

STATEMENT OF

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SELECTMAN

ON BEHALF OF
THE TOWN OF CHATHAM, MASSACHUSETTS

BEFORE THE
SUBCOMMITTEE ON FEDERAL LANDS
COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 5, 2107

ON

H.R. 1157:

A BILL TO CLARIFY THE UNITED STATES INTEREST IN CERTAIN SUBMERGED LANDS IN
THE AREA OF MONOMOY NATIONAL WILDLIFE REFUGE

Chairman McClintock, Ranking Member Hanabusa, and Subcommittee Members, My name is Seth Taylor, I am a member of the Chatham, Massachusetts, Board of Selectmen. With me today are Chatham's Town Manager Jill Goldsmith and Director of Natural Resources Dr. Robert Duncanson. I first want to thank Representative Keating for his leadership on this issue, and Governor Charlie Baker for supporting this bipartisan legislation. We've received letters and expressions of support for the Town's position from a broad base of interests including Barnstable County Assembly of Delegates, virtually every Cape Cod and Islands town, City of New Bedford, Cape Cod and Chatham Chambers of Commerce, Association to Preserve Cape Cod, civic organizations, and many, many residents and visitors and we wish to thank them all for their support.

The bill before this Subcommittee, H.R. 1157, reaffirms the historically recognized boundary of the Monomoy National Wildlife Refuge (Refuge), which is located within the geographic boundary of the Town of Chatham (Town). The bill does nothing more than confirm what has been understood and accepted as the western boundary of the Refuge for more than seventy years. The bill is needed to permanently correct an egregious and illegal taking of submerged lands west of Monomoy Island from the Commonwealth of Massachusetts by the U.S. Fish and Wildlife Service (FWS).

For those of you unfamiliar with Chatham, it is a small coastal community, one of 15-towns that comprise Barnstable County, better known as Cape Cod. The Cape extends into the Atlantic Ocean from the body of Massachusetts like a clenched-fist arm; Chatham is the "elbow" of the arm, and the easternmost projection of Massachusetts into the Atlantic. Chatham has a population of approximately 6,000 year-round residents and a summer population approaching 25,000.

In 1944 the United States moved to acquire Monomoy Island from the Town, intending to make it a refuge for waterfowl, consistent with the United States' obligations under the Migratory Bird Treaty Act. The U.S. Government proceeded to acquire title to Monomoy by way of a "Declaration of Taking" (DOT). The title of the Order of Taking declares, in pertinent part: "*The United States of America, petitioner, versus 3,000 Acres of Land, More or Less*". The lands to be taken were further described as being limited to those lands above mean low water. Some specifically described pieces of the proposed taking were identified by their local names, such as "Sheeters Island" (Shooters Island). However, since much of the taking was not specifically identifiable, a general and generic description of the expanse of the taking was included. Regardless of whether the portions of land to be taken were generally or specifically identified, all of the taking was constrained by two things: first being the mean low water line, and second being specifically described within the "exterior" limits. The exterior limits were defined lines of latitude and longitude, which provided the southernmost and westernmost extent of the refuge, and any lands that might then, or in the future, appear or exist due to shifting sands. The only other proviso applicable to the DOT was that, within these defined geographic limits, the taking only contemplated lands above mean low water. The general size of the Refuge at the time of the intended taking was 3,000 acres, more or less.

Since the 1944 taking, federal, state, and local governments, as well as Cape Cod residents and visitors, have all recognized the Refuge as consisting of approximately 3,000 acres of upland on Monomoy Island and surrounding intertidal flats. Attached to my testimony is a list of historical citations where FWS has characterized the Refuge as consisting of approximately 3,000 acres. As mentioned above, the boundary of the Refuge, consisting of uplands, marshes, sand dunes, and the intertidal areas, was recognized as the mean low water line. All land above the mean low water line was considered part of the Refuge but ownership of submerged lands and overlying waters in Nantucket Sound remained with the Commonwealth. That is, until the FWS re-interpreted the DOT, changed their position and started characterizing the Refuge as consisting of more than 7,000 acres.

The effort to resolve this dispute started in early 2014 when FWS released its Draft Comprehensive Conservation Plan (DCCP) for managing the Refuge. The Town and the Commonwealth were surprised that, for the first time since creation of the Refuge, the DCCP contained a written position that FWS owned the submerged lands and overlying open waters west of Monomoy Island and intended to exert management authority over these areas and resources. Such a position was not evident in the previous refuge management plan (*1988 Environmental Assessment, Master Plan, Monomoy National Wildlife Refuge*). This significant change in management direction, for no environmental or conservation reason, is in large part why residents and public officials were so surprised and concerned. The Town and Commonwealth have, for generations, effectively managed these open waters and submerged lands, and the resources contained within, to the benefit of the environment, the public, and Refuge. The Town and Commonwealth immediately expressed their opposition to this new, unjustified taking, and developed and submitted to FWS extensive legal comments substantiating our position during the DCCP comment period.

Contrary to decades of historical precedent and as a result of their reinterpretation of the DOT, the FWS now contends that a line drawn over the westerly open waters on a map accompanying the DOT is to be interpreted as the Refuge boundary. The Town and the Commonwealth know that the mapped line only depicts the exterior limit of the DOT for the purpose of including in the Refuge any land above mean low water that may accrete or buildup inside the line. This is consistent with the DOT language which speaks to “...land lying above mean low water...”. The DOT map legend itself states “*Limits of Declaration of Taking June 1, 1944 on Lands To Mean Low Water*”. Historic documents from the 1930’s and 40’s show that FWS could not conclusively determine the upland limits of Monomoy Island due to its changing nature, so they simply drew a line to the west of Monomoy Island. Monomoy Island’s western coastline is typified by constant change, the result of which has been the appearance and disappearance of new and often ephemeral land masses above mean low water. By drawing a rectangular box, FWS was able to capture such transient upland areas within the Refuge, so long as such lands were within the rectangular box. From the beginning, FWS was aware of the dynamic nature of Monomoy’s western coastline and the slow westerly movement of the island. As sand builds up over time and the island moves to the west, this accreted land above mean low water becomes part of the Refuge.

The position of the Town and Commonwealth is also supported by the legislative record for designation of a portion of the Refuge as Wilderness Area; as well as past FWS positions, all confirming that the FWS did not acquire any of the Commonwealth’s submerged lands pursuant to the DOT. The 1968 and 1969 reports from the U.S. Senate Committee on Interior and Insular Affairs on legislation to designate the Monomoy Wilderness Area described the proposed “*exterior boundaries of the wilderness proposal*” as “*all lands on Monomoy Island to the line of low tide which coincides with the national refuge boundary around the island*”.¹ Despite involvement of the Department of Interior in the wilderness designation process, the Department of Interior never objected to Congresses description of the Refuge. Congress understood, and Interior agreed, that the Refuge consisted of all the land area (only) contained in the box drawn on the 1944 map depicting the Refuge.

Moreover, the FWS’s 1986 Draft and 1988 Final Environmental Assessments for the Master Plan for the Refuge state that the “*Declaration of Taking which created the Refuge in 1944 established a boundary line to the west of Monomoy...and provided for inclusion in the refuge of all land which may accrete within the boundary*”.² In that Final Master Plan FWS also explained that “*under Massachusetts law, derived from the Great Colonial Ordinance of 1641, an upland landowner’s property extends to the low water mark or 100 rods from the ordinary high water mark, whichever is less*”³. Clearly FWS’s reinterpretation of the DOT is inconsistent with congressional intent as well as the agency’s historical position on the western boundary. Despite persistent, historical, reasonable, and legally objective standards of opposition by the Town and Commonwealth, the FWS, by and through the Final CCP, has presumed the right to impose regulations on all activities occurring in and on the open water and submerged lands of Nantucket Sound within the extreme original limits of the DOT.

¹ SEN. REP. NO. 91-198, at 2 (1969); SEN. REP. NO. 90-1368, at 5 (1968).

² 1988 FINAL MONOMOY MASTER PLAN at 39; see also id. at 7; U.S. FWS, U.S. DEPT OF THE INTERIOR, DRAFT ENVIRONMENTAL ASSESSMENT : MASTER PLAN-MONOMOY NAT’L WILDLIFE REFUGE 7, 45 (Nov. 1986).

³ 1988 FINAL MASTER PLAN at 7.

Unfortunately, some national environmental groups have come out against the bill. They claim that the Refuge is under threat; that the proposed legislation would give away half the Refuge, and that horseshoe crabs and the wildlife they support would again be at risk. Let me assure you that this is not the intention of the Town and frankly these allegations are not based on any facts. As a matter of record, none of these groups can point to any activity sanctioned by the Town that has created a negative impact on Refuge resources!

Obviously these groups are not familiar with the Refuge and do not know of our Town and community's long history of environmental protection and sustainable resource utilization. Chatham has been at the forefront of working to mitigate adverse environmental problems brought on by too many people in too small a space, common to popular tourist destinations. Chatham enacted some of the most stringent local wetland bylaws that exist anywhere in the state, and likely the nation. Chatham was the first town on Cape Cod to implement a Comprehensive Wastewater Management Plan that complies with the Clean Water Act, and we have spent more than \$100 million, to date, on a sewer project to reduce the impact of nitrogen to estuaries and coastal waters. Our Town spends millions of dollars annually to fund and staff offices devoted to Natural Resources, Coastal Resources, Shellfish, Harbormaster, Police and Fire, all of which have a role in sustainably managing resources, protecting endangered species, and overseeing appropriate, safe public access.

Chatham's shellfish industry, much of which occurs in and around Monomoy Island, brings in millions of dollars to our local economy which is why we are dedicated to long-term sustainable resource management and why we devote the necessary resources to manage natural resources. Despite this current dispute, the Town and FWS have maintained a very good working relationship to ensure that Refuge resources are protected. For example, FWS was concerned about harvesting of small mussels near the Refuge as small mussels are a source of food for many waterfowl. After FWS brought this concern to the Town, the Town instituted regulations setting minimum size and minimum harvesting depth so that small mussels would be available to waterfowl. The Town has supported FWS research on migratory birds, and other endangered species, by allowing FWS to conduct research on town-owned beaches. Concern has been raised about horseshoe crabs as there is currently a prohibition on the harvest of horseshoe crabs. The Town has committed to continuing this ban once the submerged lands ownership issue is resolved.

What environmental opponents to this legislation don't understand or appreciate is that the natural resources of this area have been cared for, protected, and managed by the Town and Commonwealth for decades (long before FWS). There has been no finding by FWS of a single management practice of either the Commonwealth or Town that has been harmful to the Refuge or the plants and animals that live there. In fact, both Chatham and the Commonwealth have well documented environmental stewardship and responsible resource management records, which are beyond reproach.

In summary, the Town of Chatham and Commonwealth of Massachusetts have, for generations, effectively managed the open waters and submerged lands west of Monomoy Island, and the resources contained within, to the benefit of the environment, the public, and the Refuge. Regulations governing these areas and resources have been implemented, or revised, as needed

to ensure the long-term sustainability of these resources for use by the public and in support of Refuge goals. Our Town will unequivocally continue our stewardship responsibilities once HR 1157 is enacted into law and as we have done in the past, the Town will work cooperatively with FWS to ensure that Refuge resources are protected.

Mr. Chairman, I hope that I have demonstrated through my testimony that there was absolutely no reason for FWS to usurp local and state management of the open waters and submerged lands west of Monomoy Islands for environmental reasons. Similarly, there is no legal basis for them to reinterpret the original DOT so they can expand their ownership and control over 7,000 acres (not 3,000). If FWS's unsubstantiated claim is allowed to stand, it would forever cede jurisdiction and management authority over the submerged lands and open waters of an area owned by the Commonwealth and cared for by our Town to an Agency with insufficient resources or understanding to properly manage them.

Thank you for this opportunity to testify on HR 1157 and we hope that this Subcommittee will support the legislation clarifying the Refuge's western boundary. I would be pleased to answer any questions.

Attachments:

1944 Refuge map

Acreage references

MA Attorney General's December 5, 2015 letter to FWS

Monomoy National Wildlife Refuge References to Acreage/Mean Low Tide

1929 Monomoy, Barnstable County, Massachusetts Investigated by Neil Hotchkiss and Leonard E. Ekvall

- *“As a refuge for waterfowl, the area is not particularly desirable, but it should be kept in as much isolation as at present and should be protected for the sake of breeding gulls and terns.”* (page 3)

1938 Proposed Monomoy Island Migratory Waterfowl Refuge Cape Cod, Massachusetts (USFWS)

- *“Size. 300 acres of marsh, 1600 acres of sand beach, 1800 acres of shoal water. [3,400]”*
- *“The proposed area as outlined on the accompanying map includes an area of about 3700 acres. Three hundred acres of the total is marshland most of which lies between Romp Hole and Morris Island. A small part of this salt marsh extends to the beach south of Romp Hole. There are 1600 acres of sand beach included, also 1800 of shoal water which were formerly used by brant and geese.”* (page 2)
- *“The cost of acquisition is estimated at \$5.00 per acre, a total of \$9500 for the 1900 acres of beach and marshland recommended for inclusion [in] the refuge boundaries.”* (page 2)

1938 Memorandum to Dr. Gabrielson Proposing the Monomoy Island Migratory Waterfowl Refuge (USFWS)

- *“... is that by ownership of the land area, the Bureau can close the water area immediately west of the island which can be re-established.”* (page 2)
- *“... that the Bureau acquire title to the land area enclosed within the red line on the attached Coast Guard chart.”* (page 2)

1944 Declaration of Taking/Judgement on the Declaration of Taking

- *“United States of America, Petitioner, v. 3,000 Acres of Land, more or less, Situated in Barnstable County, Commonwealth of Massachusetts, Susie H. Kosak, Et Al., Defendants.*
- *“... more particularly described as being all those tracts or parcels of land lying above mean low water, including a portion of Morris Island: all of Monomoy Beach, Monomoy Island, and Monomoy Point; Sheeters Island; together with all land covered by the waters of land locked ponds; and all islands, islets, sand bars and tidal flats lying in Nantucket Sound, Chatham Bay and Stage Harbor; all lying within the following described exterior limits: ...”.* (page 2)
- *Map Legend: “Limits of Declaration of Taking June 1, 1944 On Lands To Mean Low Water”* (USFWS attached; contained in - The Road to Monomoy: Chatham, Massachusetts and the Cape Cod National Seashore {Masters Thesis Douglas Doe}) (page 36)

1945 Statement of United States Fish and Wildlife Service Concerning the Monomoy National Wildlife Refuge Controversy, Barnstable County , Massachusetts

- *“The Monomoy National Wildlife Refuge covers approximately 3,000 acres comprising a point of land approximately 8 miles long and varying in width from one-eighth to one mile lying immediately south of the Village of Chatham ...”*. (page 4)

1951 Memo, Regional Director Gascoyne, USFWS (quoted in - The Road to Monomoy: Chatham, Massachusetts and the Cape Cod National Seashore {Masters Thesis Douglas Doe})

- *“... that the Refuge be closed ...”*. *“... and it was “poor management to retain control of about 3,000 acres, most of which is sand dune,” ...”*. (page 47)

1966 Monomoy National Wildlife Refuge [Brochure] (USFWS)

- *“Monomoy Island is a coastal barrier beach of about 3,300 acres.”* (page 1)

1967 Monomoy Island Wilderness Study Area, Wilderness Study Report (USFWS)

- *“The Monomoy National Wildlife Refuge comprises 2,697 acres of predominantly barrier beach island, with adjacent salt marsh, flats and some upland.”* (page 6)
- *“Except for a four-acre interior tract, the Bureau [Bureau of Sport Fisheries and Wildlife, USFWS] owns the Monomoy Island in fee to mean low tide.”* (page 6)

1969 Designating Monomoy Wilderness Area in Massachusetts (Committee on Interior and Insular Affairs)

- *“The exterior boundaries of the wilderness proposal are all lands on Monomoy Island to the line of mean low tide which coincides with the national wildlife refuge boundary around the island.”* (page 2)

1988 Environmental Assessment, Master plan, MNWR (USFWS)

- *“About 2,600 acres on the Monomoy Islands comprise the Monomoy Wilderness Area.”* (page 1)
- *“The refuge consists of north and South Monomoy Islands, as well as about 40 acres on Morris Island, ...”*. (page 39)
- *“The ephemeral configuration of the Monomoy Islands makes it impossible to accurately state the refuge size. In 1984, the islands encompassed approximately 2750 acres, including about 750 acres of intertidal marine mud and sand flats.”* (page 39)
- *“The Declaration of Taking which created the refuge in 1944 established a boundary line to the west of Monomoy (shown on Figure 2 on page 3) and provided for inclusion in the refuge of all land which may accrete within the boundary (U.S. District Court 1944).”* (page 39) {emphasis added}

2000 Monomoy National Wildlife Refuge Morris Island Trail Brochure (USFWS)

- *“The refuge consists of 2,750 acres that is only accessible by boat except for the 40-acre unit of Morris Island.” (page 2)*

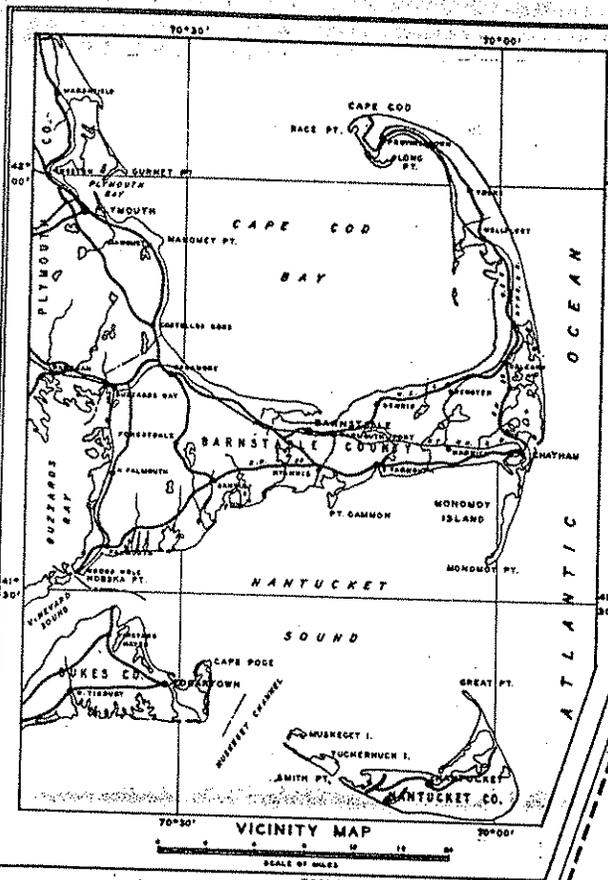
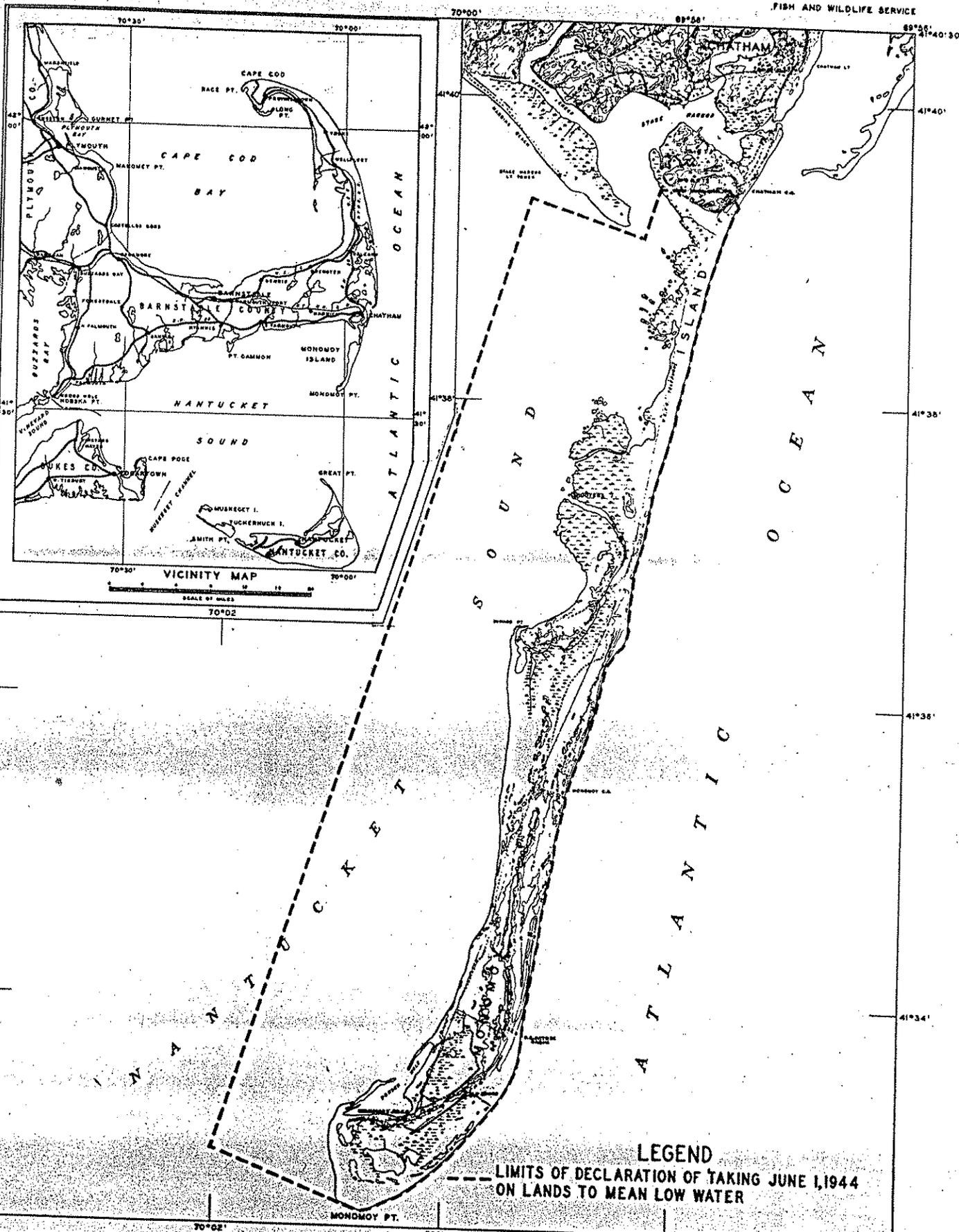
MONOMOY NATIONAL WILDLIFE REFUGE

U.S. DEPARTMENT OF THE INTERIOR

BARNSTABLE COUNTY, MASSACHUSETTS

33513

FISH AND WILDLIFE SERVICE



LEGEND
LIMITS OF DECLARATION OF TAKING JUNE 1, 1944
ON LANDS TO MEAN LOW WATER

COMPILED IN THE DIVISION OF LANDS
FROM SURVEYS BY U.S.G.S.

WASHINGTON, D.C.
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APRIL 1941

