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An Investigation into the History and Ownership of Adams Island

N. Bartlett Theberge
Virginia Institute of Marine Science

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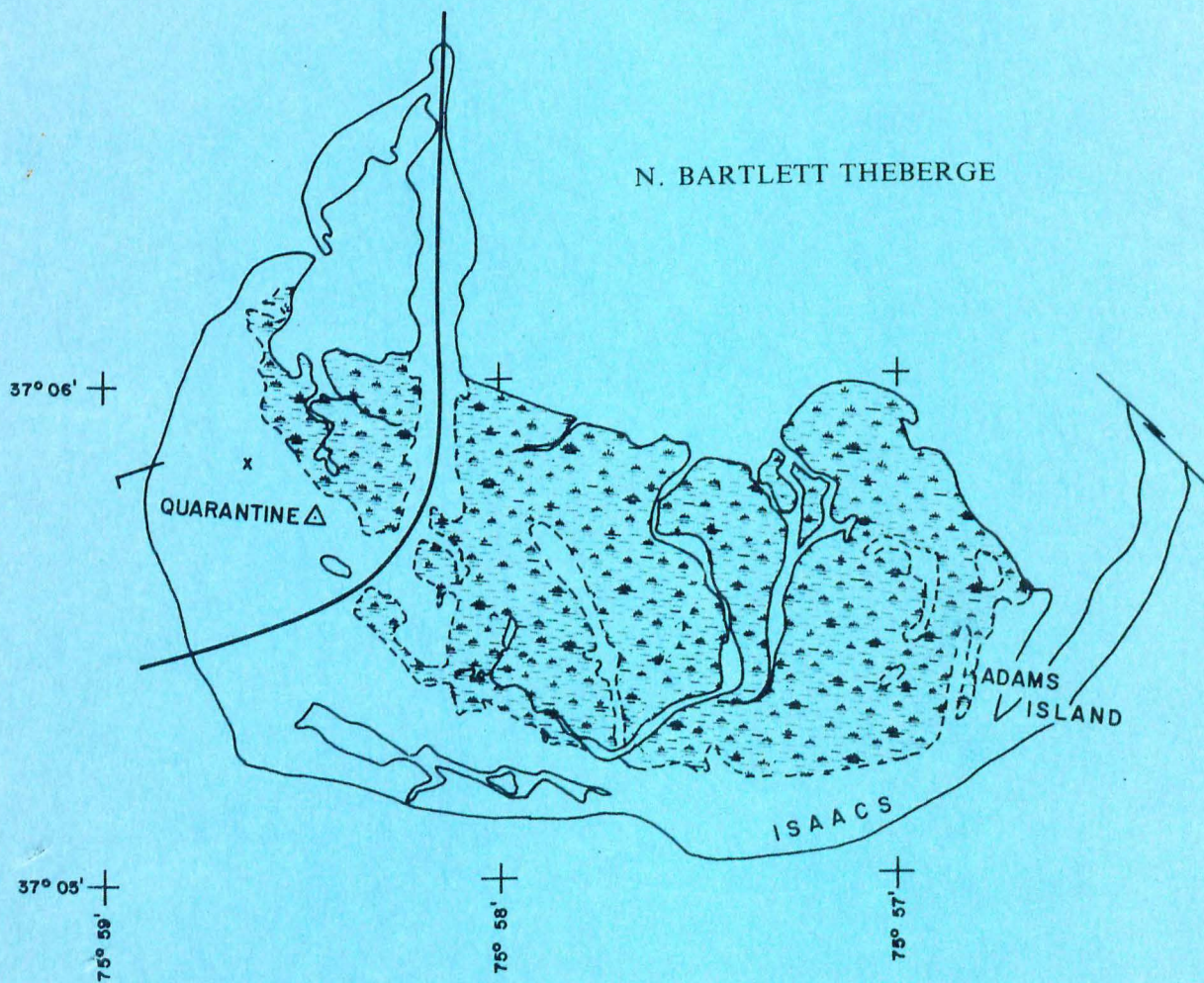
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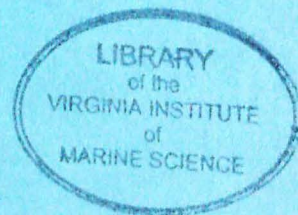
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AN INVESTIGATION INTO THE HISTORY AND OWNERSHIP OF ADAMS ISLAND



Prepared by the
Virginia Institute of Marine Science
Pursuant to Senate Joint Resolution No. 57
Offered February 9, 1976



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30 November 1976

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FOREWORD

Coastal lands, being relatively unique, are the subject of increasing interest and concern. An awareness of the importance of such lands is not new to the Commonwealth of Virginia. Historically, the Commonwealth has long recognized the unique value of these lands and has sought to preserve certain coastal lands for the benefit of the citizens of the state. It was in response to the possibility of state ownership of such lands that this report was initiated.

Of particular importance in understanding the conclusion drawn in the text are illustrations and photographs contained in a packet at the back of this report. The illustration in the packet and referred to in the text are in the form of transparencies which may be superimposed one upon another according to marks of latitude and longitude. In conjunction with the text, overlaying these transparencies and examining the series of photographs sequentially will better enable one to appreciate the formation of these lands and the conclusions drawn in relation thereto.

ACKNOWLEDGMENT

A debt of appreciation is owed not only to Patrick B. McDermott for his part in research, but also to those in charge of public records in the County of Northampton, to the archivists at the Virginia State Library, and to Virginia Institute of Marine Science personnel, Robert Byrne, Senior Marine Scientist; Marc Boule and Kenneth A. Dierks, graduate students, for their aid and kind cooperation.

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INTRODUCTION

This study of the ownership of Adams Island was commenced by the Virginia Institute of Marine Science pursuant to a directive expressed in Senate Joint Resolution No. 57 (See Appendix A). The resolution best summarizes the reason for the study in that "...there is an island commonly known as Adams Island, located in Northampton County, directly east of lands known as the Isaacs or William Knight Shoals and near Fisherman's Island and...the United States Department of Interior, Fish and Wildlife Service has expressed interest in acquiring Adams Island for use as a wildlife refuge and in that connection has inquired regarding any legal interest or title the Commonwealth may have in the island; and whereas there is reason to believe the Commonwealth may have a legitimate basis for claiming title and ownership of Adams Island; and...the determination regarding the Commonwealth's interest, if any, in Adams Island is prerequisite to any negotiations with the United States regarding use of the island for a wildlife refuge... the Virginia Institute of Marine Science is directed to study the question of ownership of Adams Island in connection with and as a part of its current study of common lands..."

In a letter from Howard Larsen, regional director of the Department of the Interior Fish and Wildlife Service, to Andrew

P. Miller, Attorney General of Virginia, received October 3, 1975, Mr. Larsen notified the Attorney General that "...Mr. Thomas Watkins, representing the interest of George W. Martin" wished to sell an undivided half-interest in Adams Island. Mr. Larsen desired to know if the Commonwealth claimed any interest in the island.

Mr. Watkins subsequently indicated that he entered into a contract with George W. Martin by which Mr. Watkins would, for his efforts on Mr. Martin's behalf, receive a percentage of the sale price of Mr. Martin's interest in Adams Island. Mr. Watkins obtained a 20 year lease on Adams Island in 1969.

A Decree of Sale entered September 29, 1975 by the Circuit Court for the County of Northampton ordered Special Commissioners to sell certain lands known as the Isaacs (William Knight Shoals) and divide the proceeds of sale among the heirs of the former owners of the Isaacs. Evidence based on the best available charts and maps indicates Adams Island was once separated from the Isaacs but has, at some point in time, merged with it. The Decree of Sale, however, provides that what is known as Adams Island be sold as a part of the Isaacs.

In summary, this report was commenced in the context of:

1. The Circuit Court for the County of Northampton determining by decree of sale that Adams Island no longer existed as a parcel of land separately owned and distinct from the Isaacs.
2. George W. Martin, Jr. claiming Adams Island does exist and that he owns an undivided one-half interest in the island.

3. The islands, shoals, and sandbars in this area undergoing (and having undergone) a continuous process of formation, accretion, erosion, submergence, reformation and migration leading to confusion over ownership among federal, state, and private interests.

It is in the hopes of clarifying these matters that this report is submitted.

HISTORY

I

The earliest documentary evidence of Adams Island that has been discovered is a 1914 survey. On December 30 of that year an island was surveyed by G. H. Badger, County Surveyor for Northampton County on behalf of George O. Smith and George F. Adams.¹ The island surveyed was called Adams Island and was found to consist of 29 3/4 acres. It was located East of the Isaacs (also called the William Knight Shoals) bounded as follows:

"North by High Water of Smith's Island Inlet and a small inlet between said land and the Isaacs, East by Smith's Island Inlet and Chesapeake Bay, South by High Water of Chesapeake Bay, West by High Water of Chesapeake Bay."²

Adams Island was granted by the Commonwealth to George O. Smith and George F. Adams jointly on September 24, 1915.³ It is known that George F. Adams retired from his position as manager of the Hotel Chamberlin, Fort Monroe, Virginia in 1920 and died in New York City in 1938.⁴ In Virginia there is no right of survivorship of an interest in a joint tenancy⁵ which becomes in effect, a tenancy in common.⁶

Therefore, Adams' undivided 1/2 interest passed to his heirs upon his death. Although the existence of several heirs is known, they have not been located.

George H. Smith, executor under the will of George O. Smith, the grantee of the other undivided 1/2 interest in Adams Island, conveyed on September 15, 1951, George O. Smith's interest to Mabel Pruitt Adams. The description of Adams Island in this conveyance had not changed from the description in the 1915 Grant.⁷

On April 19, 1954, Mabel Pruitt Adams conveyed by general warranty deed her undivided 1/2 interest to George W. Martin, Jr.⁸ It is George W. Martin, Jr. that presently claims an undivided 1/2 interest in Adams Island.

On October 20, 1969, G. W. Martin, Jr. and his wife leased their interest in Adams Island to Thomas L. Watkins.⁹ In this conveyance, Adams Island is no longer described as 29 3/4 acres in size, but rather consisting of about 600 acres.

"...being all of said island owned or possessed by said George W. Martin, Jr., or which may be owned or possessed by said lessors, their heirs or assigns within the next 20 years, whether acquired by purchase, accretion, or in any other manner from the 1st day of October 1969, for the term of 20 years."

The lease agreement also states that, "As a matter of information said island was once a separate island but is now joined to Fisherman's Island."

II

As a result of a suit for partition of William Knight Shoals (or the Isaacs as it also became known), the history of Adams Island became inextricably intertwined with that of William Knight Shoals.

By a grant from the Commonwealth dated April 1, 1867, Francis G. Pierpointe, Governor of Virginia, granted to William H. Parker a certain parcel of land at that time containing 244 acres known as William Knight Shoals.¹⁰ One-half of this interest was conveyed by William H. Parker and his wife to Governor Henry A. Wise in 1872.¹¹ It appears that both Parker and Wise died seized of their undivided 1/2 interests in William Knight Shoals.

On July 2, 1974, the seventy Parker heirs filed a suit in chancery in the Circuit Court for the County of Northampton, naming the fifteen Wise heirs and all other interested persons as respondents. The suit is for partition of the Isaacs and states "that by reason of the number of owners and varying interests, and the nature of the lands here involved," the property cannot be divided in kind and a public or private sale is requested. The description of the Isaacs (William Knight Shoals) in the Bill places the Isaacs "between Fisherman's Island and Adams Island."

"...containing by original survey 244 acres, more or less, but by virtue of accretions thereto containing a substantially greater acreage, said real estate lying near the southern end of Northampton County, Virginia, between Fisherman's Island and Adams Island. The real estate herein described being adjacent to and separated by a tidal creek on the West and South from Linen Bar on Fisherman's Island and also being adjacent to and separated by the same tidal creek on the South and East from Adams Island." (emphasis supplied)

C. A. Turner, Jr., Esq. was appointed Commissioner in Chancery to hear the case. The Eastville engineering firm of Werden and Chubb gave evidence in the partition suite and submitted certain maps and surveys. It is their belief, adopted by Mr. Turner, that the Adams Island granted to George H. Smith and George O. Adams has disappeared.¹² They believe

that the land presently called Adams Island is an accretion to William Knight Shoals rather than part of the Adams Island granted in 1915. This position was adopted in the Commissioner's Report, filed July 24, 1975.

On September 29, 1975, George W. Martin, Jr. and Thomas L. Watkins petitioned through Mr. Watkins' attorney, T. David Thelen of Eggleston and Thelen, Lovingson, Virginia, to intervene in the Parker-Wise heirs partition suit. They requested "...leave to submit evidence to prove the extent and boundaries of their interest in Adams Island; that a Declaratory Judgment issue from (the Circuit Court for the County of Northampton) ruling that Adams Island is a tract of land separate and distinct from William Knight Shoals and the Isaacs..." Also on September 29, 1975 the Northampton Circuit Court, adopting the Report of the Commissioner in Chancery, issued a Decree of Sale of the William Knight Shoals, embracing Adams Island in its description of the area.

On Thursday, January 15, 1976, the Circuit Court of the County of Northampton issued a Decree Denying Leave to Intervene.¹³ As a result of this ruling, G. W. Martin and Thomas Watkins are, at this writing, proceeding to institute a suit to establish boundaries pursuant to a directive by the Circuit Court of the County of Northampton in the Decree Denying Leave to Intervene in which the court stated "...the Petition to Intervene offered for filing calls into question the boundary between Adams Island and William Knight Shoals, the proper proceeding to adjudicate the rights of the petitioners being a Petition to Determine Boundaries and not a Motion to Intervene in the instant case."

PHYSICAL HISTORY

A determination of the ownership of Adams Island will be arrived at to a large extent through an interpretation of its geologic development. Therefore, it is necessary to discuss the physical history of Adams Island.

The land which is presently identified as Adams Island forms the eastern part of Fisherman's Island, which lies south of Cape Charles at the very southern end of the Eastern Shore. Fisherman's Inlet separates the island from the mainland, and Smith Island Inlet lies between Fisherman's Island and Smith Island to the northeast.

What is generally known today as Fisherman's Island is the descendant of several smaller islands, such as the Isaacs and Adams Island, which have merged over the years.

Fisherman's Island as it exists today is generally rectangular in shape with its longest dimension lying in an east-west direction. It has a maximum length of 2.13 miles, but it averages about 1.9 miles in length. Fisherman's Island is almost a mile wide except at its eastern and western ends where beach deposits increase the width somewhat.

Illustration No. 1 represents Fisherman's Island and the Isaacs (also known as William Knight Shoals) as they existed in 1869.¹⁴ Note that they are quite separate and that there exists no Adams Island. It is appropriate to point out at this time that the first evidence of Adams Island was a 1914 survey by the County Surveyor for Northampton County on behalf of George O. Smith and George F. Adams. The particular location of the Isaacs as indicated by longitude and latitude is important because throughout more than a century of geological changes the land mass which

is presently identified as the Isaacs remained basically in the same position from 1869 to the present although changes in shape and orientation have occurred.

By 1888 (Illustration No. 2) the Isaacs had divided into two separate islands although retaining the east-west, north-south right angle shape. Fisherman's Island had grown considerably to the south-east.

Illustration No. 3 represents the Isaacs and Fisherman's Island as they existed in 1910-11. The location of Adams Island as it was surveyed in 1914 has been superimposed on this 1910-11 chart. In this illustration there is an indication of the recurrent shapes of the various islands which have formed in this location south-east of Fisherman's Island. Adams Island, in shape if not location, was not unlike the southern east-west leg of the 1869 Isaacs or the long east-west island of the 1888 Isaacs. This shape and formation have recurred since that time and continue to the present. Note also in Illustration No. 3 that the Isaacs had developed some marsh grass and had moved closer to Fisherman's Island which had a salt marsh, a water tank and a quarantine station.

A 1917 Army Corps of Engineers map (Illustration No. 4) indicates the northerly migration shift of Adams Island from its 1914 position and the orientation of a portion of the island along a north-south axis. In shape Adams Island in 1917 closely resembled the Isaacs of 1888 except that a narrow channel separated the 1888 Isaacs into two separate Islands.

In 1929 the Coast and Geodetic Survey established a Horizontal Control Data Station on Adams Island. The station consisted of standard bronze disks set in concrete and underground, a block of concrete containing a glass bottle. Adams Island was described as "a narrow island

just SE of Fisherman's and Isaac Islands. The station is on the most southern portion and on the first prominent grassy knoll."

In 1934 the Coast and Geodetic Survey, returning to the location of the station established in 1929 reported as follows:

"No trace of station or reference mark could be found. This island was completely submerged in the storm of August 1933, and badly washed. The indefinite description for the station made it impossible to ascertain its exact location. The marks were probably washed out in August 1933, but may be covered by shifting sand."

By 1938 the size, shape, and location of Adams Island had changed dramatically. Adams Island had shifted to the north, and its length lay in a north-south direction. (See Illustration No. 5). The highland west-central portion of the island which appears in the illustration with marsh grass on it has remained a constant feature of the island's topography to this day. The long sandy outline, which extended for approximately 1.5 miles to the north and south of the grassy knoll is important for its shape. Note the recurring bow-like trend of the sand and the large sandy extension to the north which reached latitude $37^{\circ}06'$. This recurring shape has remained the general configuration of the east shore of Fisherman's Island since that time, and plays a significant role in the manner of accretion to the island in later years. Note also in Illustration No. 5 the diminished size of the Isaacs in 1938, although the general location has not changed since 1869.

By 1949 the Isaacs and Adams Islands had shifted to the locations in which they are today. Illustration No. 5 represents topographically the prototyped Fisherman's Island. Some of the water channels which existed in 1949 have not disappeared. For example, the channel which forms the west and north boundaries of the Isaacs, separating the Isaacs from

Fisherman's Island proper today is the same channel which Illustration No. 6 represents as having existed in 1949. In all succeeding illustrations, the channel angling to the south-west continues to form the west and north boundaries of the Isaacs.

However, the dominant feature which existed in 1949 for purposes of this report was the long, narrow, hooked sand spit which extended to the north-east from the area just south of Adams Island. The sand spit extended for almost 1.5 miles. The formation of such a spit, as will be seen, has been the product of a repetitive process in the accretion of land to the east shore of Fisherman's Island. By 1962, (Illustration No. 7) the sand spit had shifted westward until it angled north-west. Photographs of the area in the years between 1949 and 1962 indicate an active process of shoal formation off the east shore of Fisherman's Island.

The hydrodynamic process operative in the area result in the offshore formation of shoals in a series of concentric bars which, as they become emergent above low water, migrate toward the island and become welded to the southern shore of the island forming a sand spit. As each sand spit is reshaped by the waves and currents, it is driven inshore extending the southern beach and gradually moving westward to be replaced by another spit formed by the same process.

Through this repetitive process of accretion, emergence and migration, these bars or shoals formed a new spit extending in a north-east direction by 1974 (Illustration No. 8). The sand spit which existed in 1962 migrated to the west depositing some of its material along the sand beach next to the inland marsh and losing the remainder of its material to the hydrodynamic processes present in the area.

As a result of Fisherman's Island being the recipient of the southerly transport of sediment along the barrier islands and subject to the described processes, the island as a whole is increasing in size. Recent flights over Fisherman's Island by VIMS personnel confirm that the eastern shore of Fisherman's Island continues to build in the manner described. Two observations of particular importance have, however, been made. They are the following:

1. The sand shoals moving across Smith Island Inlet to form the next spit on the eastern shore of Fisherman's Island are emergent and discrete at mean low water. (See Photograph Nos. 2, 3, 4, taken 9 August 1976 at mean low water.)
2. The shoals, however, are not emergent at mean high water. (See Photographs No. 5 and 6 taken from VIMS aircraft on 30 August at Spring High Water. On that date Spring High Water was only 0.6 feet higher than mean high water yet there was no evidence of break-water or shoals near the surface.)

Any attempt to resolve the ownership of the islands of the Fisherman's Island complex must integrate the history and physical processes associated with these islands with the current status of law in Virginia relating to accretion and island formation.

LEGAL ASPECTS

In the course of this study several major questions relevant to the ownership of Adams Island presented themselves. First, was the original grant to Adams Island valid either in part or in toto? Has the original Adams Island disappeared or migrated to a new location? If the original island has disappeared, who owns land now known as Adams Island? Who owns the shoals and bars which are submerged at high water but emerge as islands at low water? Who owns such shoals and bars emergent only at low water when they migrate and merge with other parcels of land to ultimately form long spits or ridges above high water? And finally, are there parcels of land in the Fisherman's Island complex other than Adams Island which may be owned by the Commonwealth?

To the extent answers to these questions exist, they are to be found in an understanding of the history and formation of the Fisherman's Island complex and current Virginia law relating to these factors.

I

Validity of Grant

The first issue to consider is the validity of the original grant of Adams Island. At common law as a general rule private ownership stopped at the high water mark. Subject to certain public rights the sovereign held title to land between the high and low water mark. (At common law title to subaqueous land was also vested in the sovereign)

Such was the general rule of law in Virginia until 1819 when the General Assembly passed an act enabling owners whose land ran to the high water mark to extend their ownership over contiguous lands to the low water mark except where such extension would infringe upon common lands. Any such act in derogation of common law would be subject to strict interpretation.

From 1780 to the present the General Assembly has given expression to a policy of protecting certain special lands under state ownership. The current expression of this policy is found in section 62.1-1 which was originally enacted in its present form in 1873. Section 62.1-1 says "the shore 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... any future laws that may be passed by the General Assembly." It would appear that this 1873 act would have precluded the grant of the original Adams Island at least as far as the area from high water to low water was concerned since the "shore of sea" refers at a minimum to the area between the high water and low water marks. In addition to mandating that the shores not conveyed by special grant or compact according to law of the sea shall continue and remain the property of the Commonwealth, the act of 1873 also states that such land may be used as a common. In order to give

meaning to the words "conveyed by special grant or compact", it would appear reasonable to assume something other than the ordinary grant procedure (such as an act of the General Assembly) must be followed in order to grant such land. Such was not the case in the grant of Adams Island. A grant was obtained through normal procedures. However, it may be significant to note that the grant and the survey only refer to land down to the high water mark. It may have been assumed the grant ran to the low water mark or this may have been a recognition of state ownership of the shores of the sea under the 1873 act.

Even if it could be argued the original grant was invalid in toto, such an argument is probably rendered moot by the passage of remedial or curative statutes in 1932 and 1966 which validate prior invalid grants of shores of the sea (§41.1-3 and §41.1-6 of the Code of Virginia).

An argument may exist that the original grant in recognition of the 1873 act was valid only down to high water mark as set out in the survey and grant. Such an argument would make the state the owner of the land between the high water and low water marks and any accretions thereto. (This would be an alternative ground on which the state could claim ownership of any spits, shoals or bars which merge with Adams Island.)

Absent what appears to be a rather unlikely challenge based on the public trust theory it seems likely that the original grant is valid at least down to the high water mark. The act of 1873 taken with the wording of the survey and the grant would be the basis of a strong argument against any assumption that the original grant ran to the low water mark.

II

Continuity and Ownership of Adams Island

The second question to be addressed is the present ownership of what is now known as Adams Island. Evidence indicates and the opinion of experts is that more probably than not the original Adams Island migrated to its present position. Title under such circumstances would rest with the successors in interest of the original grantees.

This is contrary to the holding of the Circuit Court of Northampton County in the partition suit over the Isaacs by the Parker heirs against the Wise heirs. Evidence admitted in that suit led the Commissioner in Chancery to report that Adams Island no longer existed and that "William Knight Shoals has grown from an original grant of 244 acres, to a present size of 483 acres."

The court denied G. W. Martin, Jr., who claimed Adams Island as a successor in interest to the original grantees, leave to intervene on January 15, 1976, saying that the appropriate procedure was to file a suit to establish boundaries. As a result of this denial, evidence tending to prove the migration of Adams Island was excluded from the partition suit. (An analysis of Illustrations Nos. 3, 4, 5, and 8 tend to prove the migration. For further supporting material refer to the Physical History section of this report.)

If, contrary to the claim of George W. Martin, Jr., the original Adams Island did disappear forever below low water and a new island arose above high water in a different location and then later merged

with the Isaacs, who would own such parcel of land? If the original Adams Island disappeared, evidence exists showing that what would be considered a new island arose above high water and later merged with the Isaacs. Such land now called Adams Island would be owned by the Commonwealth of Virginia not the owners of the Isaacs and would not be subject to sale as a result of the partition suit.

III

Ownership of Spits, Shoals and Bars Associated with Adams Island

In the relatively rare situation where a shoal or bar forms an island emergent above low water but submerged at high water, who owns such a formation? And, if such a shoal or bar formed above low water migrates and joins with the land of a private citizen to ultimately form a large accreting sand spit or beach process above high water, who owns such a formation?

As previously stated, at common law private ownership stopped as a general rule at the high water mark. The sovereign owned the subaqueous bottoms and the lands between the high water and low water marks. Such was and is with one exception the rule of law in Virginia today. That exception was the passage by the General Assembly of the Act of 1819 which extended the ownership of riparian owners beyond the high water mark to include contiguous intertidal areas down to the low water mark. Lands used as commons were not subject to claim under the Act.

Being in derogation of a well accepted rule of common law (the

majority of states have retained the traditional common law rule of ownership to the high water mark) such an act is subject to strict interpretation and limited in its application. This act is the only deviation to the original common law rule of sovereign ownership between the high and low water marks and applies only to land having adjacent and contiguous intertidal areas subject to claim under the act. All other ungranted islands now existing or to be formed above low water would remain in sovereign ownership as at common law. In 1873 the General Assembly passed an act which buttressed this traditional common law rule. The Act of 1873 which is now section 62.1-1 of the Code of Virginia states that "the shore 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... and may be used as a common by all the people." By any reasonable definition, shoals and bars emergent as islands between low water and high water would be considered to be the shores of the sea and thus the subject of state ownership under this statute as well being the subject of state ownership under traditional common law principles still applicable in Virginia today.

In Virginia owners of shoreland hold title to the low water mark.¹⁵ However this line may change either for the advantage or disadvantage of the riparian owner, low water remains the boundary under the Virginia statute. The title of the Commonwealth to subaqueous bottoms likewise shifts with the shifting sands. That which is lost in one place is

sometimes gained in another.¹⁶ The Act of 1819, which permits private ownership to the low water mark, was originally enacted in order to resolve confusion over riparian ownership created by ambiguous wording in grants. In the case of emergent shoals, bars, or islands the traditional common law rule of ownership and the Act of 1873 would pertain. The sovereign owns such land as it does the subaqueous bottoms.

Once ownership is vested in the Commonwealth by virtue of common law and the Act of 1873 this ownership would continue, not disappear, upon merger of state owned property with privately held land. Such is also the case when privately held lands merge under similar circumstances.

Many of the questions of law which occur in the instant case were presented recently in the case of Lynnhaven Marine Center v. The Commonwealth of Virginia and The Virginia State Dept. of Highways.¹⁷ The case involved a determination of whether a certain 15 acres of land south of Lynnhaven Bridge belonged to the Commonwealth or to the complainant. The suit was in the nature of a suit to clear title to property. The complainants based their claim on two separate theories:

1. That to Lynnhaven's predecessor in interest, Arthur J. Winder prior to January 25, 1957 certain additional property had accreted; attaching to the "station lot" as a result of natural forces.
2. That the Virginia State Department of Highways had quit claimed the accreted land.

The Commonwealth citing §62.1-1 Code of Va. as amended argued that the Commonwealth is the fee owner of all ungranted beds of navigable rivers, bays, streams and creeks within its boundaries. Miller v. Common-

wealth,¹⁸ a leading case in which Justice Epes engaged in an extensive discussion of the history of land ownership in Virginia was cited. The Commonwealth then cited cases from other states to state the well settled law that where title to the bed of a stream rests in the state, islands forming by accretion to such bed belong to the state even though such island later connects to the shore.¹⁹ This issue was then joined as to the signifiacnce of the term "island" in relation to the law of accretion.

Essentially, the complainant's contention was that where the offshore land did not rise above mean high water, it was not an "island"; hence the rule of law preventing title from passing to the riparian owner did not apply. The complainants accepted the rule stated in Mather, supra, that a basic principle of the law of accretion is that title to an "island" which has become attached to the mainland does not shift to the riparian mainland owner. The complainants disputed, however, whether the peninsula in question ever qualified as an "island". They contended that any shoal which may have existed offshore was connected to the mainland, forming a peninsula, before it had acquired the dignity of an island. They argued that an "island" must be a geographical feature of some solidity and permanence and that at the very least the feature must be above mean high water.

The Commonwealth's position was that that portion of the peninsula attributable to the offshore land which rose above mean low water prior to connection should remain the property of the Commonwealth. The Common-

wealth argued that it is the "offshore origin of the connecting land rather than its elevation above mean high water prior to connection which underlies the rule of Mather that title to offshore lands does not shift when they connect." The argument continued that since it is the offshore origin of the land which distinguishes such land from shore accretion, it would be inequitable to permit the riparian owner to acquire title to land which had arisen offshore above mean low water.

Further points were argued. The complainants, ignoring that the sovereign owned land between the high water and low water marks at common law, contended that because of common law, an individual could own an island only to the high water mark and no island could, therefore, exist unless the land was above the high water mark.

The Commonwealth disagreed arguing that by virtue of having statutorily (§62.1-2) extended private riparian ownerships from mean high water to mean low water the law of accretion changed.²⁰ "After the statutory change shore owners gained by accretion when added land rose above mean low water, whereas before, to gain by accretion on the shore added land had to arise above mean high water."²¹

Sovereign ownership based on common law and the Act of 1873 was not specifically argued and judgment was eventually entered for the complainant on the basis of a quit claim deed conveyed by the Highway Dept. to Mr. Winder in 1957, the court never deciding the point of law presented in the briefs. Therefore the question of ownership of land which merges with another parcel of land, never rising above mean high water in the

process, remains undecided in Virginia.

Regardless of the decision in the Lynnhaven case, it appears that a strong argument can be made for state ownership of such lands and since the spit represents the growing or accreting part of the island, the Commonwealth may desire to institute an action to claim ownership of the spit. In the event of such action the Commonwealth would have the benefit of the Lynnhaven arguments as well as the benefit of the argument for sovereign ownership based on common law and the Act of 1873 presented in this report.

IV

State Ownership of Lands Other Than Adams Island

Finally, does there exist any other land in the Fisherman's Island complex over which the Commonwealth may claim ownership? The brief answer to the forgoing question is "yes". The Commonwealth may have a potential claim in several parcels of land north of the Isaacs and west of Adams Island and, also, parcels on the south, north and northwest sides of Fisherman's Island. (Illustration No. 9 shows only the parcel north of the Isaacs and west of Adams Island.)

In 1907 the permanent boundary was established between Fisherman's Island and the William Knight Shoals by the laying down of numbered pipes (See Illustration No. 10) by Homer P. Ritter of the United States Coast & Geodetic Survey. Ritter had used a boundary line laid down on August 28, 1890 by John S. Wise on the Coast Chart of Chesapeake Bay No. 131 -sheet 1 in agreement with federal officers in order to determine the boundary

between the Cape Charles Quarantine Station and the William Knight Shoals. A copy of Ritter's survey map was filed as an exhibit in a civil trespass action brought by the United States against Carman Skidmore et al. in the District Court of the United States for the Eastern District of Virginia at Norfolk. On June 18, 1912 final judgement was entered for the United States and the boundary of Fisherman's Island was set as Ritter surveyed it.

As Illustration No. 9 represents, this boundary cuts across the northwest corner of an island lying north of the Isaacs and west of Adams Island. This island (now connected to the Isaacs by a thin slip of land at its southern point) as well as the two smaller islands next to it emerged above high water unconnected with either the Isaacs, Adams Island, or Fisherman's Island in the ten years from the late 1930's to the late 1940's. (See Illustration Nos. 5, 6).

It is well settled that islands arising out of the seabed belong to the owner of the bed, and where such owner is the state, the islands belong to the state.²² Therefore, when the island group arose north of the Isaacs, title vested in the Commonwealth.

In summary, a group of at least three islands (See Illustration No. 9), north of the Isaacs, west of Adams Island, and east of Fisherman's Island has emerged above high water from the bed of the bay and title therein should vest in the Commonwealth. Other parcels appear to be subject to state ownership but time constraints precluded further research.

CONCLUSION

In considering the ownership of Adams Island, or any parcel of land in the Fisherman's Island group certain facts should be noted. Fisherman's Island is the only one of the Barrier Islands that is growing in size. Moreover there is some reason to believe that it may, some years hence, grow to connect with Smith Island. Through the process of accretion there has come to exist excellent beaches along the southeastern and southwestern shores. The part of the island east of the Fisherman's Island boundary line has been estimated as having a market value of \$210,000. Much of this value is related to the growth along the eastern shore evidenced by the recurrent sand spits.²³

Within the context of such considerations, the following conclusions are submitted (See Illustration No. 9):

1. Due to remedial or curative statutes passed in 1932 and 1966 (sections 41.1-3 and 41.1-6 of the Code of Virginia) the grant of Adams Island is valid. It may be only valid, however, to high water as set out in the original grant and in accordance with common law and the Act of 1873 mandating that the ungranted shores of the sea shall continue and remain the property of the state.
2. It appears more likely than not that Adams Island migrated to its present position and, with exception of the area between high water and low water which may not have been included in the original grant, it also appears the Commonwealth in all probability has no proprietary interest in that part of Fisherman's Island identified as the remnants of the original Adams Island.

If the original island disappeared, however, the state would own what is now called Adams Island.

3. In view of sovereign ownership at common law and the Act of 1873, a strong argument exist for state ownership of the large sand spit extending from the eastern shore of the Fisherman's Island Complex. Since the spit represents the growing or accreting part of the island, the Commonwealth may desire to institute an action to claim ownership of the spit. In the event of such action the Commonwealth would have the benefit of the arguments made in the Lynnhaven case as well as the factual evidence and the argument for sovereign ownership based on common law and the Act of 1873 presented in this report.

4. A group of three islands north of the Isaacs, west of Adams Island and east of Fisherman's Island has emerged above high water from the bed of the bay and title therein should be in the Commonwealth.

It also appears that at least three other parcels of land in the Fisherman's Island Complex not indicated in Illustration No. 9 may be owned by the Commonwealth.

FOOTNOTES

1. Deed Book 87, Page 353, County of Northampton.
2. See Appendix B for copy of 1914 Survey by G. H. Badger.
3. Deed Book 87, Page 389, County of Northampton.
4. Correspondence from Chester D. Bradley, M. D., Corator, Casemate Museum, Fort Monroe, Virginia, to George F. Adams, III, son of grantee. Correspondence dated March 19, 1956.
5. Code of Va. § 55-20.
6. S. F. Parham, Jr., A Virginia Title Examiners Manual, 2nd. Ed. p. 79.
7. Deed Book 122, Page 182, County of Northampton.
8. Deed Book 128, Page 380, County of Northampton.
9. Deed Book 165, Page 172, County of Northampton.
10. Deed Book 38, Page 687, County of Northampton.
11. Deed Book 38, Page 648, County of Northampton.
12. Conversation of P. McDermott with Messrs. Chubb and Werden.
13. Chancery Order Book No. 21, Page 629, County of Northampton.
14. All illustrations have been traced by Marc Boule from the indicated charts. For an in-depth analyses of Fisherman's Island see: Boule, 1976. Geomorphic Interpretation of Vegetation on Fisherman's Island, Virginia MA Thesis, Virginia Institute of Marine Science, College of William and Mary, 125 pp.
15. Code of Virginia §62.1-2.
16. Steelman v. Field, 142 Va. 383, 128 S. E. 558 (1925).
17. File Number C-793-76, Circuit Court of City of Virginia Beach, Chancery, heard, August 20, 1975, Final Order, May 27, 1976.
18. 159 Va. 924 (1932).
19. Mather v. State, 200 N. W. 2d 498 (1972). Dartmouth College v. Rose, 133 N. W. 2d 687 (1965). Siesta Properties, Inc. v. Hart. Fla. App. 122 So. 2d 218 (1960).

20. See Miller v. Commonwealth, supra note 18, for an extensive discussion of the extension of private riparian ownerships from mean high water to mean low water in Virginia.
21. Lynnhaven v. Commonwealth, supra note 17, Defendant's Brief at p. 18.
22. Note 17 supra.
23. Deposition of A. Jackson Mason, Mason and Davis, Accomac, Virginia, Real Estate, Insurance and Appraisal, in the Parker-Wise partition suit.

Appendix A

SENATE JOINT RESOLUTION NO. 57
Offered February 9, 1976

Directing the Virginia Institute of Marine Science to study the question of ownership of Adams Island.

WHEREAS, the Virginia Institute of Marine Science is currently engaged in research relative to the existence and location of coastal lands known as common lands, which are ungranted lands of the Commonwealth held in trust for the use and benefit of the people of the Commonwealth; and

WHEREAS, there is an island commonly known as Adams Island, located in Northhampton County, directly east of lands known as the Isaacs or William Knight Shoals and near Fisherman Island; and

WHEREAS, the United States Department of Interior, Fish and Wildlife Service has expressed interest in acquiring Adams Island for use as a wildlife refuge and in that connection has inquired regarding any legal interest or title the Commonwealth may have in the island; and

WHEREAS, there is reason to believe the Commonwealth may have a legitimate basis for claiming title and ownership of Adams Island; and

WHEREAS, the determination regarding the Commonwealth's interest, if any, in Adams Island is prerequisite to any negotiations with the United States regarding use of the island for a wildlife refuge; now, therefore, be it

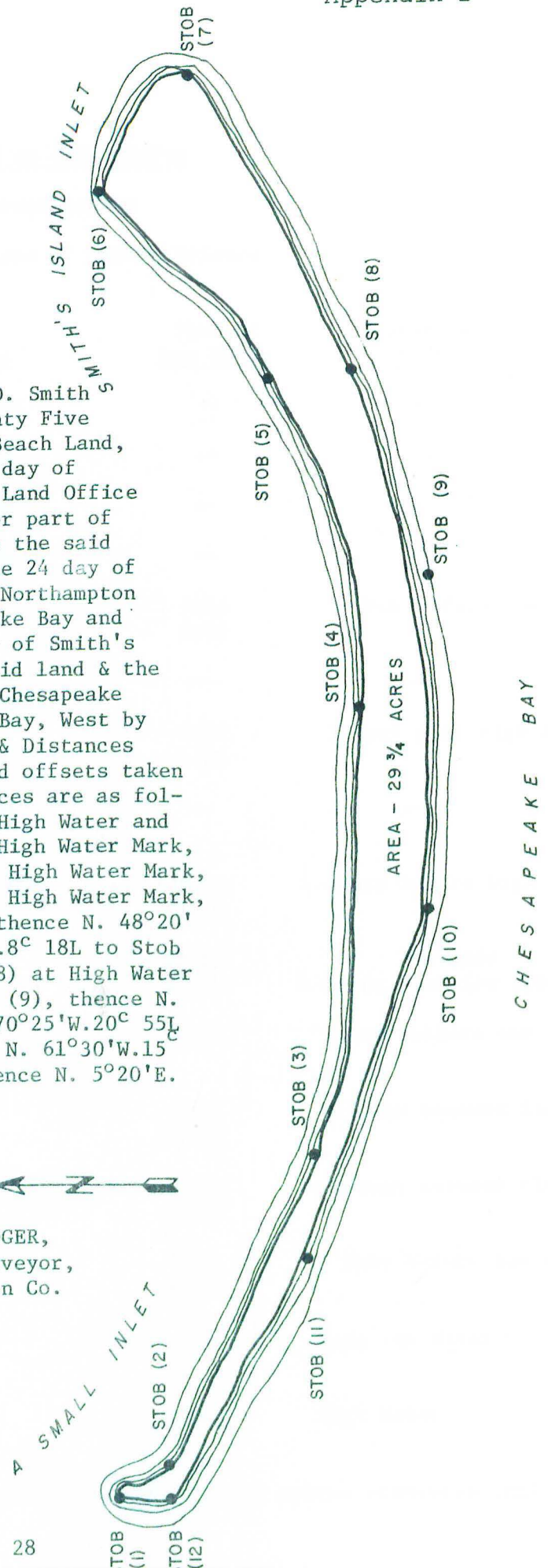
RESOLVED, by the Senate, the House of Delegates concurring, That the Virginia Institute of Marine Science is directed to study the question of ownership of Adams Island in connection with and as a part of its current study of common lands in the Commonwealth and to report its findings and conclusions relative thereto, in writing, to the Attorney General of Virginia, not later than November thirty, nineteen hundred seventy-six.

BILL OF SURVEY

Surveyed December 30, 1914 for George O. Smith & George F. Adams Twenty Nine and Seventy Five Hundredths Acres (29 75/100 Acres) of Beach Land, by virtue of an entry made on the 26th day of November, 1914, under and by virtue of Land Office Exchange Treasury Warrant No. 32,120 for part of Exchange Warrant No. 32, 059, issued to the said George O. Smith & George F. Adams on the 24 day of November, 1914, lying in the County of Northampton East of the Isaacs in Mouth of Chesapeake Bay and bounded as follows: North by High Water of Smith's Island Inlet & a small inlet between said land & the Isaacs, East by Smith's Island Inlet & Chesapeake Bay, South by High Water of Chesapeake Bay, West by High Water of Chesapeake Bay. Courses & Distances measured around above described land and offsets taken to High Water Mark. Courses and Distances are as follows, to-wit: Beginning at Stob (1) at High Water and going S. 30°25'E.3^c 261/2 to Stob 2 at High Water Mark, thence S. 64°45'E.19^c 3L to Stob (3) at High Water Mark, thence S. 84°40'E.25^c 9L to Stob (4) at High Water Mark, thence N. 74°20'E.19^c 31L to Stob (5), thence N. 48°20'E.14^c 29L to Stob (6), thence S.52°40'E.8^c 18L to Stob (7), thence S. 61°20'W.19^c 4L to Stob (8) at High Water Mark, thence S. 69°10'W.12^c 56L to Stob (9), thence N. 89°50'W.18^c 64L to Stob (10), thence N.70°25'W.20^c 55L to Stob (11) at High Water Mark, thence N. 61°30'W.15^c 31L to Stob (12) at High Water Mark, thence N. 5°20'E. 3^c 6L to Starting Point.

George O. Smith) Sworn
G. H. Badger) Chainmen

G. H. BADGER,
County Surveyor,
Northampton Co.



INVENTORY OF PHOTOGRAPHS

Fisherman Island

Virginia Institute of Marine Science

| <u>Date</u> | <u>Time</u> | <u>Time of Low Water</u> | <u>Approximate Tide</u> |
|--|----------------|------------------------------|-----------------------------------|
| 1) May 17, 1938 | Unknown | -- | -- |
| 2) February 17, 1949 | Unknown | -- | -- |
| 3) May 14, 1949 | Unknown | -- | -- |
| 4) November 24, 1952 | Unknown | -- | -- |
| 5) March 10, 1955 | 2:02 | 3:16 3:25 | 1 hour before low tide |
| 6) November 10, 1959 | Unknown | -- | -- |
| 7) March 24, 1962 | 11:38 | 4:00 4:08 | 1 hour past high tide |
| 8) December 2, 1962 (Available, U. Va.) | Unknown | -- | -- |
| 9) January 30, 1967 | 1:38 - 1:51 | 5:11 5:35 | 2 hours before high tide |
| 10) February 5, 1967 | 10:21 12:16 | 10:23 10:23 | Low Tide 2 hours past low tide |
| 11) July 25, 1971 (Available, VIMS) | 3:15 | 4:25 | 1 hour before low tide |
| 12) October 13, 1971 | 6:00 | 9:47 10:29 | Halfway between tides |
| 13) June 4, 1974 | 10:39 | 1:48 1:42 | Halfway between tides |
| 14) December 3, 1974 | 3:06 | 4:23 5:10 | 1 hour before low tide |
| 15) August 9, 1976 (Available, VIMS) | 1:50 | 1:51 | Mean Low Water |
| 16) August 30, 1976 (Available, VIMS) | 12:00 | 5:21 | High Water |

All photographs available through U. S. Geological Survey unless otherwise indicated.

INVENTORY OF CHARTS

Historical

| <u>Date</u> | | <u>Source</u> |
|-------------|--|---|
| 1606 | Described by Capt. John Smith Drawn by William Hale. | Virginia Historical Society Richmond, Virginia Facsimile available. |
| 1719 | A new map of Virginia and Maryland and the improved parts of Pennsylvania and New Jersey. | Virginia State Library Richmond, Virginia Facsimile available. |
| 1775 | A map of the most inhabited part of Virginia containing the whole province of Maryland with part of Pennsylvania, New Jersey and North Carolina. Drawn by Joshua Fry and Peter Jefferson | Virginia State Library Richmond, Virginia Facsimile available. |
| 1778 | Carte de la Baie de Chesapeake, A navigation chart. | Virginia State Library Richmond, Virginia Facsimile available. |
| 1826 | Entered according to Act of Congress, the 14th day of April, 1826 by John Tyler, Governor of the Commonwealth of Virginia. | Virginia State Library Richmond, Virginia Facsimile available. |
| 1835-1841 | Geological map of Virginia and West Virginia. | Virginia State Library Richmond, Virginia Facsimile available. |
| 1848 | A map of the internal improvements of Virginia. Prepared by C. Crozet, principal engineer of Virginia under a resolution of the General Assembly adopted March 15, 1848. | Virginia State Library Richmond, Virginia Facsimile available. |

Navigation

| | | |
|------|----------------|---------------------|
| 1859 | Coast Chart 31 | The Mariners Museum |
| 1872 | Coast Chart 31 | The Mariners Museum |
| 1877 | Coast Chart 31 | The Mariners Museum |
| 1905 | Coast Chart 31 | The Mariners Museum |

| <u>Date</u> | | <u>Source</u> |
|-------------|-------------------------------|--------------------------------------|
| 1911 | Coast Chart 31 | The Mariners Museum |
| 1930 | Coast Chart 1222 | The Mariners Museum |
| 1968 | Fisherman's Island Quadrangle | U. S. Geological Survey |
| 1972 | Coast Chart 78 | Virginia Institute of Marine Science |
| 1973 | Coast Chart 78 | Virginia Institute of Marine Science |

National Ocean Survey

(formerly
U. S. Coast and Geodetic Survey)

Following is an inventory of the boat sheets used in research for this report. Boat sheets are the base bathymetric surveys from which succeeding editions of the common navigation charts are made and updated from time to time. Certified stable base copies of these original surveys may be obtained from the N.O.S. (National Ocean Survey) of NOAA (National Oceanic and Atmospheric Administration) in Rockville, Maryland. Stable base copies of the boat sheets listed are on file at the Virginia Institute of Marine Science, having been obtained from Rockville.

| | | |
|------|--|------|
| 1852 | Stable Base - Cape Charles, Section III Hydrography - H-345 | NOAA |
| 1852 | Stable Base - Smith's Island, Cape Charles and vicinity, T-509 | NOAA |
| 1869 | U. S. Coast Survey, Hydrography of Magothy Bay, Reg. No. 1013 | NOAA |
| 1888 | Stable Base - Little Inlet to Cape Henry, H-1873 | NOAA |
| 1888 | Stable Base - Cape Charles and vicinity, H-1875 | NOAA |
| 1905 | Stable Base - Coast and Geodetic Survey, Chesapeake Bay, Eastern Shore, Cape Charles and vicinity, No. 2675. | NOAA |

| <u>Date</u> | | <u>Source</u> |
|-------------|---|---------------|
| 1906 | Stable Base - Coast and Geodetic Survey, Chesapeake Bay, Fisherman's Island, No. 2757 | NOAA |
| 1907 | Stable Base - Fisherman's Island (with numbered iron pipes by Ritter) Reg. No. 2757a | NOAA |
| 1910-1911 | Stable Base - Fisherman's Island to Ship Shoal Island, Reg. No. 3191 | NOAA |
| 1911 | Stable Base - Ship Shoal, Smith Island, and Fisherman's Inlets, H-3295 | NOAA |
| 1949 | Lower Chesapeake Bay vicinity of Cape Charles, Topographic Survey No. 7074a | NOAA |
| 1954 | Stable Base - Lower Chesapeake Bay vicinity of Cape Charles, Hydrographic Survey No. 8217 | NOAA |

Private or Non-Governmental Charts

| | | |
|------|---|--|
| 1867 | Prepared 1974 by Werden and Chubb Engineers, Eastville, Virginia. Reproduced from information obtained from survey of the coast of the U. S. Coast Chart No. 131 published 1863 with hydrography executed between 1852 and 1870 and from survey of the Isaacs by E. C. Fitchett in 1866. Admitted as an exhibit in the partition suit of the Parker-Wise heirs filed in Northampton County. | Circuit Court for the County of Northampton Copy - VIMS |
| 1907 | Prepared 1974 by Werden and Chubb, Engineers, Eastville, Virginia including G. H. Badger Survey of 1914 of Adams Island | Circuit Court of County of Northampton Copy - VIMS |
| 1967 | By Werden and Chubb, Eastville, Va. 1974, admitted into evidence in the partition suit of the Parker-Wise heirs. | Circuit Court for the County of Northampton Copy - VIMS |
| 1974 | By Werden and Chubb, Engineers, Eastville, Va. Map of certain islands known as Fisherman's Island and the Isaacs. Admitted as evidence in the partition suit of the Parker-Wise heirs. | Circuit Court for the County of Northampton Copy - VIMS |

Exhibits

Date

Source

1906

Fisherman's Island and the Isaacs.
Shoreline and mean low water line
resurveyed by Homer Ritter June
7-19, 1907,

District Court of the Uni
States for the Eastern
District of Virginia.
Exhibit No. 1 in the Case
of U. S. v. Carmen Skidmo
et.als. (1912)

Corps of Engineers

1917

U. S. Engineer Office, Norfolk, Va.
South End - Fisherman's Island
Corps of Engineers, U. S. Army

Corps of Engineers via
Thomas Watkins

Illustrations and Photographs



FIRMCLASP - Suntan
No. 90 - 9 x 12

Photograph No. 1

10 November 1959

Fisherman Island and Smith Island Inlet



Photograph No. 2

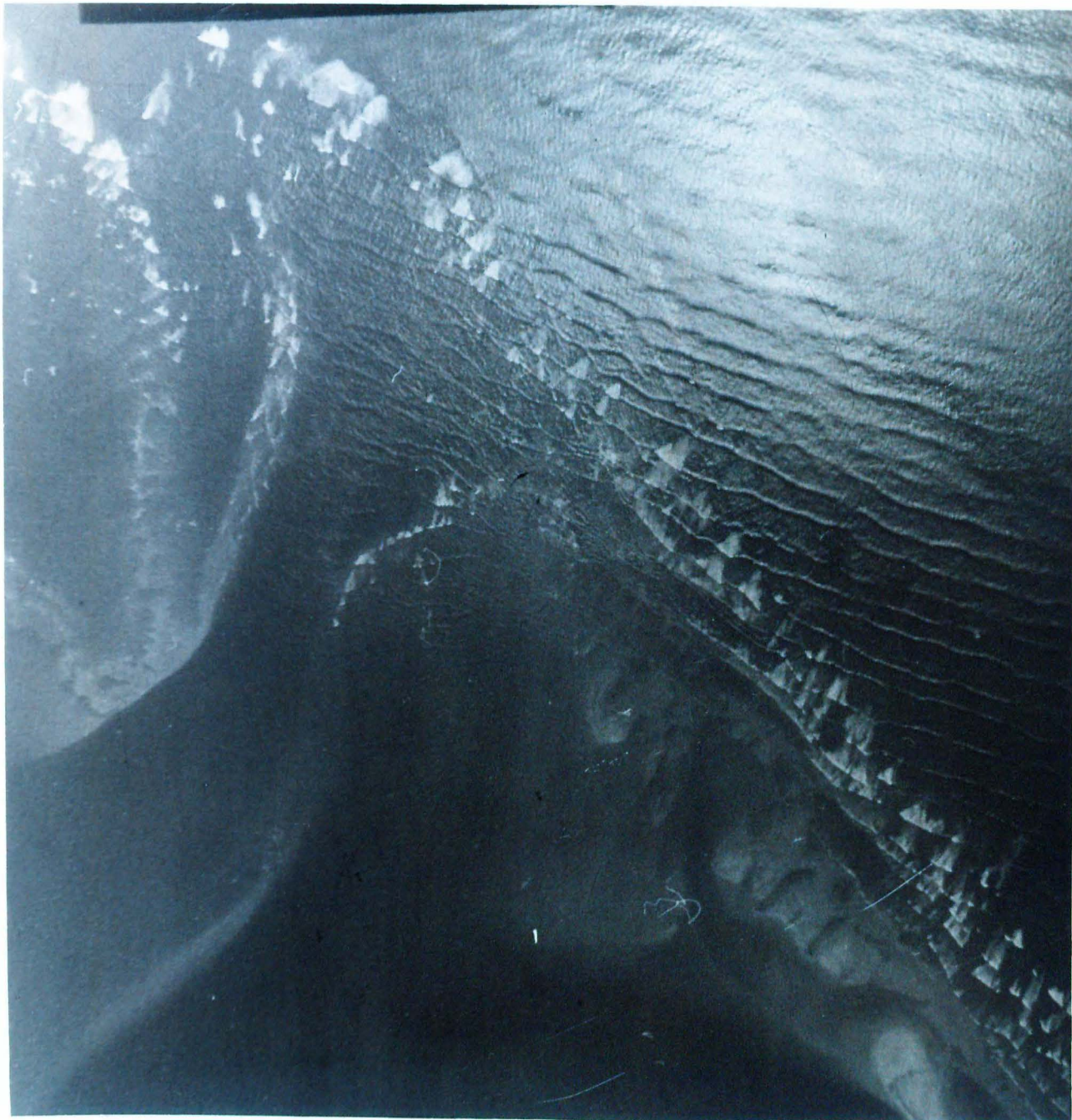
9 August 1976



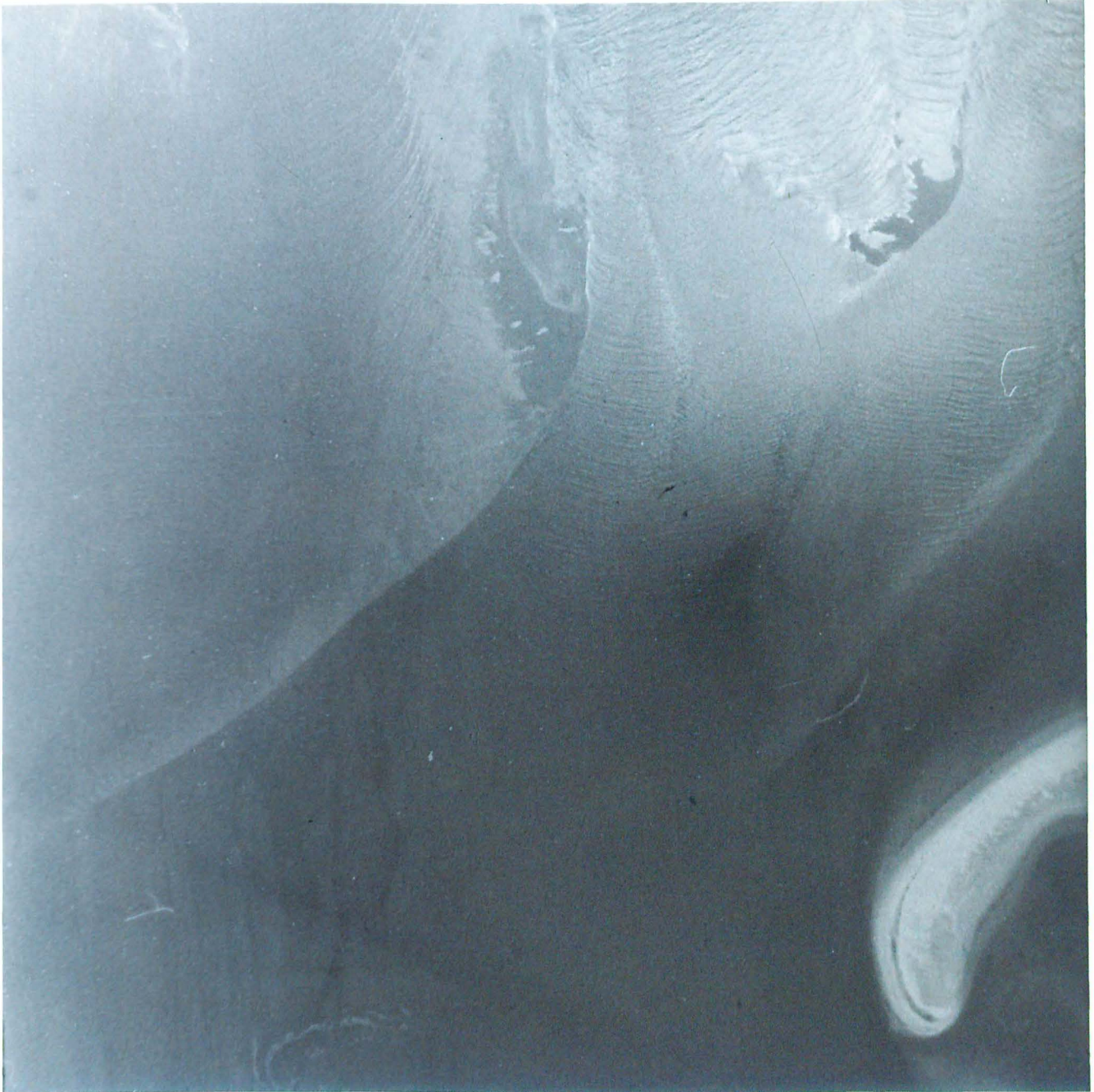
Smith Island Inlet at Mean Low Water



Photograph No. 3 9 August 1976
Shoal Development, Smith Island Inlet
(north and east of Photograph No. 2) at
Mean Low Water.



Photograph No. 4 9 August 1976
Shoal Development, Smith Island Inlet
(due north of Photograph No. 2 at Mean Low
Water)



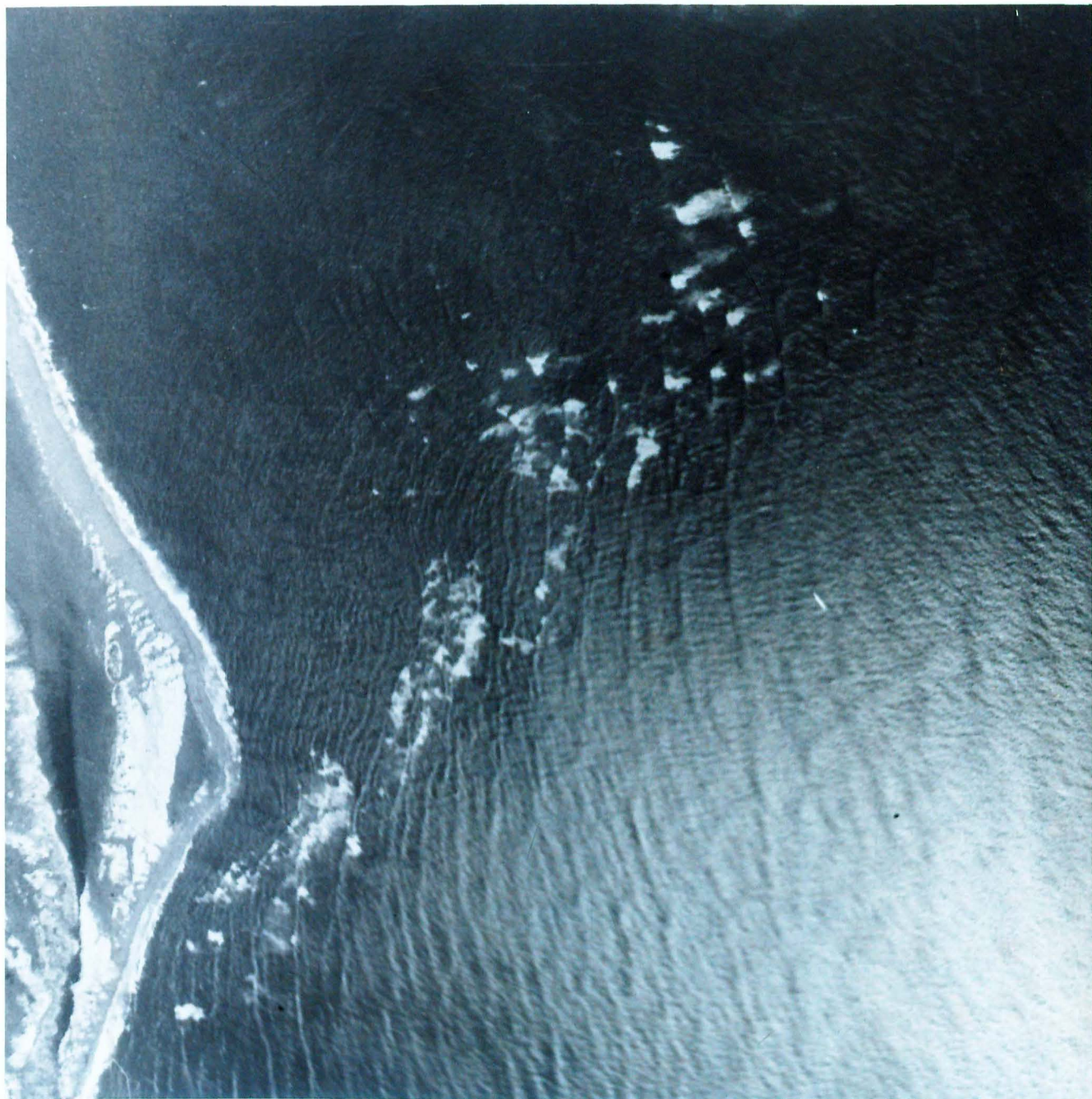


Photograph No 5 30 August 1976
Sand spit adjacent to eastern side of
Fisherman Island showing shoals submerged
by Spring High Water.





Photograph No. 6 30 August 1976
Lower portion of sand spit adjacent to
eastern side of Fisherman Island submerged
by Spring High Water. (compare to Photo #2)



75° 59' 00"

75° 58' 30"

75° 58' 00"

75° 57' 30"

75° 57' 00"

75° 56' 30"

75° 56' 00"

37° 06' 30"

37° 06' 00"

37° 05' 30"

37° 05' 00"

CIRCA
1907
SCALE 1" = 400 FT
37° 04' 30"

NOTE
DASHED LINE CONNECTING NUMBERED
POINTS SHOWS LINE ESTABLISHED AND POINTS
LOCATED BY SURVEYOR GENERAL JOHN W. BAKER
DURING HIS EXPLORATIONS OF ADAMS ISLAND
FOR U.S. NAVY IN 1897

AS PRODUCED FROM INFORMATION OBTAINED
FROM U.S. COAST AND GEODETIC SURVEY
CHART OF FLEETMAN ISLAND & THE BODIES
ADJACENT TO THE BODIES 110 AND 1000 AND
DATED 1898 WITH CORRECTIONS AND REVISIONS
MADE SINCE 1898 TO CORRECT JUNE 1, 1897
AND FROM SURVEY OF ADAMS ISLAND BY
S. A. BAGGLEY, U.S. NAVY
PUBLISHED BY
WATERMAN & COMPANY, BOSTON
1906

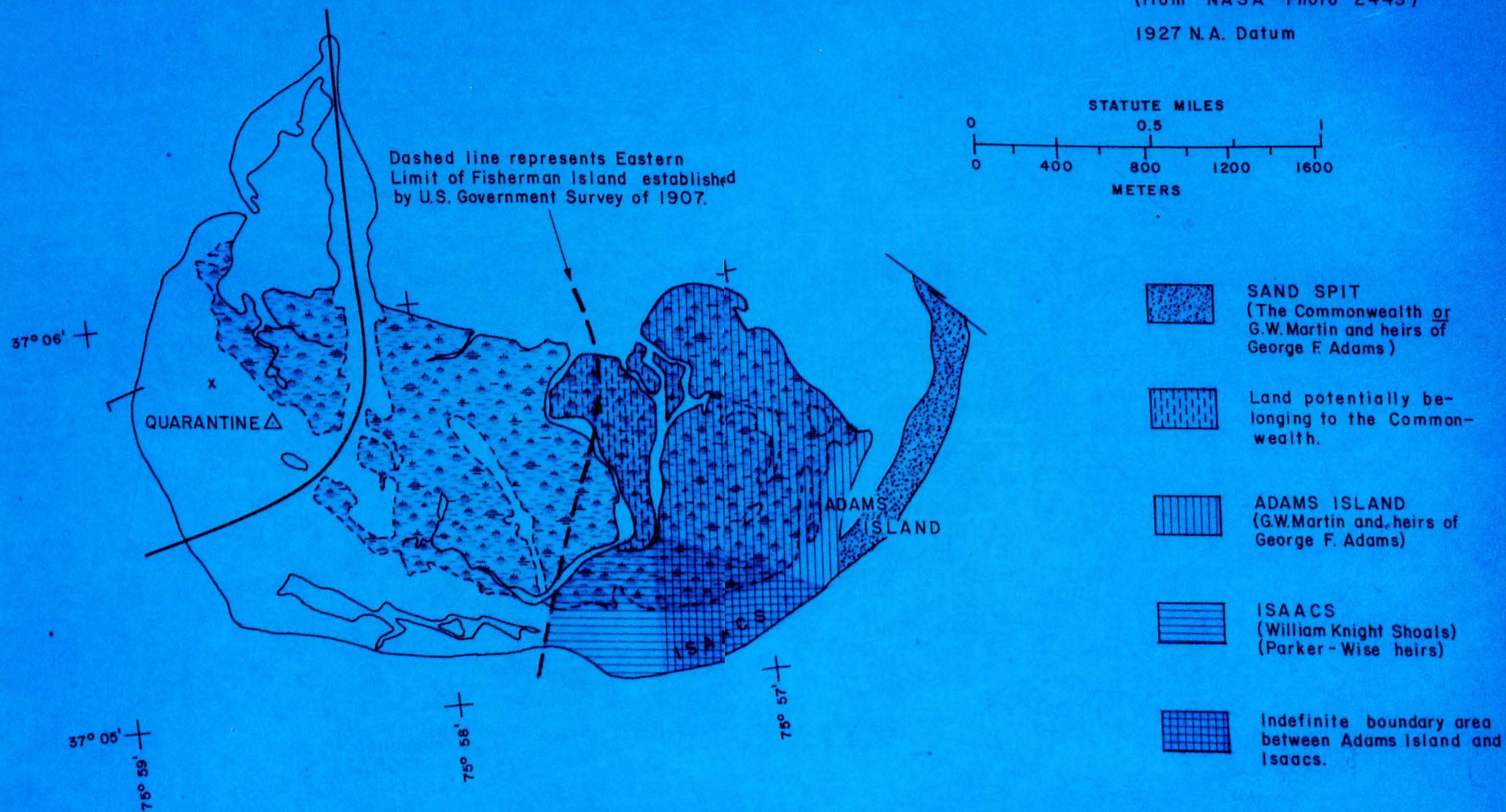


NO. 9

FISHERMAN ISLAND, 1974

(from NASA Photo 2443)

1927 N.A. Datum



No. 8

FISHERMAN ISLAND, 1974

(from NASA Photo 2443)

1927 N.A. Datum



No. 6

FISHERMAN ISLAND, HAWAII

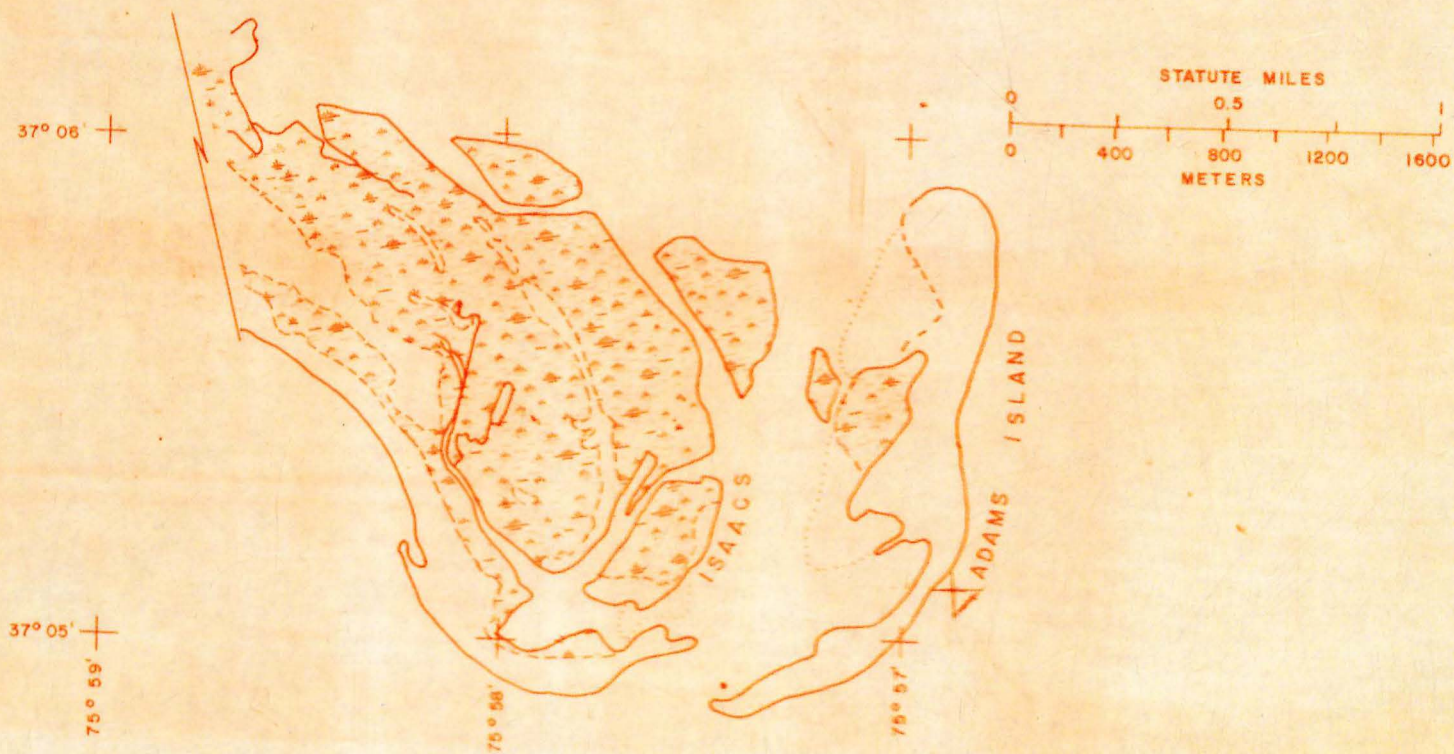
(from USGS Photos ANP 100-1000)

1927 N. A. Datum



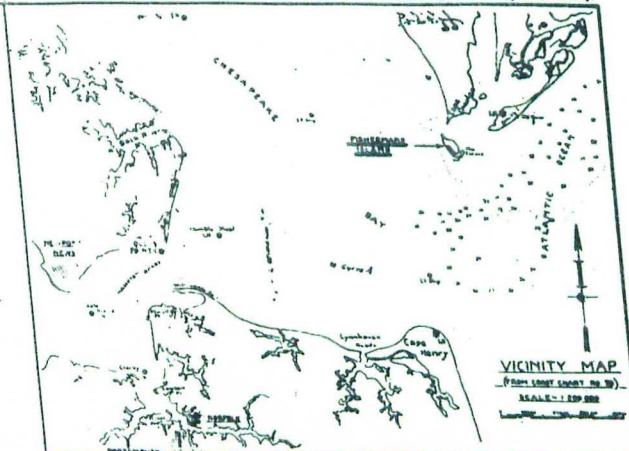
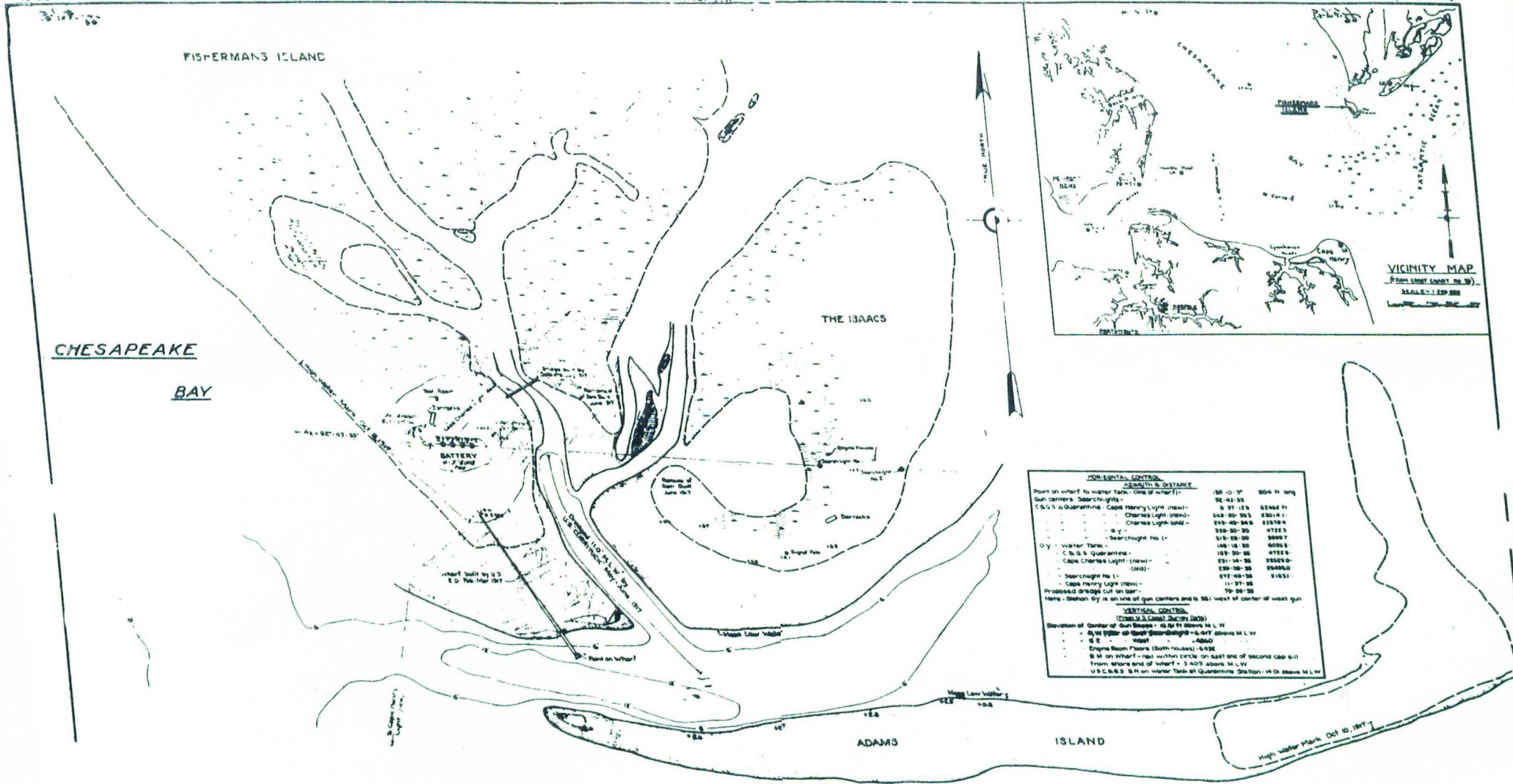
No.5

FISHERMAN ISLAND, 1938
(from USDA Photos ANP 22-18, 22-19)
1927 N.A. Datum



ENGINEERING DEPARTMENT

CORPS OF ENGINEERS, U.S. ARMY



| HORIZONTAL CONTROL | | VERTICAL DISTANCE | |
|--|------------|-------------------|--|
| Point on wharf to water tank (top of wharf) | 158-10-37 | 504 ft long | |
| Gun camera Searchlights | 92-43-33 | | |
| C.B.'s Quarantine Cape Henry Light (new) | 0 37-124 | 5244 ft | |
| Charles Light (new) | 143-50-343 | 5304 ft | |
| Charles Light (old) | 245-49-343 | 5218 ft | |
| By | 330-50-30 | 4722 ft | |
| Searchlight No 1 | 515-55-00 | 5097 ft | |
| Water Tank | 104-18-30 | 5093 ft | |
| C.B.'s Quarantine | 143-50-35 | 4722 ft | |
| Cape Charles Light (new) | 231-14-35 | 5549 ft | |
| Searchlight No 1 (old) | 190-08-30 | 5000 ft | |
| Cape Henry Light (new) | 11-37-35 | 79-30-35 | |
| Proposed bridge cut on bar | | | |
| Note: Station 017 is on line of gun camera and is 551 feet of center of west gun | | | |

| VERTICAL CONTROL | |
|---|----------------------|
| (FROM U.S. Coast Survey 2187) | |
| Elevation of Center of Gun Camera = 10.24 ft above M.L.W. | |
| • 5 M on 1938-01-10 | 6.07 ft above M.L.W. |
| • 5 E | 1938-01-10 |
| • Engine Room Floor (South House) | 6.43 ft |
| • 5 M on wharf - not within circle on east end of second cap sill | |
| From shore end of wharf | 3.40 ft above M.L.W. |
| U.S.C. & G.S. 5 ft on water tank at Quarantine Station | 14 ft above M.L.W. |

2" ATLANTIC OCEAN

U.S. ENGINEER OFFICE, NORFOLK, VA.
SOUTH END - FISHERMANS ISLAND
 VIRGINIA
 Surveyed March 1917 & October 1917
 By
 S. Cassin, Asst. Engr. & T. J. Hamill, Jr. Engr.
 SCALE - 1:5000

Submitted: _____ Approved: _____
 Assistant Engineer Major General, U.S.A., Retired
 Drawn by T. J. H. Traced by J. H. H.
 15-26-

Scale 1"=400' of this Reduction

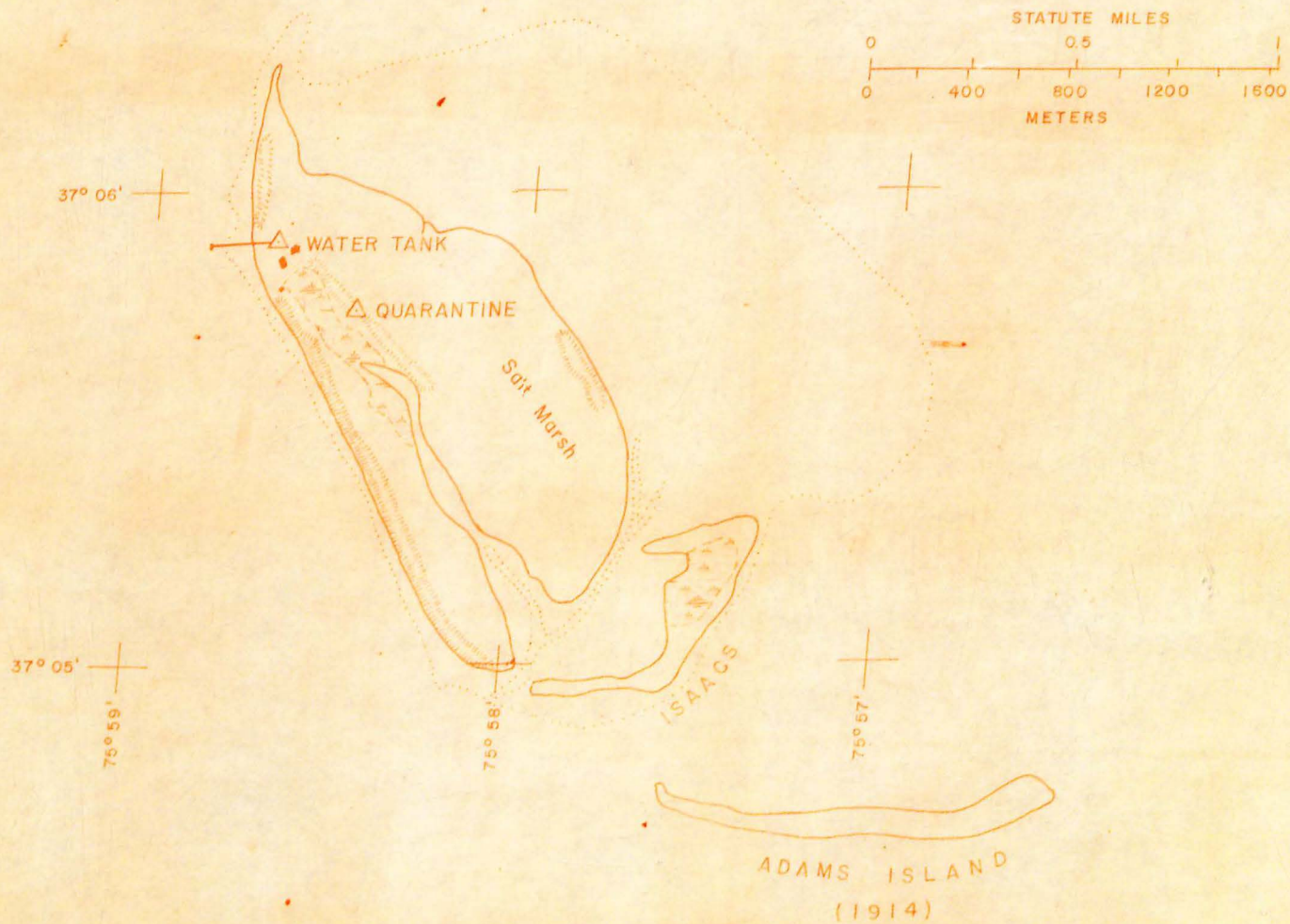
No. 3

CAPE CHARLES

FISHERMAN ISLAND, 1910-II

(from C & GS Chart H-3191)

1927 N.A. Datum

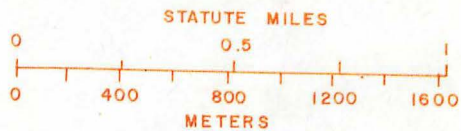


No. 2

37° 07' +

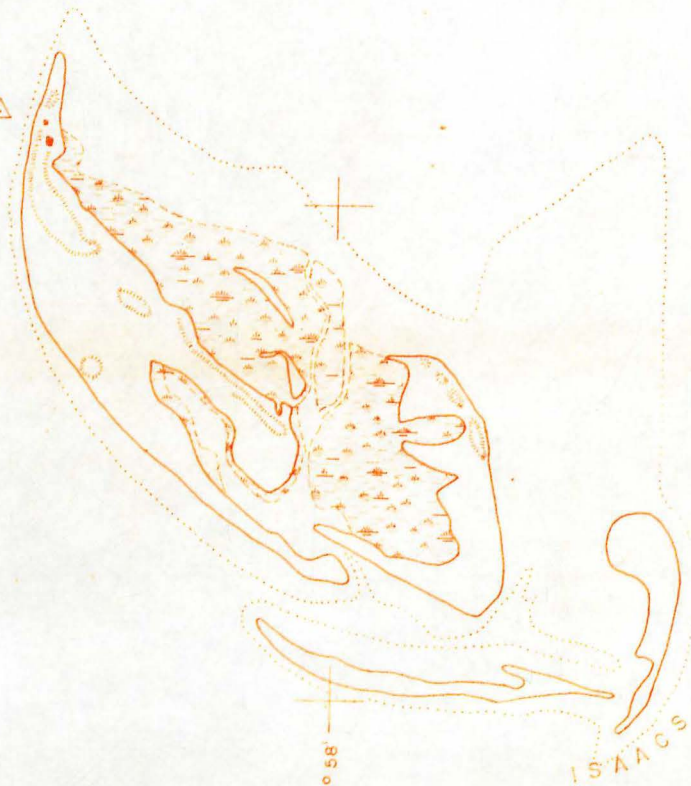


FISHERMAN ISLAND, 1888
(from Coast Survey Chart T-1203)
1927 N.A. Datum



FISHERMAN Δ

37° 06' +



37° 05' +

75° 59' +

75° 58' +

75° 57' +

75° 57' +

No. 1

CAPE CHARLES

FISHERMAN ISLAND, 1869
(from Coast Survey Chart H-1013)
1927 N.A. Datum

