. The Act itself was viewed as a cooperative venture between the federal and state governments. As Paul Redington, Chief of the Office of

Biological Survey stated: "[The Act] . . . provides for the greatest degree of cooperation between the Federal Government and the governments of several states in the administration and enforcement of regulations and laws for the protection of the migratory birds of America." Hearings before the Senate Committee on Agriculture and Forestry, S. 1271, Feb. 17, 1928. Not only did § 715f require state consent by law to the provisions of the Act, but § 715a required that either a ranking officer in charge of game lands within the state or the governor of the state be authorized representatives on the Migratory Bird Conservation Commission "for the purpose of noting on all questions relating to the acquisition, under this Act of areas in his State." The state representative on the Commission was there not only to foster a spirit of cooperation, but also to protect legitimate interests of the state in its lands.

Another indication of the state's right to qualify consent is found in the hearings before the Senate Committee on Commerce in 1961. The Committee approved a $105,000,000 appropriation for the acquisition of lands under the Migratory Bird Conservation Act under which a proviso in the bill was added that no land could be acquired without the consent of the Governor or the appropriate state agency. Senator Magnuson commenting on the proviso, stated that "it is provided that they [the Federal Government and the State] must be in complete agreement as to the nature of the lands and the acreage involved." 74 Cong. Rec. 117111 (May 28, 1961). Considering the cooperative purpose that was

envisioned between the Federal and State Governments at the inception of the Act and the continuing effort that is being made to maintain this atmosphere of cooperation, the consent clause which is embodied in the Act clearly permits the state to limit its consent to federal acquisition of land within the state.

The 1936 Virginia Act of Assembly gave that qualifying consent to the United States allowing the acquisition of all land within the state with the exception of state-owned public lands. Therefore, since the enabling Migratory Bird Conservation Act limited the condemning power of the United States by the imposition of state consent, Virginia's exemption of state-owned lands from the purview of the Act rendered the federal government without authority to take such public lands of the state. As such, where the federal government holds such state lands, its title is void and inoperative.

3. Taking Without Compensation

The owner of property is constitutionally protected against any taking of, interference with, impact upon, or damage to his right to use, possess, or enjoy such property or his freedom to dispose of such property. This constitutional protection allows the affected owner to bring an action recovering his loss. Such action has been variously characterized as a suit in "inverse condemnation" or "reverse condemnation" or as an action based on a "de facto" or "common law" taking. Nichol's, The Law of Eminent Domain § 8.1[4], (3d. ed., 1981).

The concept of inverse condemnation is based on the idea that the defendant has exercised the power of eminent domain, but has not observed the legal processes to accomplish its purpose. Thus, physical interference with the use, possession, and enjoyment of property constitutes a de facto taking of the property for which there is a constitutional obligation to make compensation.

Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover title to or possession of property. The former property owner cannot compel return of property taken because of the eminent domain power of the condemnor but the former owner does have a constitutional right to just compensation for what was taken. Nichol's at § 8.1[4].

State-owned land is considered and treated the same as privately-owned land with regard to compensation. The United States cannot take state property under eminent domain proceedings without paying appropriate compensation to the state. The principle that state lands will be accorded the same considerations as private lands was enunciated by the United States Supreme Court in St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893). The Court declared:

> While a grant from one government may supercede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal government to a corporation state or national to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the

> private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when under the grant of a a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the statehouse grounds of the state, and construct its depot there without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control is in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees without suitable compensation to the state. Id. at 100, 101.

Regarding the payment of interest as part of just compensation, the general rule is that no interest is allowed on claims against the United States unless it consents. Jacobs v. United States, 290 U.S. 13 (1933). However, this general rule does not apply to claims for just compensation for governmental taking.

Just compensation is provided for in the Constitution and may not be taken away by statute. It involves making the owner whole, as if no taking had occurred. With this principle in mind, it follows that:

> Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. Seaboard Airline Ry. Co. v. United States, 261 U.S. 299, 306 (1923).

This view is codified in 40 U.S.C. § 258a, a statute which allows the United States to take title and possession to land in advance of final judgment. The law allows interest at a rate of six percentum per annum on the amount finally awarded from the date of payment; "but interest shall not be allowed on so much thereof as shall have been paid into the court." 40 U.S.C. § 258a.

Regarding the Back Bay National Wildlife Refuge condemnation, the government paid into the court the entire value of the land, thus apparently precluding the state from claiming interest due. There is, however, case law to suggest that if the United States is responsible for a delay in the distribution of the deposited fund, interest will be allowed. United States v. Certain Lands in Suffolk County, N.Y., 270 F. Supp. 323 (E.D. N.Y. 1967).

In Fulcher v. United States, 632 S.2d 278 (4th Cir. 1980), land was condemned under 40 U.S.C. § 258a, the same authorization for condemning the Back Bay lands. There, as in Back Bay, the United States failed to determine and notify the true owner of part of the land. The Court of Appeals ruled that if Fulcher could show his title to be good he would be entitled to the value of the land at the date of the taking plus interest from that date.

4. Ejectment Against Individual (statute of limitations, concealment)

Another possible approach would be to bring an ejectment action against the present manager of the Wildlife Refuge under a claim of better title. By naming the individual as the defendant instead of the United States one could presumably avoid the sovereign

immunity problem and thereby proceed without the constraints relating to such. This was the situation in United States v. Lee, 106 U.S. 196 (1882), a cornerstone to present day sovereign immunity law.

Although the law since Lee has been far from consistent, it now appears to be fairly certain that this approach is confined to a limited number of situations. A claim for specific relief against the officer as an individual can be maintained in two situations: one, when his actions are not within his statutory powers; two, when his actions, even if within his powers, are violative of the Constitution. Malone v. Bowdoin, 369 U.S. 643 (1962). Hence, the Lee case has continuing validity only when a claim is made that the holding of the property constitutes an unconstitutional taking without just compensation. Id.

It appears that the State of Virginia's situation fits neatly into the Lee exception. This would suggest that Virginia could maintain an ejectment action in a state court. There are, however, certain important caveats involved with this approach. Both the land in Lee and in Malone were acquired by the United States through a purchase. The Back Bay Wildlife Refuge was a condemnation. In a condemnation the United States acquires an indefeasible title leaving only a right to compensation to the claimants. In a purchase, the government's title is not as inclusive.

An ejectment action would be filed in a state court. Undoubtedly, it would then be removed to a federal district court. If that court determines that the action is actually one which should be brought

under 28 U.S.C. 2409a (allowing the United States to be named as a defendant in an action in which it has an interest in real property) the state court will be deemed not to have had jurisdiction to hear the case. Since the district court's removal jurisdiction is only as good as the state's original jurisdiction, the case will be dismissed. McClellan v. Kimball, 623 F.2d 83 (9th Cir. 1980).

5. Negligence - Federal Tort Claims Act

Through the Federal Tort Claims Act, 28 U.S.C. § 1346(b), the United States waives its immunity from tort liability in certain cases. Under this section the federal district courts are given exclusive jurisdiction of claims against the United States for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his employment.

The Federal Tort Claims Act (FTCA) has been interpreted as only waiving immunity for negligence. Intentional torts (other than by law enforcement officials) are not seen as being within the scope of employment. Virgil v. United States, 293 F. Supp. 1176 (D.C. Col. 1968); United States v. Drinkwater, 434 F. Supp. 457 (E.D. Va. 1977).

The FTCA presents a problem of limited retroactivity. That is, the United States has only waived immunity for claims accruing on and after January 1, 1945. This Act appears to eliminate any claim arising from the 1937-38 title searches. However, this

section has been interpreted as allowing claims for injuries suffered after 1945 which resulted from pre-negligence. In Re: Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D. W. Va. 1974). Thus, Virginia must demonstrate that injury did not occur until its claim was discovered, which was after 1945.

6. Public Trust/Custom

The public trust doctrine was recognized early in our United States case law as applied to land beneath navigable waters and the adjacent shoreline. The doctrine basically asserts that land under navigable waters is owned by the sovereign and is held in trust for the use and benefit of all the people.

One of the basic premises of the public trust doctrine is that the sovereign acts as a trustee to protect and preserve the public trust lands. The Supreme Court has declared:

> The Federal government holds all public lands of the United States not as a monarch for private or prerogative purposes, but as a trustee for the benefit, use, and enjoyment of the sovereign people of the United States. Light v. United States, 220 U.S. 523, 536 Van Brocklin v. Tennessee, 117 U.S. 151, 158 (1885).

It has been argued that the concept of public trust imposes three types of restrictions on governmental authority:

> first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses peculiar to that resource. J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 477 (1969).

The most famous public trust case is Illinois Central Railroad Co. v. Illinois, 146 U.S. 287 (1892). At issue was the authority of the state legislature to convey a fee simple title to the railroad of over one thousand acres of commercial waterfront to a private railroad company. The Supreme Court ruled that conveyance of public trust lands was beyond the legislature's authority. The Court reasoned that a state has special regulatory obligations over its shorelands and these obligations are inconsistent with private ownership of the lands.

The Virginia Supreme Court discussed public trust lands in a case involving the dumping by the City of Newport News of raw sewage into the James and Hampton Roads.

> The State holds its tidal waters and the lands thereunder as a trustee for the benefit of all the people of the State, to be administered as a trust for the enjoyment by them of their public rights therein, and subject to certain rights of user thereof which are common to all the people of the State. This trust is an active, continuing trust; and the trustee cannot be discharged or relieved from the duty of actively and continuously administering it and enforcing the common rights of the people therein 'unless by revision of our Constitution'. Commonwealth v. Newport News, 158 Va. 521, 533 (1932).

Assuming that the State of Virginia consented to the 1938 condemnation proceeding which established the Back Bay National Wildlife Refuge, an argument can be advanced that all of the land along the shores must remain in trust for the benefit of all Virginians and thus are not subject to conveyance.

This theory of the public trust would in all probability be subsumed by the potentially far-reaching effects of the eminent domain theory. If presented with such an argument, the court is

likely to supercede any public trust arguments.

An argument based on custom would in all probability suffer a similar fate. There are numerous requirements for the establishment of valid customary use. Among these are the necessities that customary uses be uninterupted and free from dispute. Given the circumstances surrounding the Back Bay National Wildlife Refuge, satisfying these two requirements may prove difficult.

The primary weakness in making a custom argument is that only one state, Oregon, appears to have recognized it as a viable legal doctrine. State ex rel. Thornton v. Hay, 254, 462 P. 2d 671 (1969).

7. Implied Dedication

Other state courts have relied on the doctrine of implied dedication to grant public recreational easements to dry sand beaches. See, Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964) and Gion v. City of Santa Cruz, 2 Cal.3d 29, 465 P.2d 50 (1962). In Virginia, the State Supreme Court will soon decide a case bearing on this doctrine.

In Bradford v. The Nature Conservancy (Va. Supreme Court Record No. 79-1297), due for oral argument in the fall of 1981, the State of Virginia has joined plaintiff Bradford as a coparty. The dispute concerns title to Hog Island, which lies off the Eastern Shore of Virginia. The Nature Conservancy acquired title to the island several years ago and has since closed public access through their property. Specifically closed was a north-south road or "highway" located in the inter-tidal area along the beach, which had been used as a road for decades. The state is asserting a claim to a substantial part of the beach property as a state commons

pursuant to the Virginia commons statutes of 1873 and 1888 previously discussed in this report.

Judge Wahab in Northampton County Circuit Court decided that the Atlantic Beach on Hog Island was subject to the public right to use the intertidal strip as a roadway. He observed that the common law principles of dedication have been recognized and applied in Virginia since 1871. Bradford Opinion at 38. Based on his reading of Virginia law, the judge then addressed the claims of the plaintiffs' concerning the Atlantic Beach of Hog Island:

> As the tide falls, the inter-tidal strip is left smooth and compacted providing a suitable surface upon which vehicles can travel at speeds comparable to those allowed on highways. From the earliest days of the island's history, the people have preferred the inter-tidal strip for their route of travel north or south when conditions permitted.
>
> As the court has found, the title to this strip remains in the Commonwealth of Virginia where grants were made after April 1, 1873. Whatever title in the strip owners of land granted prior to that time may have, their estate is subservient to the public right to use the inter-tidal strip as a roadway established by ancient and continuous use. Where the strip is owned by the Commonwealth, public use is subject to its control. Id. at 42.

However, even if the doctrine of implied dedication is a viable argument in the Back Bay case, it may run counter to the commons argument and is certainly counter to the position taken by the Commonwealth in the Bradford v. Nature Conservancy appeals to the Virginia Supreme Court. The state has taken different sides

on some of the issues determined by Judge Wahab in Bradford. In fact, the case pending before the Virginia Supreme Court is actually two separate appeals which will be heard together before the Virginia court.

In its opening brief in the case styled Commonwealth of Virginia v. The Nature Conservancy and Bradford, Record No. 79-1320, the state has taken the position that the trial court erred in holding that the beaches at Hog Island had become a public roadway. Brief of Appellant, p. 6. The brief written by Assistant Attorney General James E. Moore stated that:

> The trial court seems to have concluded that under 'principles of dedication or prescription historic public use of the beaches for travel created a public road . . . . This holding is contrary to decisions of this Court which hold that lands dedicated to one public use are not subject to other public or private prescriptive right . . . .' [Citations omitted].
>
> The lower court's conclusion regarding the beach roadway is also contrary to clearly established public policy. The Acts of 1780, 1819 and 1873, respectively, reveal unambiguous legislative intent to preserve the shores for public fishing, fowling and hunting. Declaring the Atlantic beaches a roadway for vehicular travel seriously threatens the uses for which the Atlantic beaches have been statutorily reserved since 1780. Brief of Appellant, p. 6.

The reply brief of the Commonwealth is equally unwaivering in this position. The brief states that public fishing, fowling and hunting does not necessarily imply travel required to exercise these public rights. The state maintains the position that the Commonwealth's right to regulate the purported roadway does not cure the illegality of the purported roadway dedication. Reply Brief of Appellants, p. 3.

In view of this position concerning public roadways on Atlantic Beaches at Hog Island, the state may find it difficult politically if not legally to adopt a position directly opposite concerning the beaches at Back Bay. If the state argues that the entire ocean strand is a commons, the state may find that its own arguments in Commonwealth v. Bradford preclude it from arguing that it is a public easement. (See, the following discussion of defenses.)

8. Prescriptive Easement

A number of state courts have extended common law property doctrines to enable the public to acquire easements to private beach property. Unfortunately, none have gone so far as to grant prescriptive easements in state or federal lands. The Supreme Court of Florida recognized that prescriptive easements by the public could be acquired through recreational uses in City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974) and the Texas Supreme Court in Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964) found that the requirements for a public prescriptive easement had been satisfied.

These cases, while expanding the doctrine of prescriptive easements, involve the acquisition of property belonging to private parties. Research has revealed no cases which extend this doctrine of public prescriptive easements to property owned by the government. 25 Am. Jur.2d Easements and Licenses, § 41 states that:

> In absence of an enabling statute an easement by prescription cannot be acquired in property belonging to the United States or a State. Furthermore, no prescriptive right can ordinarily be acquired in property affected with a public interest or dedicated to a public use.

Virginia cases on this point are in accord. Lynchburg v. Chesapeake & Ohio R.R., 170 Va. 108 (1938); Virginia Hot Springs Co. v. Lowman, 126 Va. 424, 432 (1919); Bellenot v. City of Richmond, 108 Va. 314 (1908).

Following this line of cases it makes no difference whether the state or the federal government owned the property in question. A prescriptive easement cannot be acquired in property owned by the state or the federal government.

B. DEFENSES

There are a number of defenses available to the Department of Interior if the state brings suit under the theories discussed above.

1. Conflict of Law

The Constitution of the United States (Art. III, § 2) provides that any suit to which the United States is a party must be brought in federal court. One of the first issues that may arise in federal court is whether state or federal law should be applied in a suit of this type. This issue could have several facets. The question may arise as to whether state or federal common law rules should apply (e.g., in the areas of res judicata, collateral estoppel, eminent domain, etc.).

The current approach to the choice-of-law question has its basis in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In that case, the Supreme Court removed the power of the federal courts to declare independent federal common law in deciding issues which would be

governed by state law in state courts. However, later cases have held that where the matter before the courts is closely related to a federal function, state law does not govern of its own force and the federal courts have the responsibility to fashion a federal rule to decide the issue. In the landmark case Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) the court held that unless Congress has specified otherwise, a federal court has the option either to "adopt" state law as the content of the federal rule or to develop uniform federal law to resolve the question. In the Clearfield Trust case though, federal law was chosen as the applicable federal rule to govern an action against the United States on a federal check.

In determining whether to adopt state law as the content of federal rule in the case before it, several prerequisites must be present. First the source of law applicable to the litigation must be federal. The source of applicable law is held to be federal when the question at issue is substantially related to a federal governmental function. See, Comment, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U. Chi. L. Rev. 823, 824 (1976). More specifically, a federal source has been found in cases involving activities stemming from a statute or the Constitution (Clearfield Trust, supra.); in cases involving a federal relationship (United States v. Standard Oil Co., 332 U.S. 301 (1947)); and in cases arising out of a particular federal program (United States v. Little Lake Misere Land Co.,412 U.S. 580 (1973)).

The second prerequisite before reaching the adoption issue is that Congress must not have determined the choice-of-law issue. (See, e.g., Clearfield Trust, supra.) Taken together, these two prerequisites set the stage for the adoption choice by requiring the court to fashion a federal rule while leaving them free to base that rule on either federal or state law.

Applying the guidelines in Clearfield Trust and later cases to the set of facts in the Back Bay controversy, it is likely that the court will formulate a federal rule. The dispute over Back Bay appears to be closely related to a federal function and there is no language in the Migratory Bird Conservation Act (16 U.S.C. § 715, et seq.) determining choice-of-law. Thus, in attempting to discern whether the court will be likely to adopt Virginia state law as the federal rule, it should be helpful to focus on federal cases similar to the Back Bay controversy.

In United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973), the Court was presented with a case involving the Migratory Bird Conservation Act. As was the case with the Back Bay National Wildlife Refuge, the United States acquired land parcels in Louisiana for a wildlife refuge pursuant to that Act. Mineral rights were reserved for a period of ten years to the Little Lake Misere Land Co. (hereinafter Little Lake) who were former owners. These rights were subject to extension if certain detailed exploration and production conditions were met. Fee simple title was to vest in the United States after either event. The ten year period expired without the extension conditions being met. However, Little Lake continued to claim the mineral rights, relying on a Louisiana statute passed in 1940 after the refuge acquisition. The

statute, as applied retroactively, provided that mineral rights reserved in land conveyances to the United States would continue indefinitely. The government brought suit to quiet title.

For the majority, Chief Justice Burger first acknowledged that disputes over real property are generally governed by state law. 41 U.S. at 591-92. But following the guidelines in Clearfield Trust, he indicated that the source of law under these circumstances must be federal: " . . . [T]his land acquisition . . . is one arising from and bearing heavily upon a federal regulatory program. Here, the choice-of-law task is a federal task for federal courts, as defined by Clearfield Trust . . . ." 412 U.S. at 592.

The federal regulatory program referred to in Little Lake is the National Wildlife Refuge System established in accordance with the Migratory Bird Conservation Act.

Chief Justice Burger further noted that the Migratory Bird Conservation Act is silent on the choice-of-law question, "[b]ut silence on that score in federal legislation is no reason for limiting the reach of federal law." Id. at 593. Once the Court establishes that the source of law is to be federal, the question becomes whether state law should be adopted as the federal rule. Here, the Court found that the Louisiana statute was not an appropriate standard for federal law:

> The Court in the past has been careful to state that even assuming in general terms the appropriateness of 'borrowing' state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law . . . .
>
> To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal

> land acquisition programs. These programs are national in scope . . . Certainty and finality are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds. Id. at 597.

Conceivably, the district court could ignore any Virginia statute or common law rule it believed was aberrant or hostile to the federal program at Back Bay based on this passage in Little Lake.

However, the Little Lake case can be distinguished by the fact that the Louisiana statute in Little Lake was passed after the federal land acquisition and also by the fact that the state had no real interest in the outcome of the suit. In Little Lake, the government argued that virtually without qualification, land acquisition agreements of the United States should be governed by federally created federal law. The court declined to resolve the case in such broad terms. In fact the Court states that, "Conceivably our conclusion might be influenced if Louisiana's Act . . . as applied retroactively, served legitimate and important state interests the fulfillment of which Congress might have contemplated through application of state law." Id. at 599.

Thus, the state can distinguish Little Lake by demonstrating that not only did the Virginia commons statutes precede the federal land acquisition at Back Bay, but a legitimate and important purpose has been served historically and would be served presently by a right-of-way through Back Bay.

In addition, the state can demonstrate that the courts have traditionally deferred to state law in certain areas of the law. For example, in United States v. Yazell, 382 U.S. 341 (1966),

the Supreme Court held that state law has traditionally governed in the field of family and family-property arrangements, and in this case there was no reason to establish a federal rule. State law "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interest, will suffer major damage if the state law is applied." Id. at 507.

A more recent example of deference to state law was in Georgia Power Co. v. Sauders, 617 F.2d 1112 (5th Cir. 1980). This case arose out of a dispute over the amount of compensation for property condemned by the utility company. The Fifth Circuit held that the source of the eminent domain power was clearly federal, following the guidelines of Clearfield Trust. As to whether state law should be adopted as the federal rule the court stated that "[b]asic considerations of federalism, as embodied in the Rules of Decision Act, prompt us to begin with the premise that state law should supply the federal rule unless there is an expression of legislative intent to the contrary or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case." Id. at 1115-1116. The Rules of Decision Act, 28 U.S.C. § 1652 (1976) states that:

> The laws of the several states, except where the Constitution or treaties of the United States or Act of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The court in Georgia Power reviewed several Supreme Court decisions and concluded that the cases evidence "a growing desire to minimize displacement of state law." Id. at 1118.

Moreover, the court acknowledged that even though there were important federal interests at stake in the suit, these interests were not sufficient to warrant displacement of state law on the issue of compensation in a private condemention proceeding.

The problem, however, with the Georgia Power case and other recent decisions that adopt state law as the federal rule is that the majority of these cases involved with the rights and claims of private litigants. In fact the Georgia Power court notes that federal rules have been applied in federal condemnation cases where the United States is the party condemning and paying for the land. Id. at 1119.

Research has revealed one other theory that may be advanced to support the state's contention that state law should govern the Back Bay dispute. In 1977, the Supreme Court rules in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), that disputed ownership of land underlying the Willamette River was governed solely by state law and not federal common law. While this case was based primarily on an interpretation of the equal footing doctrine, it may have precendentialvalue. The Court in Corvallis based its ruling on an 1845 Supreme Court decision, Pollard's Lessee v. Hagan, 3 How. 212 (1845). Pollard's Lessee held that the United States held land below the usual high water mark in trust for the new states and under the equal-footing doctrine each state as it joined the union enjoyed the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution. The Court concluded that:

> First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively . . . . 3 How. at 230. (Emphasis added).

The Corvallis court then recounts subsequent decisions consistent with Pollard's Lessee. For example in Weber v. Harbor Commr's., 18 Wall. at 65-66, the Court held that ". . . absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state . . . " of California. And in Shively v. Bowlby, 152 U.S. 1, 57-58 (1894) the Court stated: "The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

Based on this line of cases, the Supreme Court chose to overrule a decision decided the same year as Little Lake, supra. In Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) the Court had treated the equal footing doctrine as a source of federal common law and had applied federal rules to a disputed riverbed in Arizona. However, the court in Corvallis stated:

> This court has consistently held that state law governs issues relating this property, like other real property, unless some other principle of federal law requires a different result. Under our federal system, property ownership is not governed by a general federal law, but rather by the law of the several states. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the states.' Id. at 379 quoting Davis Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944).

Even though the Corvallis decision is encouraging for the state's position, there appears to be at least two problems. First, the Court held that state law governs, unless some other principle of federal law requires a different result. That principle arguably could be the one articulated in Little Lake. The second problem is stated in Hughes v. Washington, 389 U.S. 290 (1967). In that case the Court held that a dispute over title to lands owned by the federal government is governed by federal law: "The rule deals with waters that lap both the lands of the state and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the nation in its own boundaries to allow it to be governed by any law but the "supreme law of the land!" Id. at 293. At this point it is mere supposition whether the court will follow the rule as stated in Corvallis or as stated in Hughes.

2. Res Judicata

In an effort to relitigate access through Back Bay National Wildlife Refuge, the first hurdle will be the doctrine of res judicata. Under this doctrine, a valid, final judgment rendered on the merits is an absolute bar to a subsequent action between the same parties or those in privity when based upon the same claim or demand. 1B Moore's Federal Practice § 0.405[1] (2d. ed. 1980)

> As stated in the U.S. Supreme Court:
>
> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations.

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac., 94 U.S. 351, 352, 24 L. Ed. 195.
>
> The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating judgment. Com'r. v. Sunnen, 333 U.S. 591, 597 (1948).

Bearing this rule in mind, the Department of Interior has already defended one attempt in court to re-open the beach at Back Bay to motorized traffic. Until the early 1970's the Refuge beach was open to automobile traffic, but on March 30, 1973 regulations severely curtailing beach traffic became effective. Immediately thereafter, a suit was filed seeking to keep the beach open. One of the claims of the plaintiffs was that the United States did not own the beach between high and low water pursuant to the Virginia commons statutes, and federal attempts to close the beach were thus invalid. The federal regulations were upheld and plaintiffs' claims dismissed in Coupland v. Morton, 7 ERC 1965 (1975) and affirmed by the Fourth Circuit, 7 ERC 2127 (1975).

If the state attempts to bring any of the same causes of action involving the commons statutes in the present action as were heard in Coupland, the Department of Interior may attempt to assert the doctrine of res judicata as a defense. However, the doctrine should not bar any future litigation by the state involving the Back Bay National Wildlife Refuge.

On December 18, 1973, an interoffice memo was written at the Virginia Institute of Marine Science (VIMS) by Theodore Smolen, an attorney who was conducting research on the Virginia commons statutes for VIMS. The memo indicated that the Commonwealth was joined as a party defendant on December 7, 1973 in Coupland v. Morton, supra. In the last paragraph of this memo, Smolen states that "conversations with Mr. Baird (Assistant U.S. Attorney for Eastern District of Virginia) indicated that the interests of the United States and the Commonwealth in this matter were identical. However, I do not know if this is still the case. There seems to be no apparent ground for conflict between these parties in the matter." (Emphasis added).

If Smolen's statement is correct -- that the interests of the United States and the Commonwealth were identical or there was no conflict between the parties -- then res judicata should not be a bar to litigation on the Back Bay National Wildlife Refuge between the United States and the Commonwealth.

In researching the res judicata issue, a preliminary matter will be the question of conflict of law: whether the Virginia or Federal rules will apply which has been discussed in a preceeding section.

As noted in Coupland v. Morton, supra, the Commonwealth was joined as a co-defendant with the United States. In the event of future litigation Virginia would be the plaintiff. In this situation the black letter rule is well established: Parties to an action are not bound by a judgment, in a subsequent controversy with each other, unless they were adversary parties in the original

suit. Dobbins v. Barnes, 204 F.2d 546 (9th Cir. 1953); Livesay Industries, Inc. v. Livesay Window Co., 202 F.wd 378 (5th Cir. 1953); Fidelity and Cas. Co. of N.Y. v. Federal Express, 136 F.2d 35 (6th Cir. 1943); Byrum v. Ames & Webb, Inc., 196 Va. 597, 85 S.E. 2d 364 (1955); Natl. Bondholders Corp. v. Seaboard Citizens Natl. Bank of Norfolk, 110 F.2d 138 (4th Cir. 1940).

50 C.J.S. Judgments § 819 summarizes the rule as follows: "Estoppel . . . is raised only between those who were adverse parties in the former suit and the judgment therein originally settles nothing as to the relative rights or liabilities of the co-plaintiffs or co-defendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated and determined as by being put in issue by cross petition or separate and adverse answers or unless, under statute, the co-parties occupy adversary positions."

In light of the general rule stated above, it would appear that the rule of res judicata does not apply to the present Back Bay action. However, the Fourth Circuit case, Nat'l. Bondholders Corp., supra, indicates that there are several exceptions to the general rule. They are: ". . . where co-parties do in fact occupy the attitude of adversaries . . . or where some finding of fact is made in the first suit which is an essential element in a claim or action subsequently brought by one against the other." 110 F.2d 138, 144.

From the facts as established, it does not appear that the United States and the Commonwealth could be termed adversaries in Coupland v. Morton, supra. "The test is whether they make each other

adversaries by raising issues among themselves. If they do they are bound by the findings of the jury or the Court . . . ." Universal Underwriters Insurance Co. v. Ford Motor Co., 204 F. Supp. 757,759 (N.D. Tenn. 1967).

Turning to the Virginia rule in Byrum v. Ames & Webb, Inc., supra, the Virginia Supreme Court appears to be unmoved by the res judicata argument. In a prior case, the co-defendants had tried to show the other liable for damages. But the court said: "No issue was presented to the court for adjudication as between the two defendants. The evidence each offered in that suit was for the purpose of having adjudicated an issue between themselves." The court approved the rule stated in the Restatement of Judgments § 82 (1942): "the rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their right inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves." See also, Fowler v. American Federation of Tobacco Growers, Inc., 195 Va. 770, 80 S.E.2d 554 (1954).

In sum, it is probable that the Commonwealth will not be barred from relitigating the Back Bay dispute based on the doctrine of res judicata.

3. Collateral Estoppel

A defense that is part of the doctrine of res judicata is that of collateral estoppel. Under the doctrine of res judicata a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel such a judgment precludes

relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). A more recent statement of the rule is that "once an issue is actually and necessarily determined by a court of competent jurisdiction that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979).

Thus, not only might the government attempt to collaterally estop the state from relitigating any issues determined in Coupland v. Morton, supra, but it could also assert collateral estoppel as a defense based on Bradford v. Nature Conservancy, supra, if the Virginia Supreme Court's ruling is adverse to the state.

Collateral estoppel, or issue preclusion,should be an inappropriate defense concerning the issues litigated in Coupland v. Morton, supra. Since collateral estoppel is a part of the doctrine of res judicata, the same principles concerning coparties should apply:

> Estoppel . . . is raised only between those who are adverse parties in the former suit and the judgment therein ordinarily settles nothing as to the relative rights or liabilities of the co-plaintiffs or codefendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated and determined by being put in issue by cross petition or separate and adverse answers or unless, under statute, the coparties occupy adversary positions. 50 C.J.S. Judgments § 819.

It should be noted that collateral estoppel is usually asserted when a party has litigated and lost and seeks to relitigate that issue. In the Coupland case, the state was joined as a defendant

with the Department of Interior and essentially won all issues. The state has not previously lost but could potentially change positions. (See, the section on doctrine of preclusion against inconsistent positions, infra.)

Turning to the Bradford case, the question will be whether the government, who was not a party in that action, can collaterally estop the state from reasserting the commons issues if the ruling in the Virginia Supreme Court goes against the state.

In the landmark case of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), the U.S. Supreme Court examined the scope of the doctrine. The court observed that collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Id. at 326. The traditional rule was that the scope of collateral estoppel was limited by the doctrine of mutuality of parties. That is, the determination was not conclusive if the second action involved different parties, even though one of them had been a party to the first action and had unsuccessfully litigated the issue on that occasion. The rule was stated in Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912): "It is a principle of general elementary law that estoppel of a judgment must be mutual." This principle was based on the premise that it is somehow unfair to allow a party to use a prior judgment when he himself would not be so bound. Thus, the mutuality requirement allowed a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.

The rule was subject to many exceptions, but it remained universally recognized until 1942, when it was repudiated by the California Supreme Court in Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). In an opinion written by Justice Traynor, the court said:

> In determining the validity of a plea of res judicata (collateral estoppel) three questions are pertinent: was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" 19 Cal.2d at 809-810, 122 P.2d at 893.

Bernhard gradually gained adherence from other courts, and in 1971, the U.S. Supreme Court in Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971) abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid. Under the influence of that decision, the Bernhard rule has gained wider acceptance and has now been adopted in the Restatement (Second) of Judgments § 88 (Tent. Draft No. 2, 1975).

The Blonder-Tongue and Bernhard cases both involved the defensive use of collateral estoppel -- a plaintiff was estopped from asserting a claim that he had previously litigated and lost against another defendant.

If there was any question about the scope of the Court's ruling in Blonder-Tongue, or about the Court's attitude toward the mutuality rule, it was resolved in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). There the court granted federal courts

broad discretion in determining when the use of offensive collateral estoppel should be applied. In other words, in certain circumstances a defendant who has been sued and lost on a certain issue can be estopped from defending against another plaintiff on the identical issue (e.g., on the issue of negligence in a related series of tort cases).

Thus, if the court applies the federal rule, it is conceivable that the Department of Interior could estop the state from relitigating claims based solely on the commons statutes if the ruling in Bradford goes against the state. However, if the court chooses to adopt the state rule on collateral estoppel, the trial judge might not allow the defensive use of collateral estoppel. As recently as November 26, 1980, the Virginia Supreme Court addressed the issue of collateral estoppel without mutuality. In Norfolk & Western Ry. Co. v. Bailey Lumber Co., 272 S.E.2d 217 (1980), the court noted the modern trend to abrogate the mutuality requirement, but concluded not to abandon the mutuality rule when "offensive use of collateral estoppel is sought to be invoked in one of a series of damage suits arising from a common disaster." Id. at 220. By way of explanation the court stated that: In Virginia, the established rule is that collateral estoppel requires mutuality . . . , especially when the estoppel is used offensively." Id. at 219. This explanation leaves the court's position on defensive collateral estoppel somewhat unclear; however, the tenor of the opinion suggests that the court may be reluctant to abandon the mutuality requirement in virtually any case. The court merely defines collateral estoppel and cites Ferebee v. Hungate, 192 Va. 32, 63 S.E.2d (1951) as

reference. There the court stated unequivocally that: "Judgements and decrees are conclusive evidence of facts only as between parties and privies to the litigation. And, in the case of a former adjudication set up on defense, it is no bar unless the parties to the first judgment are the same as those to the second proceeding." Id. at 63 S.E.2d 764. Thus if the Virginia Supreme Court's position is still grounded on Ferebee it appears that the mutuality requirement is still in place in Virginia.

Even if the district court chooses to apply the federal rule on collateral estoppel the doctrine may still be inapplicable to a case involving state ownership in Back Bay. Before collateral estoppel can be invoked several conditions must be satisfied. First, the issue to be relitigated must be essentially the same as the issue litigated in the previous action. Second, this issue must have been actually litigated in the prior action. Third, there must have been a determination in the first action precisely on this issue. Fourth, this determination must have been necessary to the judgment in the earlier action. See generally, Montana v. United States, 440 U.S. 147, 153-157 (1979); F. James, Civil Procedure § 11.16-31 (2d ed. 1977); 1B Moore's Federal Practice ¶¶ 0.441-.448 (2d ed. 1980).

Determination of these conditions must await a decision in Bradford, but certainly the state can show that the disputes at Hog Island and at Back Bay are distinct geographically and legally. The Court in Montana stated that it must be shown that the "question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged" in the prior litigation before

collateral estoppel can be invoked. Montana v. United States, 440 U.S. at 157. And in Alderman v. Chrysler Corp., 480 F. Supp. 600 (E.D. Va. 1979); Judge Warriner for the Richmond Division stated that, "The'infallable' test of whether a second action involves the same cause of action as a prior suit is whether the facts essential to sustain the two suits are the same." Id. at 607.

Moreover, the purpose of collateral estoppel (judicial economy and preventing needless litigation) would not be served in this case because it would have been inappropriate to join the Department of Interior in the Bradford case.

In addition, it can be argued that collateral estoppel in this situation is inappropriate because the doctrine should be limited to questions of fact or mixed law/fact. Many of the theories and issues pertinent to the state's interests in Back Bay are questions of law, and prior determinations of law have primarily precedential value. In Montana v. United States, 440 U.S. 147, 162 (1979) the Court cited United States v. Moser, 266 U.S. 236, 242 (1924) for the proposition that:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. (Emphasis added).

The Court in Montana concluded that when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. 440 U.S. at 162. This is the position taken by the Restatement (Second) of Judgments § 68.1

(Tent. Draft No. 4, 1977), and it is also the view of the Virginia Supreme Court as expressed in Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974): "Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action. In the subsequent action, the parties to the first action and their privies are precluded from litigating any issue of fact actually litigated and essential to a valid and final personal judgment in the first action." Id. at 671 (Emphasis added). Citing the Restatement of Judgments § 70 (1942) Restatement Supp. (Judgments § 70 (1948), the court noted that collateral estoppel is applied with less rigor to issues of law. Id.

The defense of collateral estoppel may be available to the federal government if the Bradford case is determined adversely to the state's interests, and especially if the court elects to follow the federal rule as enunciated in Blonder-Tongue. The state rule on the defensive use of collateral estoppel is less clear, but the Norfolk and Western case appears to indicate that the rule of mutuality is still in effect in Virginia. It is a matter of conjecture how a federal court would interpret the Virginia rule. However, even if the mutuality rule is abandoned in the Back Bay case, the state can argue with authority that collateral estoppel is inappropriate in this case, because not only are the facts in Back Bay and Bradford quite different, but the Back Bay controversy involves questions of law which should preclude collateral estoppel.

4. The Attorney General's Letter (Equitable Estoppel)

In a letter addressed to the City of Virginia Beach dated October 18, 1971, the Attorney General of Virginia disclaimed any interest of the state in the Back Bay National Wildlife Refuge.

In a suit by the state, the federal government may attempt to estop the state from asserting interest in the Refuge based on the Attorney General's disclaimer. It does not appear, however, that it would preclude the state from asserting its interest in the Refuge.

Under the doctrine of equitable estoppel a party may prevent another from changing position to the former's detriment. However, before the government can avail itself of this doctrine several prerequisites must be met. Pomeroy defines equitable estoppel as:

> . . . the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy. 3 Pomeroy, Equity Jurisprudence 3804 (5th ed. 1941).

In § 805 Pomeroy lists six essential elements and requisites in forming a defense of equitable estoppel. Among these, Pomeroy indicated that the conduct of the estopped party must be relied upon by the other party, and the relying party must in fact act upon the conduct in such a manner as to change his position for the worse. In other words, the party asserting the doctrine must rely on the conduct to his detriment.

From all indications, it appears that the Department of Interior has not changed its position in any manner since the Attorney General's letter was written. Therefore, it appears well settled that the federal government could not estop the state on this basis. The government would have the burden to prove that it had changed its position so as to be injured by the state's conduct. See, Thomasson v. Walker, 168 Va. 247 (1937) for a statement of the rule.

Even if the government could show detrimental reliance, the rule in Virginia is that the state is not subject to the laws of estoppel when acting in a governmental capacity. 7 Michie's Jurisprudence, Estoppel § 6 (1976). This rule was stated by the Virginia Supreme Court in Main v. Department of Highways, 206 Va. 143, 142 S.E.2d 524 (1965). ". . . [I]t is well settled that the doctrine of estoppel does not apply to the rights of a state when acting in its sovereign or governmental capacity. This is so because the legislature alone has the authority to dispose of or dispense with such rights." 142 S.E.2d at 529.

Noting that the Main case is still the rule in Virginia, the court in Commonwealth ex rel. Attorney General of Virginia v. Washington Gas Light Co., 269 S.E.2d 820 (1980) acknowledged that the state's view on the doctrine may be a minority view and the recent trend appears to be to the contrary. The court agreed in theory to allow application of the doctrine in this particular case (the issue involved a revenue ruling issued by the State Corporation Commission). However, the court held that the party asserting estoppel could not prove by clear and unequivocal evidence that there was reliance on the state's representations.

The federal rule on estoppel against the government (state, local or federal) is somewhat unclear. Without developing the case history of the federal rule, it should suffice to note that as recently as April 6, 1981, the Supreme Court addressed the estoppel issue. In Schweiker v. Hannen, ___ U.S. ___, 101 S.Ct. 1468 (1981), the Court held that the Social Security Administration (SSA) could not be estopped from insisting upon compliance with a

valid regulation even though a field representative of the SSA had given erroneous information to a claimant regarding the regulation. In his dissent, Justice Marshall pointed out that the majority suggests that estoppel may be justified in some circumstances, yet, there are no indications where those circumstances are. The majority simply concludes in Schweiker that estoppel is not justified in this case.

Certainly, the trend in both federal and state courts is toward relaxing the rigid rule of no estoppel against the government. See generally, K. Davis, Administrative Law of the Seventies § 17.01 et seq. (1976); Note, Equitable Estoppel of the Government, 79 Colum. L. Rev. 551 (1979). Professor Davis argues that estoppel should be applied against governmental bodies "where justice and right require it" and observes that it is now essentially the law. Davis, supra, § 17.02.

Regardless of whether the district court turns to federal or state law, it seems likely that the federal government will not be able to estop the state based on the Attorney General's disclaimer. The federal government should be hard pressed to show detrimental reliance on the Attorney General's letter or that justice and right require estoppel. If the Supreme Court is still hesitant to apply estoppel to a federal agency where there was apparent reliance on governmental advice, as in Schweiker, the district court should refuse to estop the state where these was no reliance.

5. Doctrine of Preclusion Against Inconsistent Positions

Even where the facts will not permit the application of res judicata or collateral estoppel, it is recognized that a party

who has assumed a particular position in judicial proceedings may be estopped to assume a position inconsistent to the prior position if it is to the prejudice of the adverse party. 31 C.J.S., Estoppel § 117; 28 Am. Jur.2d, Estoppel and Waiver § 68. This doctrine of preclusion against inconsistent positions is sometimes referred to as "judicial estoppel" and has frequently been recognized as a doctrine forbidding inconsistent positions, usually as to facts. Scarano v. Central R. Co., 203 F.2d 510 (3rd Cir. 1953); Thrasher v. Thrasher, 210 Va. 624, 172 S.E.2d 771 (1974). Accordingly, it has frequently been stated that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter assume a position to the contrary simply because his interests have changed. 31 C.J. S., Estoppel § 117.

Since in Coupland v. Morton the state took the position that it had no interest in the property in dispute at Back Bay, the government in subsequent litigation involving Back Bay might assert that this doctrine bars the state from now claiming an interest in the Back Bay property. However, this doctrine or rule of estoppel is subject to a number of limitations or exceptions.

First of all, the rule against self-contradiction is said to rest on the policy of preserving the sanctity of oath, the orderly administration of justice and a regard for the dignity of judicial proceedings. 1B Moore's Federal Practice, 0.405[8] (2d ed. 1980). The rationale for the doctrine seems to be based on a judicial reluctance to allow litigants to "play fast and loose" with the

courts according to the vicissitudes of self-interest. Scarano v. Central R. Co., 203 F.2d 510, 513 (3rd Cir. 1953). In other words, the doctrine is based on the idea that a party should not be allowed to argue one set of facts to serve his interest and then to argue another set when his interest has changed.

Accordingly, the doctrine may not be invoked where the position first assumed was taken as a result of ignorance or mistake, or through the fault of the party claiming estoppel. 31 C.J.S. Estoppel § 117, 1B Moore's Federal Practice, § 0.045[8] (2d ed. 1980).

Also, the basis for this doctrine has reference only to factual matters and not to contentions upon the law as applied to a given set of facts. 7 Michie's Jurisprudence, Estoppel § 34 (1976). It has generally been accepted that the doctrine against prior inconsistent positions does not apply where the prior statement was merely an expression of opinion or legal conclusion. Sturm v. Baker, 150 U.S. 312 (1893); Hartford Fire Inc. Co. v. Carter, 196 F.2d 992 (10th Cir. 1952); U.S. v. Siegel, 472 F. Supp. 440 (N.D. Ill. 1979); 7 Michie's Jurisprudence, Estoppel § 34 (1976); 28 Am. Jur. 2d, Estoppel and Waiver § 71. Thus, a person who has taken an erroneous position on a question of law is ordinarily not estopped from later taking the correct position, provided his adversary has suffered no harm or prejudice by reason of the change, 7 Michie's Jurisprudence, Estoppel § 34 (1976).

Certainly, the Attorney General's letter disclaiming any state interest in Back Bay was a legal opinion, which was the basis for the state's position in Coupland v. Morton, supra, along with

the complex legal questions of state consent and state commons. Since the Department of Interior has in no way changed its position, it could show no harm or prejudice by reason of the change. Therefore, the state should be able to demonstrate adequately that the doctrine against inconsistent statements is inapplicable in this case: the state is not changing the facts to suit its purposes, but has re-evaluated a complex set of legal theories and has discovered a state interest in land where before none was thought to exist.

If this were not enough, there are several other limitations which should bar the use of this doctrine: 1) the principal of preclusion is not usually applied against the state or federal government. Note, 59 Harv. L. Rev. 1132, 1136 (1946); 31 C.J.S. Estoppel, § 117; 2) the doctrine does not apply to a prior proceeding in which the parties are not the same; the Pittson Co. v. O'Hara, 191 Va. 886, 63 S.E.2d 34 (1951); Ferebee v. Hungate, 192 Va. 32, 63 S.E.2d 761 (1951); and the same questions must be involved. In re Johnson, 518 F.2d 246, 252 (10th Cir. 1975) cert. den. 423 U.S. 893; Sinclair Refining Co. v. Jenkins Petroleum, 99 F.2d 9 (1st Cir. 1938) cert. den. 305 U.S. 659; 3) the party invoking the estoppel must have relied on the first position, and so relying, have acted, or refrained from acting or have changed his position to his prejudice. 31 C.J.S. § 117 Estoppel; 4) there can be no estoppel based on such reliance where the party invoking it had knowledge equal or superior to that possessed by his

adversary and sufficient to protect him against being misled or relying on where he had a sufficient opportunity to acquire such knowledge. 31 C.J.S. § 117 Estoppel; 28 Am. Jur. 2d, Estoppel and Waiver § 70.

These limitations should be satisfactory to render the doctrine of preclusion against inconsistent statements inapplicable. A district court in U.S. v. Siegel, 472 F. Supp. 440 (N.D. Ill 1979) commented that: "The scope of judicial estoppel is narrow, particularly when applied to the Government, and generally, it pertains to statements made under oath in judicial proceedings and does not apply where the prior statement is merely an expression of opinion or legal conclusion."

6. Jurisdiction - Statute of Limitations

a) 28 U.S.C. § 1331 - Federal Question, now provides:

> The district court shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States, except that no . . . sum or value shall be required in any action brought against the United States, any agency thereof, or any officer thereof in his official capacity.

It appears that under one or more of the state's claims above, jurisdiction would be conferred by § 1331. In at least one decision the United States Supreme Court has stated that "jurisdiction in this action to review a decision of the Secretary of Interior is clearly conferred by 28 U.S.C. § 1331(a). Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604 at 609 (1978).

b) 28 U.S.C. § 1346(a)(2) - The Tucker Act

Under any claim for money damages not sounding in tort, the

state must seek jurisdiction under this statute, which represents Congressional consent for such actions. The Tucker Act confers on the district courts:

> Any other civil action or claim against the United States not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort.

The jurisdiction is concurrent with the Court of Claims. The purpose of the subsection is to permit a person with a relatively small claim against the United States to bring his action in the district of his residence rather than having to pursue it in Washington in the Court of Claims. Those with claims more than $10,000 must proceed in the Court of Claims.

Actions founded upon the Constitution, which have been held to be within the Tucker Act jurisdiction include actions for unconstitutional taking of property. Section 1346(a)(2) applies to inverse condemnation suits by landowners. United States v. 21.54 Acres of Land, 491 F.2d 301 (4th Cir. 1973); United States v. Wald, 330 F.2d 871 (10th Cir. 1964).

The primary problem in using either 28 U.S.C. § 1331(a) or § 1346(a)(2) is the statute of limitations provided in 28 U.S.C. § 2401; (and in 28 U.S.C. § 2501 for the Court of Claims).

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues . . . .

This general statute of limitations could be problematic because it is jurisdictional and may not be waived by the federal

government, Crown Coat Front Co. v. United States, 275 F. Supp. 10 (S.D. N.Y. 1967); and it is well settled that the statute is applicable to a claim by a state, California v. United States, 132 F. Supp. 208 (C. Cl. 1955).

In cases involving eminent domain, the claim accrues when the United States first takes possession of the land or files a declaration of taking, whichever is first. United States v. 422,978 Sq. Ft. of Land in San Francisco, 445 F.2d 1180 (9th Cir. 1971). Since the Back Bay National Wildlife Refuge was condemned in 1938, and access through the Refuge was closed in the early 1970's the statute under 28 U.S.C. §§ 2401(a), 2501 has run.

However, the statute of limitations may be tolled. The federal courts have in some instances postponed the commencement of the statute where the claimant "did not know, and in the exercise of reasonable diligence could not learn that he had been injured by the government's allegedly wrongful conduct." United States v. Sams, 521 F.2d 421, 429 (3rd Cir. 1975). The standard of the Court of Claims appears to be tougher: The plaintiff must either show that the defendant has "concealed its acts with the result that plaintiff was unaware of their existence or [plaintiff] must show that its injury was 'inherently unknowable' at the accrual date. Japanese War Notes Claimants Ass'n. v. United States, 373 F.2d 356, 359, cert. den. 389 U.S. 971 (C. Cl. 1967).

c) 28 U.S.C. § 1346(b) - Federal Tort Claims Act

Under a theory of negligence, jurisdiction will be founded on the Federal Tort Claims Act (FTCA). Under this section the

United States has waived its immunity from tort liability and district courts are given exclusive jurisdiction of claims against the United States for money damages, for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his employment.

The FTCA has been interpreted as only waiving immunity for negligence. Intentional torts (other than by law enforcement officials) are not seen as being within the scope of employment. Vigil v. United States, 293 F. Supp. 1176 (D.C. Col. 1968); United States v. Drinkwater, 434 F. Supp. 457 (E.D. Va. 1977).

The FTCA presents a problem of limited retroactivity. That is, the United States has only waived immunity for claims accruing on and after January 1, 1945. This would, at first, appear to eliminate any claim arising from the 1937-38 title searches. This section, however, has been interpreted as allowing claims for injuries suffered after 1945 which resulted from pre-1945 negligence. In re: Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D. W. Va. 1974). The task for the state, therefore, is to show that injury did not occur until its claim was discovered after 1945.

The second major obstacle presented by the FTCA is a two year statute of limitations. A tort claim against the United States is barred unless it is presented to the appropriate agency within two years after such claim accrues or unless action is begun within six months after final denial of the claim from that agency. 28 U.S.C. § 2401(b). The important point here is the date of accrual of the state's claim.

The Fourth Circuit has announced that a claim does not accrue until a claimant has had a "reasonable opportunity to discover all of the essential elements of a possible cause of action - duty, breach, causation, damages . . . ." Bridgeford v. United States, 550 F.2d 978, 981 (4th Cir. 1977).

The United States Supreme Court has since questioned the requirement that the plaintiff must know that the injury was negligently inflicted before a claim accrues. They affirm, however, that he must at least know of the facts of his injury to begin the running of the statute. United States v. Kubrick, 444 U.S. 111 (1979). Since the state did not even know of the facts of its injury until just recently, the two-year period should just now have begun to run.

The state's argument will be based on the theory that the United States had a duty to find all persons who might have had an interest in the condemned land. The federal government attempted to meet this duty through a title search. The breach of that duty occurred in that the federal government (or its agents) did not perform the search with reasonable care. Evidence is available in the interpretation of the United States map of the "Princess Anne Club Tracts" which shows the Dawley and Malbone, et al. grants in the wrong location. See discussion in this report, Section III, C supra.

d) 28 U.S.C. § 1346(f) - United States as Defendant, provides that: "The district courts shall have exclusive original jurisdiction of civil actions under § 2409(a) to quiet title to an estate in

real property in which an interest is claimed by the United States." This section, added in 1972, grants jurisdiction for an action to quiet title to land in which the United States has an interest.

28 U.S.C. § 2409(a) waives sovereign immunity and allows the United States to be named a party defendant in a civil action to adjudicate a disputed title to land in which the United States claims an interest.

Under § 2409(a) a complaint is insufficient and will be dismissed unless it states with particularity the nature of plaintiff's right, title or interest, circumstances under which land was acquired, right, title or interest claimed by the United States, and the date on which the plaintiffs or their predecessors in interest knew or should have known of claims of the United States. Buchler v. United States, 384 F. Supp. 709 (D.C. Cal. 1974), (See § 2409a(c)).

This section also contains a statute of limitations provision. § 2409a(f) provides that:

> Any civil action under this section shall be barred unless it is commenced within 12 years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

In Gross v. Andrus, 556 F.2d 972 (9th Cir. 1977), which was a suit against the Department of Interior to quiet title in certain Indian lands, the court held that the 12-year statute of limitations does not begin to run from the date the statute was enacted, but from the time when the claim of the United States became known or should have become known. This may become a major hurdle in disputing title to property at Back Bay since the interest

of the United States became known in 1938 when the land was acquired. Questioning title to a right-of-way or to an area below high tide mark may be another question since the Refuge was not closed to traffic until 1972. At any rate, language in another opinion states that statutes which waive immunity of the United States from suit are to be construed strictly in favor of sovereign and claims are barred under § 2409a where ownership claimed by the United States was well known. Hart v. United States, 585 F.2d 1280 (5th Cir. 1978).

Note also, that § 2409a(b) apparently allows the United States to condemn any property if final determination under § 2409a is adverse to the United States:

> . . . the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

Thus, even if the Commonwealth won the case, apparently the property could be recondemned under this statute.

§ 1251(b) Original Jurisdiction provides that:

> The Supreme Court shall have original but not exclusive jurisdiction of:
>
> (2) All controversies between the United States and state;

This statute provides the opportunity to invoke the original jurisdiction of the United States Supreme Court. Caveat: a suit which need not be brought originally in Supreme Court can be removed to federal court. Ames v. Kansas, 111 U.S. 449 (1884).

But Cf. California v. Arizona, 440 U.S. 63 (1979) (California sought to invoke the Supreme Court's original jurisdiction in suit to quiet title against Arizona and the United States).

7. Laches

The doctrine of laches cannot be applied against public rights. 30A C.J.S. Equity, § 114. By weight of authority the defense of laches is not available against the government, state or national, in a suit by it to enforce a public right or to protect a public interest. U.S. v. California, 332 U.S. 19, 67 S.Ct. 1658 (1947); U.S. v. Summerlin, Fla., 310 U.S. 414, 60 S.Ct. 1019 (1940); U.S. v. Ruby, 558 F.2d 697, 705 (9th Cir. 1978).

8. Adverse Possession

The federal government could attempt to use the doctrine of adverse possession in two ways. The first assertion could involve previous owners of tracts which now comprise the Back Bay National Wildlife Refuge. Title searches have revealed several tracts of land which were mysteriously expanded as they passed through the chain of title. This expansion results in an encroachment on state lands. When this evidence is presented it is probable that the federal government will attempt to show that title to state lands as acquired through adverse possession by the individual private landowners, and hence good title has passed to the United States.

a) Adverse Possession by Individuals in Virginia.

The general rule in Virginia is that there can be no adverse possession of land against the Commonwealth, and no time will bar her recovery. 1A Michie's Jurisprudence, Adverse Possession § 49

(1980). However, as early as 1798 the legislature created an exception to this rule. As the Virginia Supreme Court observed in Seekright v. Lawson, 35 Va. (8 Leigh) 458, 462 (1836):

> No time runs against the commonwealth, unless where the legislature has thought proper to allow it. By the act of 1798 it is enacted that where lands have been settled for thirty years, and the taxes have been paid thereon within that period no entry or location thereon shall be valid, and the commonwealth's right to such lands is thereby relinquished.

This Act (Sess. Acts of 1797-8, Ch. 10 § 1) has remained a continuous part of the Code of Virginia, and today can be found at § 41.1-8 of the Code. The provision which required continuous settlement and payment of taxes for 30 years has gradually been reduced until at present the requirement is only five years.

However, despite meeting the continuous settlement requirement, the claimant may still not be able to support a claim of title by adverse possession against the state in an area such as Back Bay. The 1798 Act required that lands be "settled" for thirty years before the Commonwealth relinquished its interests. It is unclear what the General Assembly meant by "settled", but a strong argument can be made that this entailed residential occupancy or cultivation of the land and not merely use for recreational purposes such as hunting or fowling.

The requirements for adverse possession are that it must be actual, exclusive, hostile, open and notorious for the statutory period. 1A Michie's Jurisprudence, Adverse Possession § 3 (1980). While the requirements for actual possession vary with the

situation of the land and the condition of the country, the typical mode of actual possession is by occupancy, residency, cultivation, enclosure or improvement. 1A Michie's Jurisprudence, Adverse Possession, § 5 (1980). Therefore, if the meaning of "settled" in § 41.1-8 is to be interpreted to be in consonance with the actual possession requirement, it can be argued that some showing of use other than recreational will be necessary. Therefore, the concept of settlement may encompass more than merely fishing and hunting activities by hunt clubs or individuals.

Assuming that statutory requirements are met, a claim of title to land by adverse possession may still be inapplicable to lands within the Refuge. It appears that where wild and uncultivated land is involved an additional element may be required to claim title by adverse possession. In Taylor v. Burnsides, 42 Va. (1 Gratt.) 166, 202 (1844), it was stated that "wild and uncultivated lands, completely in a state of nature, are not susceptible [to adverse possession]. An adversary possession of them can only be acquired by acts producing a change in their condition." This rule was followed in Harman v. Ratcliff, 93 Va. 249, 24 S.E. 1023 (1896) and in Austin v. Minor, 107 Va. 101, 57 S.E. 609 (1907) and in Leake v. Richardson, 199 Va. 967, 103 S.E.2d 227 (1958). In Leake the court stated:

> The character of the acts necessary to vest one with a title by adverse possession varies with the nature of the property involved, or in a state of nature, . . . the acts of ownership must indicate a change of condition, showing a notorious claim of title, accompanied by the essential elements of adverse possession. 199 Va. at 976.

Therefore, according to Virginia law, a claim to wild lands by adverse possession at Back Bay would not be recognized unless evidence could be shown of some change in condition of the land.

In cases deciding the question of title acquisition by adverse possession of land which has been used by the public during the period of adverse possession the courts generally have held that no title can be acquired if the public use indicates a claim of common or public right. 56 ALR 3d 1182, 1185 (1974). In Austin v. Minor, 107 Va. 101, 57 S.E. 609 (1907) the property in dispute was valuable only for hunting, fishing and trapping and to a limited extent as a range for hogs. Apparently many people hunted, fished and trapped upon the land. Though the court conceded that the claimant used the land more than anyone else, it ruled that the requirement of exclusive adverse possession had not been met.

Accordingly, if parcels claimed by adverse possession at Back Bay have been used concurrently by the public as a commons for hunting and fishing, the adversary claim may not be recognized in court.

Another line of cases exist that may be used to argue against claims of adverse possession at Back Bay. Apparently the rule in Virginia is that any property affected with a public interest or dedicated to a public use cannot be acquired by adverse possession. It was so held in Lynchburg v. C & O Ry. Co., 170 Va. 108, 195 S.E. 510 (1938) concerning waters of a canal owned by the railroad; in Virginia Hot Springs Co. v. Lowman, 126 Va. 424, 101 S.E. 326 (1919) involving a turnpike; and in Bellenot v. City of Richmond, 108 Va. 314, 61 S.E. 785 (1908) involving a public highway

Following this line of cases, any of the parcels of land at Back Bay which were dedicated to public use as a commons could not be acquired by adverse possession.

The doctrine of adverse possession could also be used by the United States in its own right. The Back Bay Refuge was acquired in 1938 and hence the federal government will probably claim that state interests in land at the Refuge have long been acquired by the United States through adverse possession under color of title.

b) Adverse Possession by the United States.

The second use of the doctrine could be by the United States in its own right. Since the United States has held the Back Bay National Wildlife Refuge under color of title since 1938, it could assert title by virtue of adverse possession for the statutory period of 15 years.

The issue will be whether the United States is allowed to acquire title by adverse possession against a state. The rule in Virginia and in other states is that title by prescription or adverse possession cannot be acquired against a state unless specifically permitted by statute. Seekright v. Lawson, 35 Va. (8 Leigh) 458 (1836); Tichanal v. Rol, 41 Va. (2 Prob.) 288 (1843); Shauks v. Lancaster, 46 Va. (5 Gratt.) 110 (1848); Levasser v. Washburn, 52 Va. (11 Gratt.) 572 (1854); 2 C.J.S. Adverse Possession, § 5b; Continental Oil Co. v. Chicago & N.W. Ry. Co., 148 F. Supp. 411 (D.C. Wyo. 1957).

It does not appear that Va. Code Ann. § 41.1-8 (1981 Repl. Vol.) as discussed supra, would apply to the United States. This section gives consent to adversely possess state lands by "persons" who

have settled continuously for five years and on which taxes have been paid. Neither is the United States a person, or has it settled or has it paid taxes on the land in question.

This rule is bolstered by the rule in Virginia and elsewhere that any property affected with a public interest or dedicated to a public use cannot be acquired by adverse possession. See, Lynchburg v. C. & O. Ry. Co., 170 Va. 108, 195 S.E. 510 (1938); Virginia Hot Springs Co. v. Lowman, 126 Va. 424, 101 S.E. 326 (1919); Bellenot v. City of Richmond, 108 Va. 314, 61 S.E. 785 (1908). Since part of the land at Back Bay was dedicated to public use as a commons, if the Virginia rule is applied, there should be no adverse posesssion. This general rule is supported by several federal courts: Adverse possession does not run against public property. U.S. Gypsum Co. v. Grief Bros. Cooperage Corp., 389 F.2d 252 (1968). Also, lands of a sovereign state may not be lost or taken from it by failure to assert its title, in absence of an agreement on the part of the state not to sue. Even with such an agreement, the state cannot lose such lands as it holds for the public trust for a public purpose. United States v. Certain Lands in Town of Highlands, N.Y., 52 F. Supp. 540 (D.C. N.Y. 1944).

Also a number of states have held that property held in trust for the people cannot be lost through adverse possession. People v. Shirokow, 162 Cal. Rptr. 30, P.2d 859 (1980); Messersmith v. Mayor & Common Council of Riverdale, 223 Md. 323, 164 A.2d 523 (1960); Smith v. People, 193 N.Y.S.2d 127, 9 A.2d 205 (1959).

As demonstrated, the Virginia rule seems to be clear: title cannot be acquired by adverse possession against the state, and

further, any property dedicated to a public use cannot be acquired by adverse possession. It might also be argued that the federal rule on adverse possession is the same. See cases supra. The problem in arguing the federal rule is that in the cases cited above, the United States was not the party asserting title by adverse possession against a state.

In the one case that has been located where the United States was asserting adverse possession against a state, the state rule was not applied. In a case before the Court of Claims, People v. United States, 132 F. Supp. 208 (Ct. Cl. 1955), declared that the rule that no one can acquire title by adverse possession against a state does not apply to the United States. The Court of Claims held that: "The state could not ignore such occupancy. Possession by one under the authority of the United States is a peril against which the state must guard, just as an individual must guard against adverse possession by anyone." Id. at 211.

The rationale of this case appears to be based at least in part on a procedural limitation that is also a problem in the present controversy. The statute of limitations in 28 U.S.C. § 2501 (§ 2401 applies to district courts) was held to bar actions by the state against the United States after six years. Thus, after that period, the state could not even sue the federal government much less defend title against an assertion of adverse possession.

This decision can be criticized on several grounds.

First, it effectively allows the United States to acquire title by adverse possession after only six years, since it has not consented to be sued after that period. Secondly, it appears

settled that a state cannot acquire title by adverse possession to land belonging to the United States. Note, 8 Ala. L. Rev. 408 (1956). This Court of Claims case seems to have enunciated a strange rule that one governmental body can, in effect, acquire title by adverse possession against the other without the latter having the same power. There seems to be grounds for an equitable argument on this point.

Also, this case can be distinguished if the statute of limitations can be tolled in the present action. Since the statute barred the suit in People v. United States, supra, the state rule was overcome. But in the present action, the state rule will be relevant. See section IV, B, 6. of this report for arguments for tolling the statute.

A key issue here as with other arguments in this report will be whether the state rule or some federal rule should apply. The Court of Claims seemed to have formulated its own rule rejecting state law in People v. California yet the Commonwealth can argue with authority that state law should govern in cases affecting title to lands. White v. Burnley, 61 U.S. 235 (1858); Beauregard v. New Orleans, 59 U.S. 497 (1856); Heirs of Burat v. Board of Levee Com'rs. of Orleans, 46 F.2d 1336 (5th Cir. 1974); Mays v. Kirk, 414 F.2d 131 (5th Cir. 1969); Jewell v. Davies, 192 F.2d 670 (6th Cir. 1951); and more specifically, the law of the state where the land lies controls on the question of adverse possession. Christ Church Pentecostal v. Richterberg, 334 F.2d 869 (10th Cir. 1964) cert. den. 379 U.S. 1000.

VI. ADMINISTRATIVE ALTERNATIVES/ PETITION TO AMEND BACK BAY REGULATIONS

Even though the chance for ultimate success is unlikely, one possible way to avoid some of the problems associated with litigation is to petition the Department of Interior to amend or repeal the requlations governing entry and use of the Refuge. The Administrative Procedure Act, 5 U.S.C. § 553(e), grants the right to petition a federal agency for the issuance, amendment, repeal of a rule promulgated by a federal agency. Title 43 CFR §14.6(b) (1980) provides that any person may petition the Secretary of Interior for the issuance, amendment, or repeal of a rule concerning public lands.

The section provides that the petition will be addressed to the Secretary of Interior or the U.S. Department of Interior. It must identify the rule requested to be repealed or provide the text of a proposed rule or amendment and include reasons in support of the petition.

The current regulations governing public entry and use of the Back Bay National Wildlife Refuge can be found in 45 Fed. Reg. 35823-27 (May 28, 1980), as amended by 45 Fed. Reg. 52391-92 (Aug. 7, 1980). The current regulations allow only those individuals who were permanent residents of the Outer Banks area as of December 31, 1979, to qualify for commuter permits across the Refuge.

The state will ultimately need to formulate the text of a proposed rule or amendment to the special regulation now effective

for Back Bay. This section will attempt to provide the background to the regulations currently in effect and to suggest several possible reasons in support of a petition to repeal or amend the Back Bay regulations.

The current rule governing access and use of the Back Bay Refuge was published in the Federal Register May 28, 1980. A series of special regulations governing public access of the Refuge have been promulgated beginning January 12, 1972, when notice was first provided that the Refuge would be closed to unauthorized vehicles. The May 28 regulation provided that only permanent, full-time residents of the Outer Banks area who could furnish adequate proof of continuous residence, commencing prior to December 31, 1976 could qualify for motorized vehicle permits across the Refuge. This rule was to be effective through December 31, 1982.

However, on July 25, 1980, President Carter signed into law Senate Bill 2382 (P.L. 96-315) which eased requirements for commuter permits through the Refuge. This law provided that any permanent resident of the Outer Banks area who showed adequate proof of residence prior to December 31, 1979, could qualify for a commuter permit through the Refuge. Consequently, this piece of legislative rulemaking was published in the Federal Register on August 7, 1980, as an amendment to the May 28, 1980 special regulation.

Apparently, this Congressional action was initiated by Senator Jesse Helms of North Carolina. According to the U.S. Fish and Wildlife Service, Division of Refuge Management, Senator Helms

petitioned the Service to amend the May 28 regulation at the request of Outer Banks constituents. When the Service refused, Senator Helms attached the amendment as a rider to Senate Bill 2382 and obtained Congressional approval. This amendment increased the number of permit holders from approximately 23 to 39. It may be advantageous for the state to explore a similar congressional course of action to achieve access through the Refuge.

Any petition for amendment to the Back Bay rules must be amended so as to comply with statutory and regulatory provisions. The National Wildlife Refuge System, 50 CFR § 26 (1980) provides that public access, use and recreation is permitted in the National Wildlife Refuge System. Congressional authorization is codified in 16 U.S.C. § 668dd(d).

In addition, the Refuge Recreation Act of 1962, 16 U.S.C. 460k, authorizes the Secretary of Interior to administer National Wildlife Refuges for public recreation as an appropriate incidental or secondary use only to the extent that it is practicable and not inconsistent with the primary objective for which the area was established. The National Wildlife System, 50 CFR § 25.11(b) provides that:

> All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources.

In addition to the requirement that any recreational use will not interfere with the primary purpose for which the area was established, the Refuge Recreation Act also requires that funds be available for the development, operation and maintenance of the permitted forms of recreation.

Therefore, the petition to amend the Back Bay regulations must include supporting evidence that the use to be authorized by the proposed regulations will be in compliance with this Act.

Further evidence to support the proposed regulation can be based on the fact that vehicular traffic is permitted in many other national refuges throughout the country. While each refuge is certainly unique, the assessment criteria for all refuges should be uniform. The May 28, 1980 special regulation for Back Bay states that the final determination on public access in Back Bay was based on consideration of among other things, Environmental Impact Statement 72-33 of December 29, 1972, Environmental Impact Assessment of May 4, 1976, and the Fish and Wildlife Service's Final Environmental Statement on the operation of the National Wildlife Refuge System published November 1976.

While the environmental impact of vehicular traffic certainly varies from refuge to refuge, a number of special regulations were promulgated (or at least reviewed and updated) within the past year that permitted public access by motor vehicles into national refuges. Special regulations pursuant to 50 CFR Part 26 were published January 5, 1981, at 46 Fed. Reg. 913-917 (1981) permitting motor vehicles into refuges in Rhode Island, Massachusetts, Maine, Vermont, New York, New Jersey and

Pennsylvania. Vehicular traffic is also permitted in refuges in Wisconsin, 45 Fed. Reg. 85030 (1980), Oklahoma and Texas, 46 Fed. Reg. 8525 (1981). However, it is difficult to ascertain precisely how limited this public access is judging solely from the rules published in the Federal Register. Vehicular traffic may be much more limited in practicality than it appears to be in the Federal Register.

It may be especially significant to note that motor vehicles are permitted in Chincoteague National Wildlife Refuge at Chincoteague, Virginia. Vehicular traffic has been allowed there for some time; the current regulation now in effect can be found at 45 Fed. Reg. 22047 (1980). In part, these regulations provide that:

> Operation of registered motor vehicles and bicycles is permitted on designated access roads, trails, and parking areas . . . . Off-road travel by oversand vehicles is permitted only on designated routes within the public use areas . . . . Motorcycles and mopeds must remain on designated access roads and are not permitted in oversand vehicle areas . . . . Forty-two (42) oversand vehicles are permitted in the oversand zone . . . .

Since there is such a wide disparity in policy concerning public access and use of these two national wildlife refuges in Virginia, it may be valuable to investigate the rationale. The question might be raised: Does the environmental impact of vehicular traffic at each refuge differ enough to justify such disparities in the regulations?

It must be recognized that past attitudes of the Department of Interior indicate that the petition will have little chance of

success. However, it should be noted that the Administrative Procedure Act, 5 U.S.C. § 702, provides for a court review of the decision. Section 702 provides that a person suffering legal wrong because of agency action, or adversely effected by agency action is entitled to judicial review. Thus, not only may the state force the Department of Interior to take an official stance on the issue of access through the Refuge, but may obtain review of any denial of the petition.

VII. SUMMARY AND CONCLUSIONS

Evidence of the coast in the Back Bay area being a commons or fishery spans a period of approximately 300 years. Only during a brief period after the War Between the States from 1866-1873 could commons have been conveyed by state grant. A survey filed for public record in the Princess Anne Courthouse in the late 1860's depicts a commons 907 feet above the high water mark spanning the eastern part of what is now the Back Bay National Wildlife Refuge. There is no record of the state conveying this commons. In 1873 the state enacted legislation banning state grant of seashores except by special act or compact. The southern portion of the Refuge was conveyed by regular state granting procedures after that date. This grant could not have legally included the seashore of what is now the Refuge. In 1888 the state enacted similar legislation protecting marshes. This statute may have barred a 1905 grant of a marsh island in what is now the Refuge.

In 1929 the federal Migratory Bird Conservation Act was passed and provided for the establishment of federal refuges subject to each state granting consent by law to the federal acquisition of land within a state. In 1930 Virginia by statute "assented" to the provisions of the federal Migratory Bird Conservation Act "as far as it necessary." In 1936 two years prior to the condemnation of the Back Bay National Wildlife Refuge the state repealed an earlier law providing for federal condemnation of private, corporate, and state land. The Statute enacted as a replacement, consented only to the federal condemnation of private and corporate

land for natural resource purposes.

In 1937 the federal government, after entering into a purchase agreement with the Princess Anne Club, became aware of title problems within the proposed Refuge and decided to condemn rather than purchase. A title examination conducted for the federal government showed an area of 1,046 acres to have questionable title. The state was the logical claimant to this land. Language in the chain of title of lands now within the Refuge speaks of commons and public lands. Of public record was the 1869 survey depicting commons within the proposed Refuge.

A map was prepared by the federal government for use in the condemnation suit which failed to reflect the 1869 commons survey or seashores and marshes not subject to private ownership. The map also incorrectly superimposed much smaller grants of 82 acres and 195 acres to private parties over this 1,046 acre area subject to state claim. This gives the appearance that the proposed Refuge is entirely in private or corporate hands and therefore subject to condemnation under the 1936 Virginia statute permitting only private and corporate condemnations. In 1938 the federal condemnation was accomplished and the state enacted a statute in that year ceding wildlife jurisdiction within the Refuge to the federal government and specifically made the grant of state jurisdiction associated with the Refuge subject to the 1936 Virginia statute permitting federal condemnation of only private and corporate land.

The Commonwealth of Virginia has arguable claims against the federal government regarding lands within the Back Bay National

Wildlife Refuge. At the time of the condemnation of the Back Bay National Wildlife Refuge the state appears to have held title to a large portion of the barrier beach now comprising the eastern part of the Refuge. The state may have also held title to a small marsh island in what is now the western part of the Refuge. Had the state consented to the condemnation of state land for the establishment of a Refuge as required under the federal Migratory Bird Conservation Act of 1929, and had the federal government, in a reasonable analysis of the title information, notified the state as a potential claimant in the condemnation proceedings, then possibly only the landward portion of the 1,046 acre tract would have been lawfully conveyed without a special act or compact from the General Assembly specifically providing for conveyance of seashores ungranted as of 1873 and marshes granted as of 1888. The state, however, never consented either generally or specifically to the condemnation of state lands under the federal Migratory Bird Conservation Act of 1929 thereby rendering the condemnation invalid as to state lands within the Refuge.

If adequate state consent could be found the question of notice must be raised. A reasonable analysis of the title information would raise questions of state claims. It is a well supported principle that potential claimants in condemnation proceedings are entitled to the right of notice under principles of due process. It would seem that a potential claimant, particularly the state considering the special nature of these lands, should receive the required notice. Yet, Virginia was not accorded that right and was either negligently or deliberately misled as to its potential claims.

Although the defenses that could confront the state in seeking redress -- res judicata, various types of estoppel, laches and the statute of limitations -- appear surmountable, tolling the statute of limitations under federal statutes waiving sovereign immunity and permitting state claims warrant comment due to the special nature and history of the lands in question.

The statute of limitations may be tolled if it is not reasonable to expect Virginia to have been aware of a claim to such lands. It is unreasonable to expect the state to have been aware of its claims within the Refuge in 1938 given the history and nature of these lands. Virginia suffers many of the same problems regarding commons and the loss of such lands as did Great Britain. Such lands are particularly subject to usurpation by private parties by being uninventoried, owned in common, important only locally, and generally misunderstood by those using them as to concept and associated legal rights. State claims to lands within the Back Bay National Wildlife Refuge were concealed from the state not only through a history of private usurpation but also by a relatively recent federal obfuscation.

APPENDIX 1

The Evolution of Claims to Title To Lands Within the Back Bay National Wildlife Refuge

Figures 1 through 9

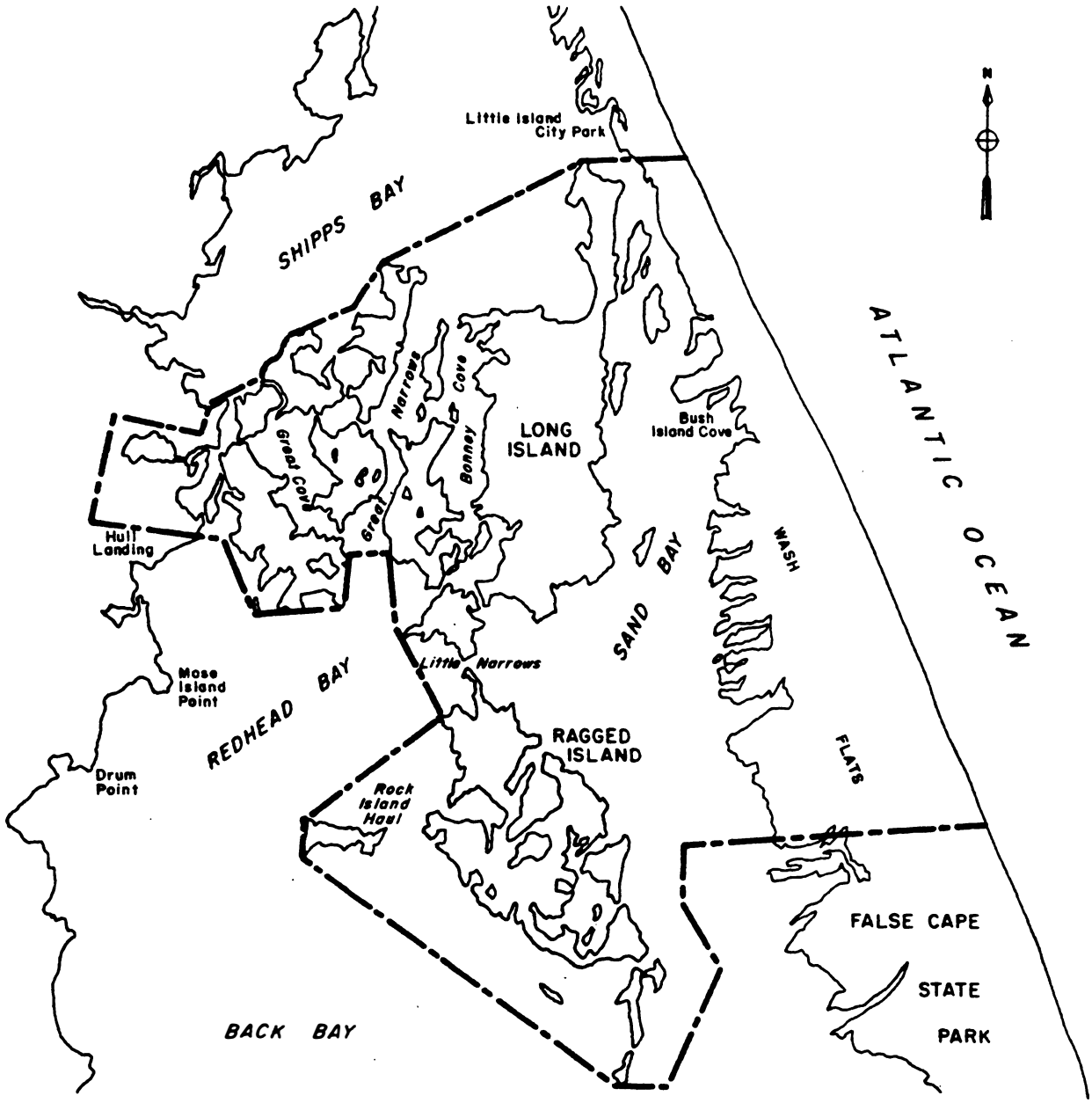

Figure 1: Back Bay National Wildlife Refuge, Virginia Beach, Virginia.

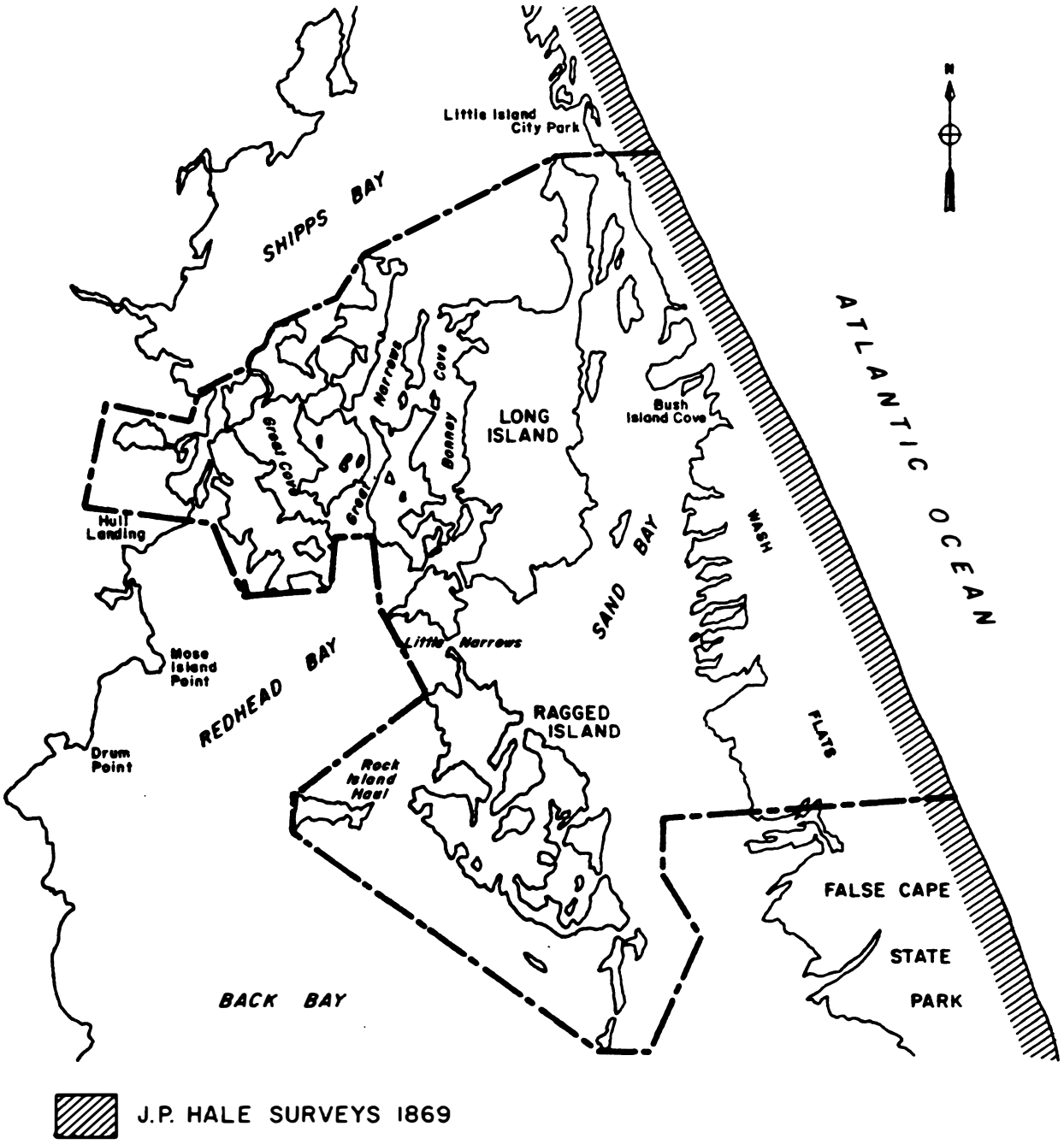

Figure 2: Common Lands Evidenced By an 1869 Survey Recorded in the Princess Anne County Courthouse

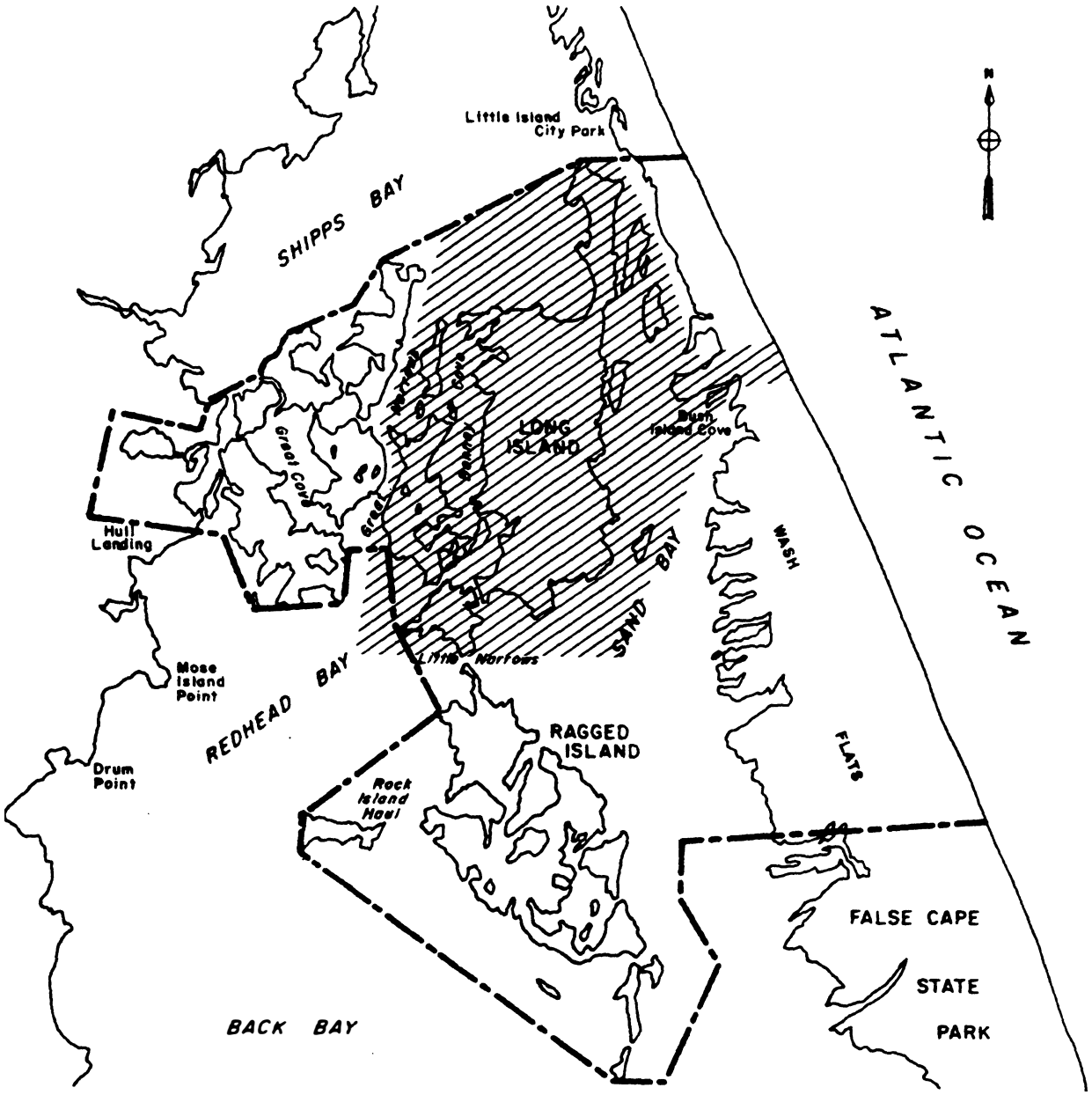

Figure 3: Long Island Tract Before 1876

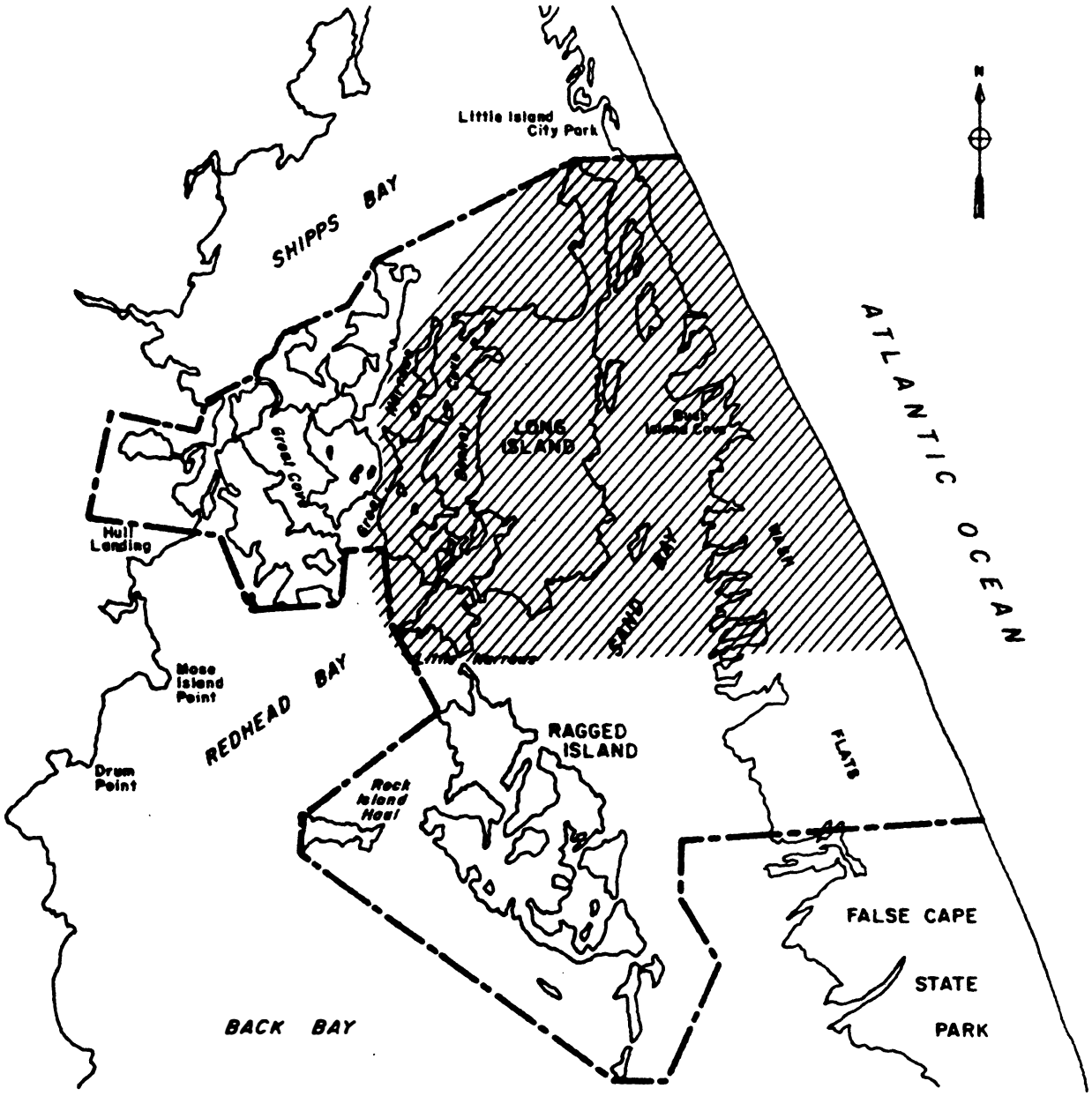

Figure 4: Long Island Tract After 1876

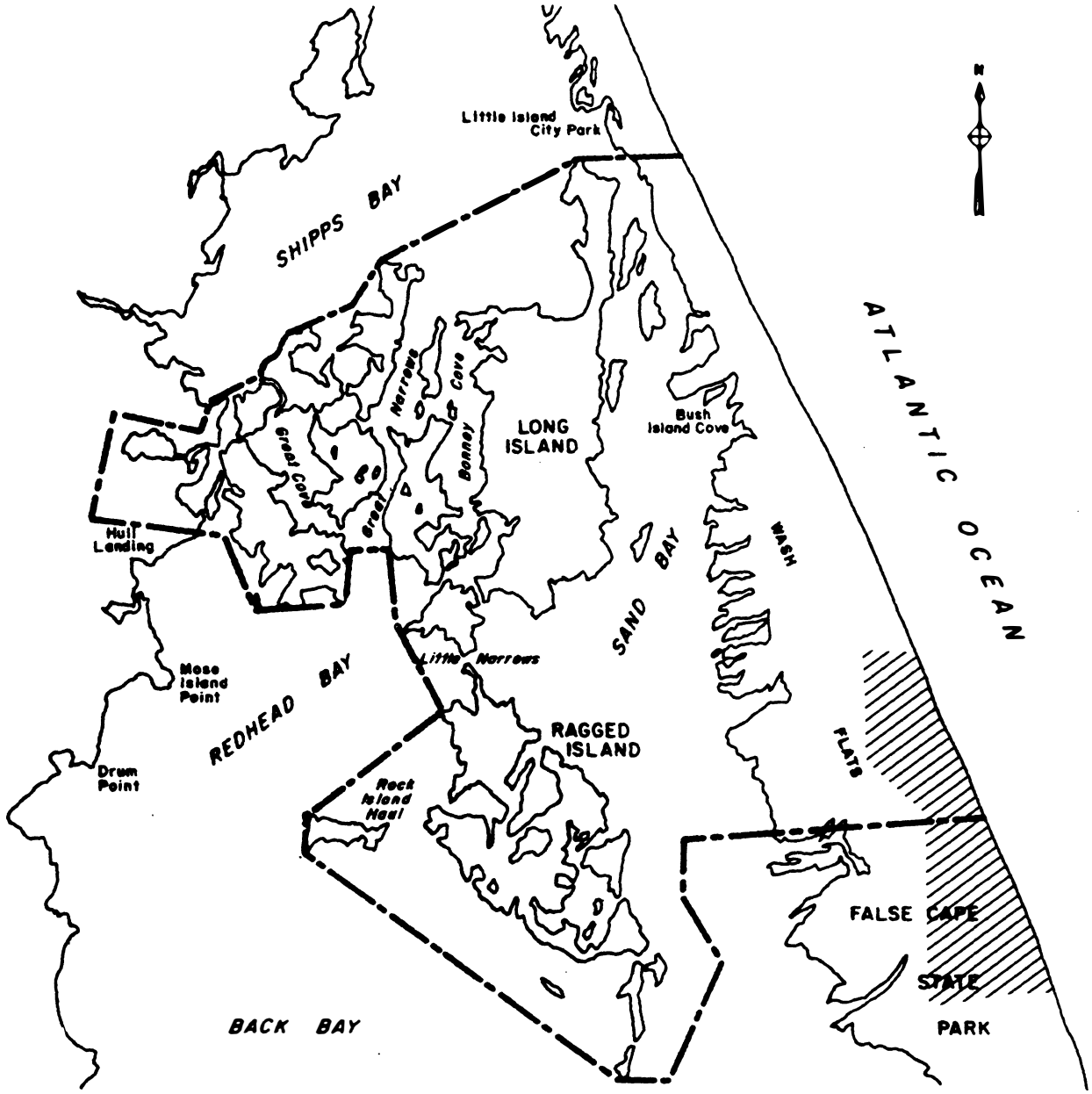

Figure 5: Lands on the Shore of the Refuge Conveyed After the Statute of 1873 Prohibiting State Grants of the Shores of the Sea

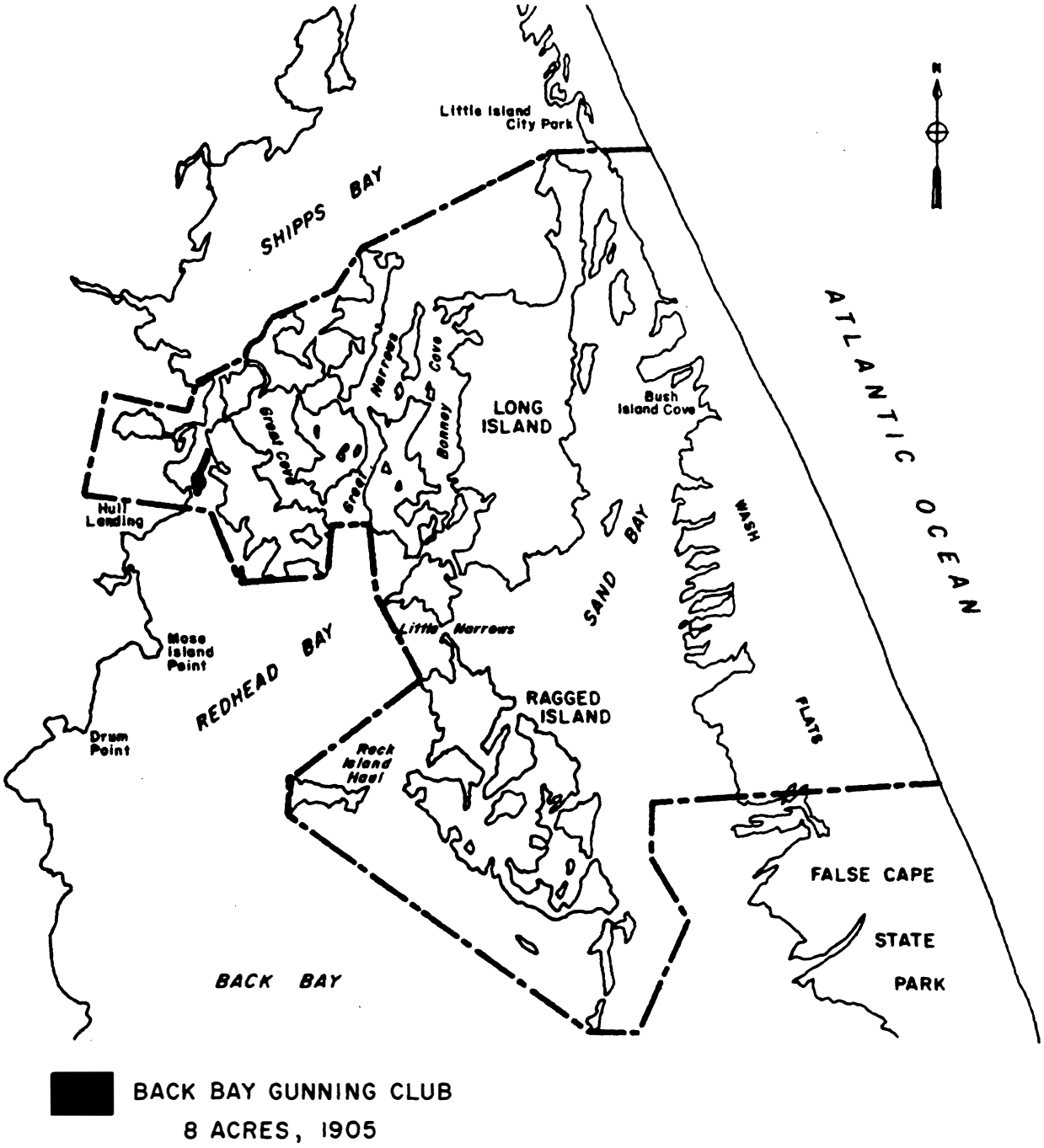

Figure 6: Marsh Lands Conveyed After the Statute of 1888 Prohibiting the Grant of Marsh and Meadowlands on the eastern shore of Virginia

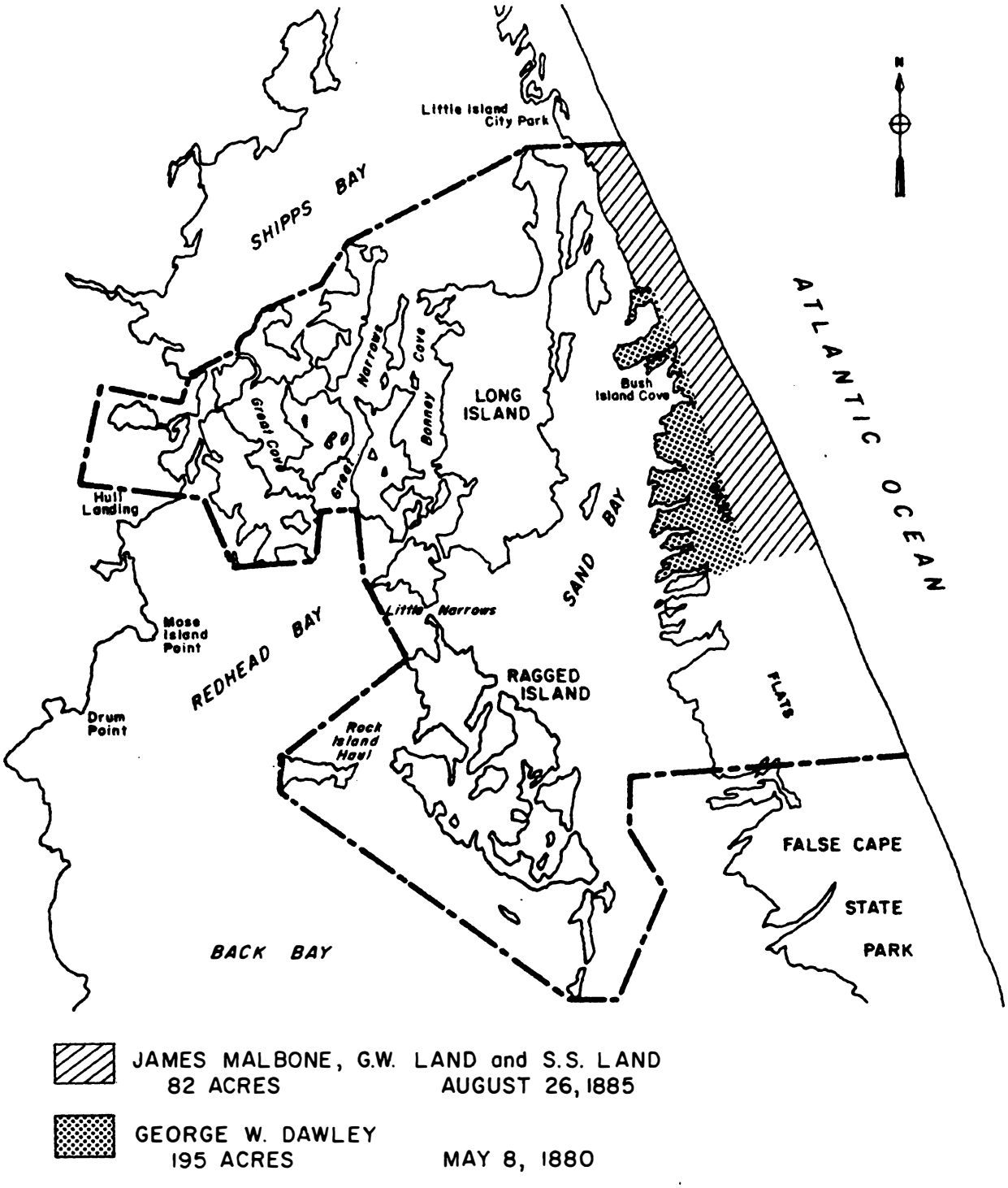

Figure 7: Key Tract Placement According to a 1937 Map Prepared and Used By the Federal Government in the Condemnation Suit

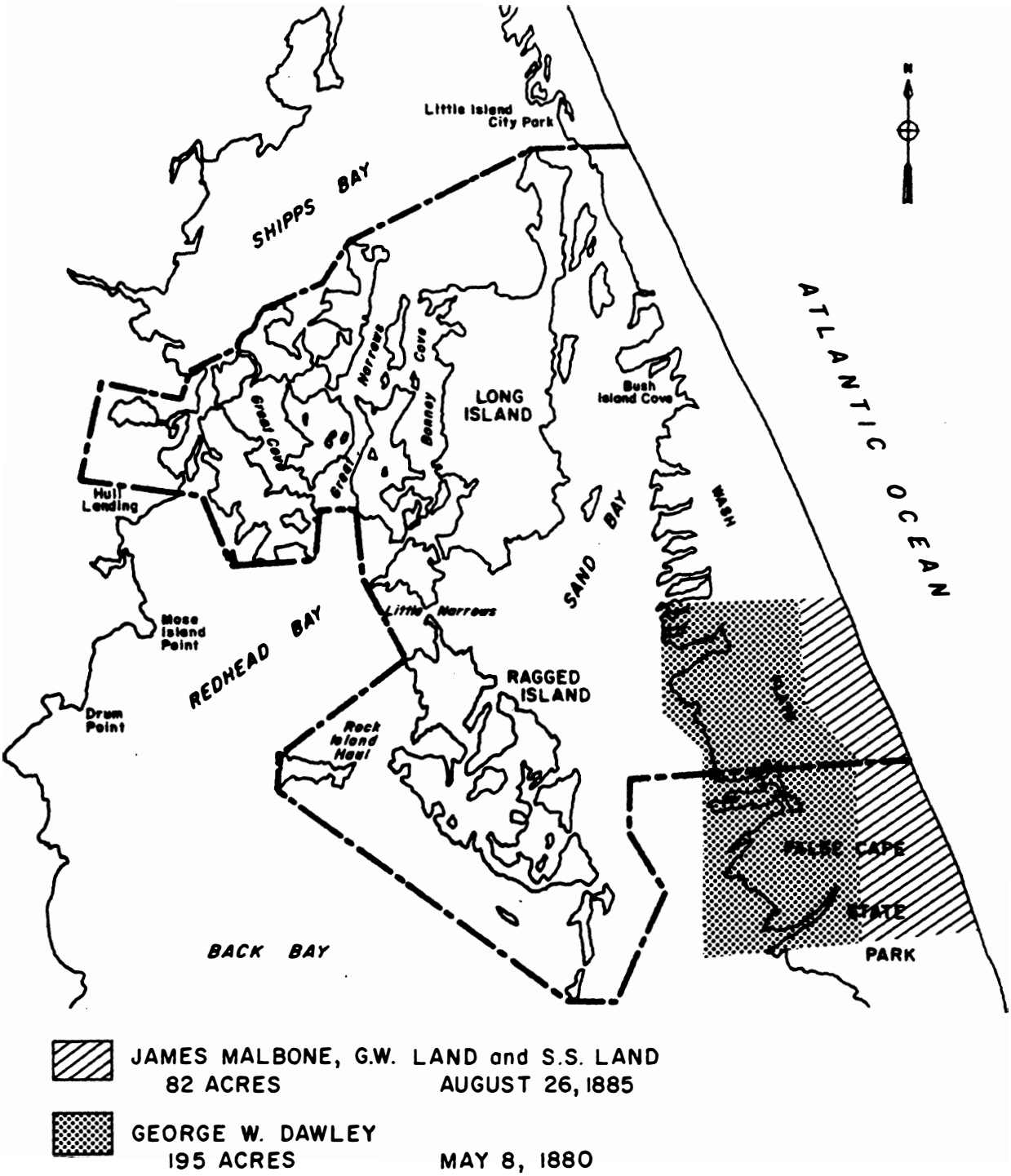

Figure 8: Key Tract Placement Determined by Project Research According to Information in the Possession of the Federal Government Prior to the Condemnation

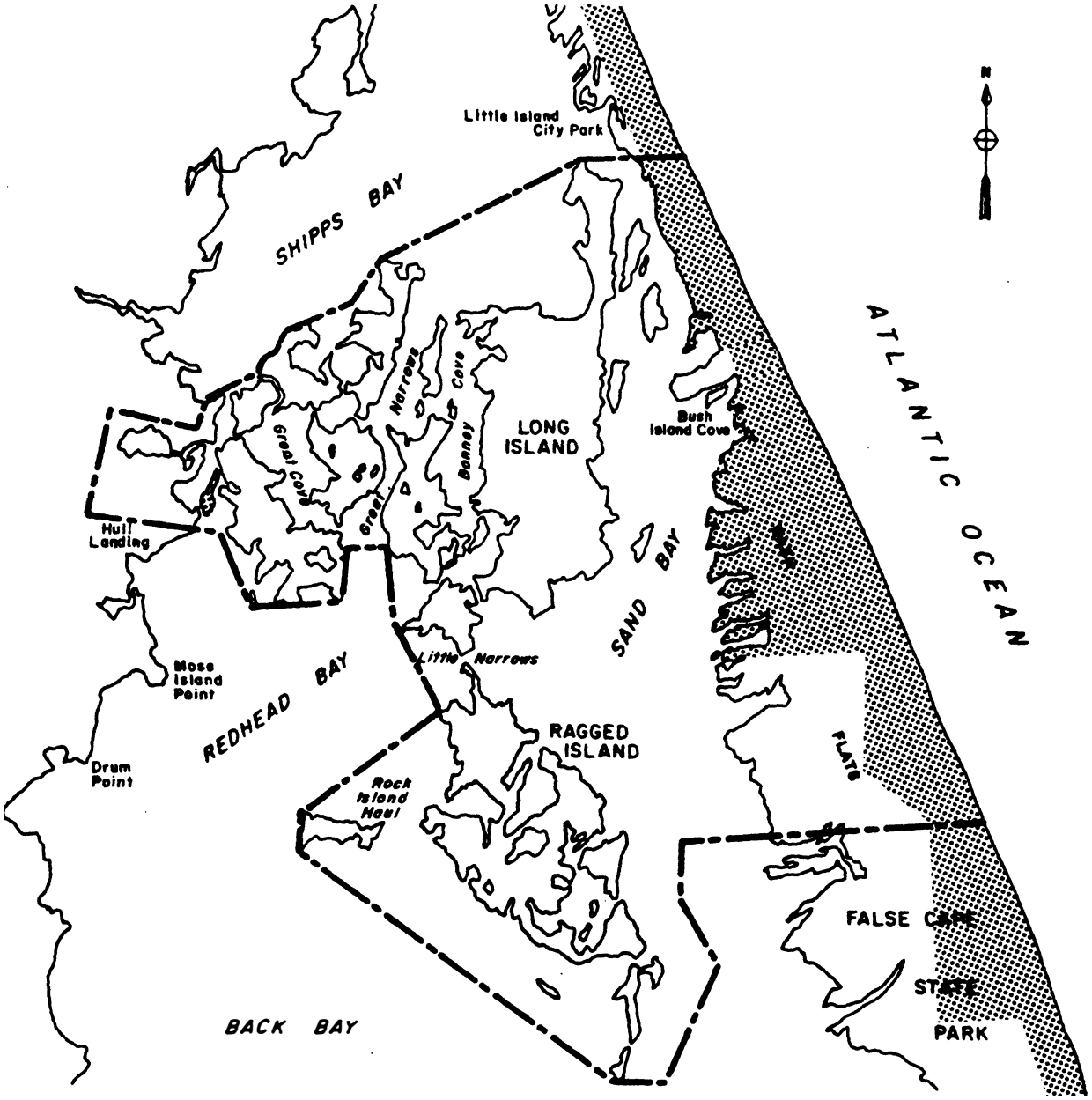

Figure 9: All Lands Subject to Potential State Claims

APPENDIX 2

POSSIBLE REFERENCES TO COMMON RIGHTS

SUPERIMPOSED OVER PRIVATE RIGHTS

1. Clerk's Office, Virginia Beach, Deed Book 1, page 514, 1708, Edward Lamount to Lewis Conner, 1,775 acres [the entire Refuge beach] ". . . with all commons and common of pasture whatsoever . . . . "

2. Clerk's Office, Virginia Beach, Deed Book 2, page 13, 1708, Thomas Griffin to J. Johnson, lying on the seaside in Princess Anne County . . . all "woods, rivers, profitts, commons of pasture, hereditaments. . . . "

3. Clerk's Office, Virginia Beach, Deed Book 5, page 112, 1736, Lewis Conner to George Smyth, "all that tract of land, sand bank and marshes containing 200 acres . . . and bounding on the sea and bay . . . To have and to hold . . . together with all and singular ye commons pastures woods underwoods wayes waters water courses easements profits . . . . "

APPENDIX 3

POSSIBLE REFERENCES TO PUBLIC OR COMMON LANDS

IN THE BACK BAY AREA

1. Records of the Virginia Company, April 1621, House of Commons, "Act for the Freer Liberty of Fishing" set forths the public's right to freely use the sea shore in the Colony of Virginia for the purposes of taking, drying, salting and otherwise processing fish, gathering of wood for fuel and repairs, and for the purposes of performing any other activities necessary for the maintenance of their fishery operations.

2. Records of the Virginia Company, June 1621, Letter from the Privy Council, "the people of the Colonies . . . should have freedom of the shore for drying of their nets, and taking and saving of their fish and to have wood for their necessary uses . . . ."

3. Clerk's Office, Virginia Beach, Deed Book 3, page 401-402, 1721, Lewis Conner to Reodolphus Malbone, "on the sand banks near the table of pines on the eastern shore . . . 250 acres . . . and running from ye said wading east a direct course to ye sand banks [sand dunes] of ye sea-shore and from thence along ye sea shore . . . ."

4. Clerk's Office, Virginia Beach, Deed Book 5, page 38, 1735, Lewis Conner to John Gornto, one piece of sand banks and marsh containing 100 acres ". . . bounding on ye said Back Bay and sea shore . . . ."

5. Acts of Assembly, Chapter II, May 1780, "An Act to secure to the publick certain lands heretofore held as common." "Whereas, certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as a common to all the citizens thereof, ... Be it therefore enacted by the General Assembly, all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used as a common to all the good people thereof, shall be, and the same are hereby excepted [from grant]."

6. Clerk's Office Virginia Beach, Deed Book 22, page 154, 1790, John Gornto to Robert Trower, 50 acres of "marsh land, sand banks and flat lands . . . bounding on the said back bay and sea shore . . . ."

7. Letter from R. E. Nash to Board of Public Works, 7/5/1870, "I have been authorized to purchase a small strip of sand land which I surveyed . . . ." [Sand Bridge to North Carolina].

8. Letter from R. E. Nash to Board of Public Works, 7/9/1870, ". . . strip of sand land . . . ."

9. Letter R. E. Nash to Board of Public Works, 7/28/1870, "I want to purchase for the Hon. Ben. Wood. . . a barren strip of sand land from sand Bridge to the N. Carolina line . .

10. Clerk's Office, Virginia Beach, Deed Book 53, page 191, 1877, Governor of Virginia to Hartley, 50 acres of marshland known as Pasture Marsh bounded on the North, East and South by the Atlantic Beach and on the West by the waters of Back Bay.

11. Clerk's Office, Virginia Beach, Deed Book 53, page 395, 1878, Governor of Virginia to Jacob Travis [North of the Refuge], bounded on the North by Forked Creek, on the East by said Creek and the Atlantic Beach.

12. Clerk's Office, Virginia Beach, Deed Book 57, page 482, 1882, Governor of Virginia to Ellenton Newbern [South of the Refuge], ". . . joining James Ewell on the North, the said Beach on the East other Public land on the South and the Waters of Back Bay on the West . . . . "

13. Clerk's Office, Virginia Beach, Deed Book 56, page 197, 1883, George Dawley to James Knowlton, bounded on the east ". . . by the sand land lying between the above-named tract of land and the Atlantic Ocean."

14. Clerk's Office, Virginia Beach, Deed Book 56, page 472, 1883 Governor of Virginia to Burwell Ewell, [just south of Barbour tract], ". . . This land is bounded as follows: On the North by the lands of Otis Ewell, on the east by other public land . . . and on the west by the waters of Back Bay . .

15. Clerk's Office, Virginia Beach, Deed Book 57, page 297, 1884, James A. Knowlton to Tenney and Woodbury, bounded on the east ". . . by the sand land lying between the above named tract of land and the Atlantic Ocean."

16. Clerk's Office, Virginia Beach, Deed Book 69, page 327, 1900, Levi Woodbury et ux. to William Barbour [refers to "Dawley" tract], bounded on the east ". . . by the sand land lying between the above named tract of land and the Atlantic Ocean."

APPENDIX 4

Chapter II, Acts of Assembly, 1780

An act to secure to the publick certain lands heretofore held as common.

1. WHEREAS certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as common to all the citizens thereof, and whereas by the act of general assembly entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," no reservation thereof is made, but the same is now subject to be entered for and appropriated by any person or persons; whereby the benefits formerly derived to the publick therefrom, will be monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing: Be it therefore enacted by the General Assembly, That all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used as common to all the good people thereof, shall be, and the same are hereby excepted out of the said recited act, and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law, to pass any estate or interest therein.

APPENDIX 5

Chapter 333, Acts of Assembly, 1873

Chap. 333 - An Act for the Preservation of Oysters and to Obtain Revenue for the Privilege of taking them Within the Waters of the Commonwealth.

1. All the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the reservations and restrictions hereinafter imposed.

APPENDIX 6

Chapter 219, Acts of Assembly, 1888

Chapter 219 -- An Act to prevent the granting of unappropriated marsh or meadow lands on the eastern shore of Virginia.

1. Be it enacted by the general assembly of Virginia, That all unappropriated marsh or meadow lands lying on the eastern shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this state, shall continue as such common, shall remain ungranted, and no land warrant located upon the same. That any of the people of this state may fish, fowl, or hunt on any such marsh or meadow lands.

2. This act shall be in force from its passage.

APPENDIX 7

Chapters 101 and 62, Virginia Code, 1873

State property in oysters and in beds of water courses.

1. All the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state, for the purpose of fishing and fowling, and of taking and catching oysters and other shell-fish, subject to the reservations and restrictions hereinafter imposed.

APPENDIX 8

Chapter 272, Acts of Assembly, 1930

Chapter 272 -- An Act relating to the acceptance by the Commonwealth of Virginia of the provisions of the United States migratory bird conservation act.

Whereas, the congress of the United States has passed an act entitled and commonly known as the "migratory bird conservation act"; and

Whereas, it is provided in section seven of the act aforesaid that no conveyance of land as a bird sanctuary shall be accepted by the secretary of agriculture unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State; therefore,

1. Be it enacted by the general assembly of Virginia, That the assent of the general assembly of the Commonwealth of Virginia be and is hereby given to the provisions and requirements of the said migratory bird conservation act in so far as it necessary for the purposes of such conveyance, acceptance and acquisition herein referred to, and the commission of game and inland fisheries of the Commonwealth of Virginia is hereby authorized, empowered and directed to do all things necessary to bring about the establishment of a bird sanctuary under the provisions of said act in the Commonwealth of Virginia, and to cooperate to the fullest extent with the United States migratory bird conservation commission.

2. An emergency existing, this act shall take effect and be in force from its passage.

APPENDIX 9

Consent Legislation of States Other Than Virginia

North Carolina

§104-10. Migratory bird sanctuaries or other wildlife refuges. The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of one or more migratory bird sanctuaries or other wildlife refuges. . . .

Utah

23-21-6. Acquisition of lands by United States for migratory bird refuges. -- (1) The consent of the State of Utah is given to acquisition by the United States of such areas of land or water in the state, as the United States may deem necessary, by and with the consent of the county commission of the county where the land or water are located and after approval of application, subject to the laws of the State of Utah for water rights, for the establishment and maintenance of migratory waterfowl refuges in accordance with and for the purpose of the Act of Congress approved February 18, 1929, entitled "Migratory Bird Conservation Act". . . .

Illinois

§ 34. Consent for acquisition of land -- Service of process. Consent of the State of Illinois is given to the United States for the acquisition by purchase, gift or lease, of such areas of land or water, or of land and water in Illinois, as the United States may deem necessary for the establishment of preserves or reservations for migratory birds, in accordance with the Act of Congress approved February 18, 1929. . . .

Washington

37.08.230 Migratory bird preserves. Consent of the state of Washington is given to the acquisition by the United States by purchase, gift, devise, or lease of such areas of land or water, or of land and water, in the state of Washington, as the United States may deem necessary for the establishment of migratory-bird reservations in accordance with the act of congress approved February 18, 1929. . . .

APPENDIX 10

Chapter 382, Acts of Assembly, 1936

Chap. 382 -- An Act to amend and re-enact Sections 18 and 19 of the Code of Virginia, relating to the acquisition of lands by the United States of America, so as to prescribe the rights, powers and jurisdiction of the Commonwealth of Virginia and the United States of America over and with respect to such lands, and persons and property thereon, and transactions, matters and things arising thereon, and to amend the Code of Virginia, by adding thereto two new sections numbered 19-a and 19-b, giving the conditional consent of the Commonwealth of Virginia, to the acquisition by the United States of America of certain lands in Virginia, and prescribing the limitations imposed upon and the reservations incident to any transfer of such lands; and prescribing the respective jurisdictions of the Commonwealth of Virginia and of the United States of America over such lands, over persons and property thereon, and over any transactions, matters and things arising thereon; and to repeal certain acts pertaining to the same subject.

Approved March 28, 1936

1. Be it enacted by the General Assembly of Virginia, That sections eighteen and nineteen of the Code of Virginia be amended and re-enacted, and that the Code of Virginia be amended by adding thereto two new sections numbered nineteen-a and nineteen-b, so that the said amended and the said new sections shall read as follows: . . .

Section 19-a. The conditional consent of the Commonwealth of Virginia is hereby given to the acquisition by the United States, or under its authority, by purchase or lease, or in cases where it is appropriate that the United States exercise the power of eminent domain, then by condemnation, of any lands in Virginia <u>from any individual, firm, association or private corporation, for soldiers' homes, for the conservation of the forests or natural resources</u>, for the retirement from cultivation and utilization for other appropriate use of sub-marginal agricultural lands, for the improvement of rivers and harbors in or adjacent to the navigable waters of the United States, for public parks and for any other proper purpose of the government of the United States not embraced in section nineteen hereof.

4. An emergency existing, in that lands in Virginia are constantly being acquired by the United States, this act will be in force from its passage. (Emphasis added).

APPENDIX 11

Chapter 388, Acts of Assembly, 1938

Chap. 388 -- An Act to release and transfer to the United States all rights and authority of the Commonwealth of Virginia, concerning wild life, except fish and oysters, within a certain area of 8,950 acres, more or less, in the county of Princess Anne, subject to certain limitations and reservations.

Approved March 31, 1938

Whereas, the Secretary of Agriculture of the United States of America, by virtue of the authority vested in him by an act of Congress approved February eighteenth, nineteen hundred and twenty-nine (45 Stat. 1222), as amended by an act of Congress approved June fifteenth, nineteen hundred and thirty-five (49 Stat. 378), is authorized to acquire areas of land and water for use as sanctuaries for migratory birds and other wild life; and

Whereas, the Secretary of Agriculture has selected, by and with the consent of the Migratory Bird Conservation Commission of the United States of America, for the establishment of a bird refuge and wild life sanctuary, certain land in Back Bay, Princess Anne County, Virginia; and,

Whereas, the Commission of Game and Inland Fisheries of the Commonwealth of Virginia has recommended that Virginia release and transfer to the United States all her rights concerning wild life, except fish and oysters, within said area, and certain waters abutting thereon and adjacent thereto, in order that the same may be developed as a migratory waterfowl refuge and wild life sanctuary under absolute Federal supervision and control; Now, Therefore,

1. Be it enacted by the General Assembly of Virginia as follows:

Section 1. All rights and authority which the Commonwealth of Virginia may have or possess, concerning wild life, except fish and oysters, in that certain area of approximately eight thousand, nine hundred and fifty acres, more or less, of land and water in Back Bay, in the county of Princess Anne, are hereby released and transferred to the United States of America, which area will be set aside and established as a migratory refuge and wild life sanctuary by the President of the United States, and which is more particularly described as follows: . . .

Section 2. The jurisdiction ceded by this act shall be controlled and measured by the provisions of section nineteen-a of the Code of Virginia, as enacted into law by chapter three hundred and eighty-two of the Acts of the General Assembly of nineteen hundred and thirty-six, and shall not vest until the United States shall have acquired the title of record to the said lands within the above description, by purchase, condemnation, lease, or otherwise, and said area established as a migratory bird refuge by presidential proclamation. Nothing in

this act contained shall be construed as in any wise affecting the right of navigation in and over the water in which said qualified wild life rights are herein released and transferred to the United States. (Emphasis added).