Supreme Court, U. S.
FILED
FEB 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA,
Defendants.

MOTION BY THE STATE OF ALABAMA FOR ENTRY OF SUPPLEMENTAL DECREE

MEMORANDUM IN SUPPORT OF MOTION FOR SUPPLEMENTAL DECREE

CHARLES A. GRADDICK
Attorney General

BENJAMIN G. COHEN
Assistant Attorney General

MARK EDWARD BRANDON
Assistant Attorney General

ROBERT A. MACRORY
Assistant Attorney General

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
Telephone: (205) 834-5150

Attorneys for Defendant
State of Alabama

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

MOTION BY THE STATE OF ALABAMA FOR ENTRY OF SUPPLEMENTAL DECREE 1

STATEMENT IN SUPPORT OF MOTION 2

MEMORANDUM IN SUPPORT OF MOTION FOR SUPPLEMENTAL DECREE 6

I. Mississippi Sound Is Inland Waters And Passed to Alabama Under The Rule In *Pollard's Lessee v. Hagan* 6

II. Mississippi Sound Is Inland Waters Under The Submerged Lands Act 11

III. Mississippi Sound Is Ecologically Separate From The Open Sea 16

IV. Conclusion 20

PROOF OF SERVICE 21

EXHIBITS

1. Reduced copy of map entitled "Outer Continental Shelf Official Protraction Diagram, Mobile, NH 16-4" dated 21 December 1977 ..... Inside Back Cover Pocket

2. Copy of map entitled "United States Department of the Interior, Bureau of Land Management, Outer Continental Shelf Leasing Map, Alabama, Mobile Area" undated ..... Inside Back Cover Pocket

3. Reduced copy of map entitled "State of Alabama Chart of Submerged State Land Oil Lease Tracts" dated March 1956 ..... Inside Back Cover Pocket

4. Reduced copy of map entitled "State of Alabama Chart of Submerged State Land Oil Lease Tracts Within 3 Marine Miles of Shoreline" dated September 1977 ..... Inside Back Cover Pocket

5. Copy of letter to Mr. John W. Hodnett from Mr. H. P. Sieverding, dated 12 January 1978 22

6. Copy of letter to Mr. H. P. Sieverding from Mr. William G. O'Rear, dated 14 February 1978 23

7. Copy of memorandum to Mr. Edward H. Reynolds from Mr. William G. O'Rear, dated 1 June 1978 24

8. Copy of letter to Mr. B. W. Hostrop from Mr. William G. O'Rear, dated 11 October 1978 26

TABLE OF AUTHORITIES

Cases Page

Louisiana v. Mississippi,
202 U.S. 1 (1905), *decree entered per curiam*, 202 U.S. 58 (1906) 8, 9

Pollard's Lessee v. Hagan,
3 How. 212 (1845) 6, 7, 9, 10, 11, 20

United States v. Alaska,
422 U.S. 184 (1975) 12, 16

United States v. California,
332 U.S. 19 (1947), *decree entered*,
332 U.S. 804 (1947) 10

United States v. California,
381 U.S. 139 (1965), *supplemental decree entered per curiam*, 382 U.S. 448 (1966) 12

United States v. Louisiana,
363 U.S. 1 (1960), *final decree entered*,
364 U.S. 502 (1960) 7, 8, 9, 10, 11, 15

United States v. Louisiana,
394 U.S. 11 (1969) 12

Constitutional Provision

Constitution of the United States,
Amendment X 14

Statutes and Legislative Acts

Submerged Lands Act, 43 U.S.C. §1301
et seq. (1953) 10
Section 1301(b) 11
Section 1301(c) 2, 11
Section 1313 1

Code of Alabama 1852, §§1121-1128(a) 12

Code of Alabama 1867, §§1301-1309 12

Code of Alabama 1876, §§1609-1618 12

Title 8, §112, *Code of Alabama* 1940 13

Code of Alabama 1975, §9-12-22 13

1915 Ala. Acts, No. 107, §1
(codified at *Code of Alabama* 1923,
§2724) 13

1939 Ala. Acts, Reg. Sess., No. 162
(codified in scattered sections
of Title 8, *Code of Alabama* 1940) 13

1951 Ala. Acts, Reg. Sess., No. 476
(codified in scattered sections of
Title 9, *Code of Alabama* 1975) 13
Section 12 (codified in *Code of*
Alabama 1975, §9-2-85) 14

1956 Ala. Acts, 1st Ex. Sess., No. 158
§4 (codified in *Code of Alabama* 1975,
§9-17-62) 15

Other Authorities

Bault, *Hydrology of Alabama Estuarine*
Areas — Cooperative Gulf of Mexico
Estuarine Inventory, 7 Alabama Marine
Resources Bulletin 1 (1972) 17

Convention on the Territorial Sea and
Contiguous Zone, 15 U.S.T. 1606,
T.I.A.S. No. 5639 12

Crance, *Description of Alabama Estuarine*
Areas — Cooperative Gulf of Mexico
Estuarine Inventory, 6 Alabama Marine
Resources Bulletin 1 (1971) 17

TerEco Corp., Literature Review of the Mississippi Sound and Adjacent Area, A Report to the Department of the Army, Prepared Under Contract No. DACW1-78-C-0244 (Feb. 1979) 18, 19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 9, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA,

Defendants.

MOTION BY THE STATE OF ALABAMA FOR ENTRY OF SUPPLEMENTAL DECREE

The State of Alabama, by its Attorney General Charles A. Graddick, moves this Court for entry of a Supplemental Decree declaring:

A. As against the United States, with the exceptions provided by §5 of the Submerged Lands Act, 43 U.S.C. §1313 (1953), the State of Alabama is entitled to all the lands, minerals and other natural resources underlying:

1. That portion of the Mississippi Sound bordered on the north by Mobile County, Alabama, on the east by Mobile Bay, on the south by a line from Mobile Point, Alabama, running westward along the seaward side of Dauphin Island to the boundary of

Alabama and Mississippi, and on the west by the Alabama, Mississippi boundary; and

2. The Gulf of Mexico, extending seaward from Alabama's coastline for a distance of three geographic miles;

B. Alabama's coastline, in light of §2(c) of the Submerged Lands Act, 43 U.S.C. §1301(c) (1953), is the line of ordinary low water along that portion of Alabama's coast from its southernmost boundary with Florida, west to Mobile Point, Alabama, extending to and continuing along the seaward side of Dauphin Island, and then westward to its southernmost boundary with Mississippi. This coastline is in direct contact with the open sea, the Gulf of Mexico, and marks the seaward limit of Alabama's inland waters, the Mississippi Sound. It is the baseline for measuring Alabama's three geographic mile limit;

C. As against the State of Alabama, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico that are more than three geographic miles gulfward from Alabama's coastline;

D. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree, the conclusions reached in its 31 May 1960 opinion, or the decree of 12 December 1960, or to effectuate the rights of the parties in the premises.

STATEMENT IN SUPPORT OF MOTION

Alabama adopts all and reiterates portions of the Motion for Entry of Supplemental Decree, Proposed Supplemental Decree and Memorandum in Support of Motion for Supplemental Decree filed herein by the State of Mississippi and served on Alabama 31 October 1979. Alabama adds, along with a Memorandum in Support of Motion for Supplemental Decree:

1. The purpose of this motion is to establish Alabama's coastline and its clear title to all the lands, minerals and other natural resources underlying the Mississippi Sound and the Gulf of Mexico, extending seaward three geographic miles from its coastline.

2. Previously in this litigation, the Court held all the lands, minerals and other natural resources underlying the Gulf of Mexico, extending three geographic miles from Alabama's coastline passed to Alabama on its 1819 entry into the Union. The coastline was not determined; it was recognized, however, that the three geographic mile limit was dependent on the position of the coastline.

3. Coastline is defined in the Submerged Lands Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

4. Alabama's coastline is the line of ordinary low water along a line from its southernmost boundary with Florida, west to Mobile Point, Alabama, extending to and continuing along the seaward side of Dauphin Island and then westward to its southernmost boundary with Mississippi. This coastline is in direct contact with the open sea, the Gulf of Mexico, and marks the seaward limit of Alabama's inland waters, the Mississippi Sound.

5. Mississippi Sound is inland waters.

(a) In 1905, the Court recognized Mississippi Sound as inland waters extending from Mobile, Alabama, to Cat Island.

(b) On at least two occasions, the United States conceded that Mississippi Sound is inland waters. In an undated Outer Continental Shelf Leasing Map, prepared in accordance with 43 C.F.R. 3380.2, the United States Department of the Interior, Bureau of Land Management, depicted Alabama's three geographic mile limit

as emanating from the coastline described above in Number 4. Similarly, in its 1960 brief, the United States conceded Mississippi Sound is inland waters and Alabama's three geographic mile limit extends seaward from the islands marking the outer limit of these waters.

(c) Therefore, all the lands, minerals and other natural resources underlying Mississippi Sound passed to Alabama upon its entry into the Union in 1819.

6. Mississippi Sound is an "historic bay," and hence is inland waters.

(a) From 1819, Alabama has continually exercised uninterrupted and complete authority over the waters of and all the lands, minerals and other natural resources underlying the Mississippi Sound. In turn, the United States acquiesced in this exercise of authority.

(b) Therefore, Alabama owns all the lands, minerals and other natural resources underlying the Mississippi Sound by virtue of the Submerged Lands Act.

7. Mississippi Sound is an ecological system distinct from the Gulf of Mexico. Factors such as geology, location, depth, dilution by fresh water, salinity, and migratory patterns of marine life distinguish it from the Gulf but dramatize its similarity to Mobile Bay. This estuarine complex is affected by the Bay and the islands framing its southernmost boundary. The ecological realities of the Mississippi Sound should not be ignored and dictate its separation from the Gulf of Mexico and its designation as inland waters, under Alabama's control.

8. Through Outer Continental Shelf Official Protraction Diagram NH 16-4, dated 21 December 1977, the United States asserts leasing authority over an area of the Mississippi Sound. This area, depicted

as leasing blocks 687, 688, 730, 731, 732 is within Alabama's inland waters. In asserting its claim, the United States precludes a nonjudicially established determination of the location of Alabama's coastline.

9. Alabama asks for this determination of its coastline. Total control over its inland waters is necessary to promote fair and responsible management of its natural resources. The present situation creates a cloud on its title and certain disruption of enforcement of its numerous and important police powers in the Mississippi Sound.

Respectfully submitted,

CHARLES A. GRADDICK
Alabama Attorney General

BENJAMIN G. COHEN
Assistant Attorney General

MARK EDWARD BRANDON
Assistant Attorney General

ROBERT A. MACRORY
Assistant Attorney General

Attorney General's Office
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR SUPPLEMENTAL DECREE

I.

MISSISSIPPI SOUND IS INLAND WATERS AND PASSED TO ALABAMA UNDER THE RULE OF *POLLARD'S LESSEE v. HAGAN.*

In 1845 the Court held Alabama was entitled to all navigable waters and the soils under them within her jurisdiction. *Pollard's Lessee v. Hagan,* 3 How. 212, 229-230 (1845). Entitlement was effective upon entry into the Union. By placing this authority in Alabama, the Court sought to prevent what it envisioned as a grave deprivation of state sovereignty. Leaving this area under the control of the United States, in the words of the Court, "would be placing in their hands a weapon which might be wielded

greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." *Id.* at 230. The police powers referred to were not defined; however, they must now include the exercise of authority over oil and gas leases. Therefore, if the Court recognizes its previous decisions and the admissions by the United States discussed herein, Alabama is entitled to and may exercise its "important police powers" over Mississippi Sound.

To discuss Alabama's complex land history further would provide little assistance. The Court's treatment of the subject in *Pollard's Lessee v. Hagan*, 3 How. 212 (1845) and *United States v. Louisiana*, 363 U.S. 1 (1960), *final decree entered*, 364 U.S. 502 (1960) was extensive; however, it is necessary to state that prior to Alabama's entry into the Union in 1819, the land under the Mississippi Sound was held in trust by the United States against the world. No foreign nation presently claims the area and there is no evidence to suggest the United States exercised authority over it prior to the publication of Outer Continental Shelf Official Protraction Diagram NH 16-4, 21 December 1977. Alabama Exhibit 1. In fact the United States has admitted on at least two occasions that Mississippi Sound is inland navigable waters within the control of Alabama.

An undated map, designated United States Department of the Interior, Bureau of Land Management, Outer Continental Shelf Leasing Map, Alabama, Mobile Area, prepared in accordance with 43 C.F.R. 3380.2, clearly designates Alabama's three geographic mile limit as originating seaward of the islands framing Mississippi Sound. Alabama Exhibit 2. The United States did not then claim any portion of the Sound; conversely, it recognized that the Sound is inland waters within the control of Alabama and that Alabama's three geographic mile limit is measured seaward from Dauphin Island.

Similarly, in *United States v. Louisiana*, 363 U.S. 1 (1960) the United States conceded:

> As in the case of Louisiana (*supra*, p. 177), we

> need not consider whether the language, "including the islands" etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana v. Mississippi*, 202 U.S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee v. Hagan*, 3 How. 212. Also, we agree that Mississippi has a marginal belt extending three miles seaward from the islands marking the outer limit of the inland waters of Mississippi Sound, under the ordinary application of the three-mile rule. Thus, the only practical issue between the United States and Mississippi is whether the statutory expression, "including all the islands within six leagues of the shore," described a water area (containing no islands) extending more than three miles seaward of the outermost islands off Mississippi. For the reasons stated, we submit that it did not.

Brief for Plaintiff at 254, *United States v. Louisiana*, 363 U.S. 1 (1960). This accurate interpretation of *Louisiana v. Mississippi*, 202 U.S. 1 (1905), *decree entered per curiam*, 202 U.S. 58 (1906), stems from the following:

> Mississippi's mainland borders on Mississippi Sound. This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them 6 miles wide. Such openings occur between Cat Island and Isle a Pitre; between Cat and Ship islands; between Ship and Horn islands; between Horn and Petit Bois islands; between Petit Bois and Dauphin islands; between Dauphin Island and the mainland on the west coast of Mobile Bay.

Id. at 48. The Court was cognizant of this interpretation and noted it:

> The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, 3 How. 212. Furthermore, since the islands enclose inland waters, a line drawn around those islands and the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coasts, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well. We do not intend, however, in passing on these motions, to settle the location of the coastline of Louisiana or that of any other State.

United States v. Louisiana, 363 U.S. at 66 n.108.

Mississippi Sound is therefore inland navigable waters and *Pollard* should be applied. The rule is that "the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission." *Id.* at 16 (citation and footnote omitted). The only conclusion reachable can be found in Mr. Justice Douglas's statement:

> The United States concedes that, so far as Louisiana, Mississippi and Alabama are concerned, all the submerged lands between the mainland and the islands are sufficiently enclosed to constitute inland waters that passed to the State on its entry into the Union. *Pollard v. Hagan*, 3 How. 212. It further concedes that these States have rights to the submerged lands within three miles of the islands under the ordinary three-mile rule.

Id. at 118 (Douglas, J., dissenting in part).

The Sound's status as inland waters was not affected by *United States v. California*, 332 U.S. 19 (1947), *decree entered* 332 U.S. 804 (1947), or the Submerged Lands Act, 43 U.S.C. §1301 *et seq* (1953). Any contention to the contrary would be in error. *United States v. California* dispelled the belief that *Pollard* applied to all navigable waters within a state's jurisdiction. In correcting this misconception the Court said:

> The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

United States v. California, 332 U.S. at 805. The *Pollard* inland water rule was not altered. The lands, minerals and other things underlying the Pacific Ocean lying inland of the ordinary low water mark on the coast of California and within its inland waters, belong to California.

Similarly *Pollard* was unaffected by the Submerged Lands Act. This Act drastically changed the rule in *United States v. California* but reinforced *Pollard*. It states in

part, "The term 'boundaries' includes the seaward boundaries of a State . . . as they existed at the time such State became a member of the Union . . . ." Submerged Lands Act, 43 U.S.C. §1301(b). Although Alabama's coastline has not been determined, its boundary, as it existed at the time of entry into the Union was recognized by the Court when it said, "Its [Alabama's] Act of Admission incorporated the Enabling Act, which described its boundary in part as follows: 'thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore, to the Perdido river . . . .' " *United States v. Louisiana*, 363 U.S. at 82 (footnotes omitted). Therefore Mississippi Sound was within Alabama's boundary when Alabama became a State and would be subject to *Pollard.*

II.

MISSISSIPPI SOUND IS INLAND WATERS UNDER THE SUBMERGED LANDS ACT

Alabama is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico extending three geographic miles seaward from its coastline. The Court so held in *United States v. Louisiana*, 364 U.S. at 503, but did not express an opinion as to the location of that coastline. *United States v. Louisiana*, 363 U.S. at 82 n. 139. Therefore, one question remains: what is the location of Alabama's coastline?

Coastline is defined in the Submerged Lands Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;" 43 U.S.C. §1301(c). If the Court agrees that Mississippi Sound has always been inland waters, the Sound is within Alabama's jurisdiction. Consequently its coastline, as defined, would be the line marking the seaward limit of Mississippi Sound. If the Court disagrees, Alabama argues

the Sound is an historic bay and therefore inland waters.

Generally inland waters is defined by the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, but historic bays are excluded from this rule. Convention at 1609, Article 7, ¶6. In light of this exception, an historic bay may qualify for inland water status independently of the Convention if it satisfies three criteria. These criteria, recognized in *United States v. California*, 381 U.S. 139, 172 (1965), *supplemental decree entered per curiam*, 382 U.S. 448 (1966), and *United States v. Louisiana*, 394 U.S. 11, 75, 23-24, n.27 (1969) were outlined in *United States v. Alaska*, 422 U.S. 184 (1975):

> (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority . . . .

Id. at 189 (citations and footnotes omitted).

Mississippi Sound is an historic bay through the above test. From 1819 Alabama has exercised continuous authority over its portion of the Sound and the United States has acquiesced in this exercise of authority. A review of the history of Alabama legislative enactments demonstrates a long, continuous and active exercise of police jurisdiction in the territorial waters of Alabama. Title 13, Chapter 13, *Code of Alabama* 1867, entitled "Preservation of Oysters," sets out nine sections regulating the taking of oysters from the waters of Alabama. *Id.* §§1301-1309. Each of these sections cites the section number of the same or similar provision contained in the *Code of Alabama* 1852, §§1121-1128(a). Title 13, Chapter 15, *Code of Alabama* 1876, entitled "Preservation and Planting of Oysters," brought these basic provisions of the law of Alabama forward. *Id.* §§1609-1618. In fact, every code adopted by the legislature since 1852 has maintained a strong control over the harvesting of oysters, expanding this exercise of jurisdiction over the years so that other seafoods, in addition to oysters, have been actively regulated.

In 1915, the Alabama Legislature enacted Act Number 107 which declared, "That all the beds and bottoms of the waters, bayous, lagoons, lakes, bays, *sounds* and inlets within the jurisdiction of the State of Alabama are declared to be the property of the State of Alabama, to be held in trust for the people thereof, ..." 1915 Ala. Acts, No. 107, at 145, §1 (codified at *Code of Alabama* 1923, §2724) (emphasis added). This declaration has been carried forward since 1915 and is now set out in *Code of Alabama* 1975, §9-12-22.

The Alabama Legislature, in 1939, consolidated various state agencies and offices regulating the wildlife resources of the State of Alabama by creating the Department of Conservation. 1939 Ala. Acts, Reg. Sess., No. 162, at 255 (codified in scattered sections of Title 8, *Code of Alabama* 1940). That same legislature adopted the *Code of Alabama* 1940, which provided:

> All seafoods existing or living in the waters of Alabama not held in private ownership legally acquired, and all beds and waters of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico, or *Mississippi Sound*, within the territorial jurisdiction of the state of Alabama including all oysters, and other shell fish and parts thereof, grown thereon, either naturally or cultivated, shall be, continue, and remain the property of the state of Alabama, to be held in trust for the people thereof, until title thereto shall be legally divested in the manner and form hereinafter authorized, and the same shall be under the exclusive control of the department of conservation until the right of private ownership shall vest therein as hereinafter provided.

Title 8, §112, *Code of Alabama* 1940 (emphasis added). In 1951, the Legislature of Alabama established within the Department of Conservation a Division of Seafoods, now called Marine Resources. 1951 Ala. Acts, Reg. Sess., No.

476, at 840 (codified in scattered sections of Title 9, *Code of Alabama* 1975). Section 12 of Act No. 476 provides in part:

> The employees of the Division of Seafoods shall diligently enforce all laws and regulations of the Department now existing or which may hereafter be enacted or promulgated for the protection, propagation, preservation or conservation of the seafoods of the State of Alabama and shall prosecute all persons who violate any of such laws or regulations. Such employees shall, at any and all times, seize any and all oysters, salt water fish or other seafoods which have been caught, taken or transported in a manner contrary to the laws or regulations based thereunder of this State.

Id. at 843 (codified in *Code of Alabama* 1975, §9-2-85).

Enforcement of the laws and regulations pertaining to seafoods in the relatively small area of Alabama's salt and brackish waters has resulted in the issuance of as many as several hundred citations in one year. Many cases have been made each year in the subject area of the Mississippi Sound where Alabama has asserted its authority to enforce seafood laws. No such authority was granted to the United States by the Constitution; consequently, this power was reserved to the State of Alabama and its people. U.S. CONST. amend. X. There is no greater example of acquiescence.

Since 1956 the Commissioner of the Department of Conservation and Natural Resources has been authorized by the legislature to lease:

> any lands or any right of any interest therein under any navigable streams or navigable waters, bays, estuaries, lagoons, bayous, or lakes and the shores along any navigable waters to high tide mark and submerged lands in the Gulf of Mexico within the historic seaward boundary of this state, which is hereby declared to extend seaward six leagues from the land bordering the

> gulf, for the exploration, development and production of oil, gas and other minerals or any one or more of them, on, in and under such lands, and such lands or interests therein for such purposes shall be supervised and managed by the Department of Conservation.

1956 Ala. Acts, 1st Ex. Sess., No. 158, at 224, §4 (codified in *Code of Alabama* 1975, §9-17-62). In March of 1956, Alabama symbolized its claim to the Mississippi Sound and the eighteen geographic mile limit emanating from its coastline. Alabama Exhibit 3. As shown, Mississippi Sound is included in Alabama's territorial jurisdiction and the eighteen geographic mile limit is measured from a line seaward of those islands marking Alabama's coastline. After *United States v. Louisiana*, (1960), Alabama revised its eighteen geographic mile limit but did not yield on its claim to Mississippi Sound. Alabama Exhibit 4. The coastline was again defined in terms of the seaward side of Dauphin and Pelican Islands and a specific interpretation of *United States v. Louisiana*, (1960), was noted. During the same period, Alabama issued seventeen permits for seismic operations, components of the oil leasing authority exemplified in Alabama Exhibits 3 and 4. Some of these permits involved the specific area now claimed by the United States and all are within the Mississippi Sound area. The latest such seismic permit was issued on January 29, 1980.

Until publication of Official Protraction Diagram NH 16-4, Alabama Exhibit 1, the United States acquiesced in Alabama's authority to lease oil and gas tracts in the Sound. In fact the United States recognized Alabama's claim in an undated outer continental shelf leasing map. Alabama Exhibit 2. This map marked Alabama's three geographic mile limit from the seaward side of Dauphin Island. The United States did not then claim any portion of the Mississippi Sound, and as stated previously, conceded the Sound was inland waters. This concession adds considerable weight to the proposition that it acquiesced in

the exercise of Alabama's authority. However, Alabama did take affirmative action to protect its claim during the United States's recent change of position. Alabama Exhibits 5, 6, 7, and 8. This failed.

In summary Alabama has actively and continuously exercised its police jurisdiction, as well as its proprietary jurisdiction, in the subject waters of Mississippi Sound. The United States in turn, has, until recently, shown no opposition to Alabama's authority and in fact has acquiesced in that authority. The Court recognizes that a body of water is inland waters if it is an historic bay. Mississippi Sound is an historic bay under the Court's criteria. Therefore, Alabama's coastline, in terms of the Submerged Lands Act, is the line of ordinary low water along that portion of Alabama's coast which is in direct contact with the Gulf of Mexico and the line marking the seaward limit of the Mississippi Sound.

III.

MISSISSIPPI SOUND IS ECOLOGICALLY SEPARATE FROM THE OPEN SEA

The Court acknowledged that additional factors may be considered to determine historic bay status. It said, "the Court appears to have accepted the general view that *at least* three factors are significant in determination of historic bay status:" *United States v. Alaska,* 422 U.S. at 189 (emphasis added). Alabama recommends a fourth factor: the subject waters must be ecologically separate from the open sea. Alabama does not ask for an expanded definition of inland waters, but asks the Court to consider the important ecological realities of the Mississippi Sound area through an historic perspective. Even though current data are supplied to satisfy factor four, historically an ecological separation of an historic bay from the open sea would certainly be significant to claiming nations' and foreign nations' biological and social management programs.

Mississippi Sound is an estuary, which is defined as, "a semienclosed coastal body of water having a free connection with the open sea and within which the sea water is measurably diluted with fresh water deriving from land drainage." Crance, *Description of Alabama Estuarine Areas—Cooperative Gulf of Mexico Estuarine Inventory,* 6 Alabama Marine Resources Bulletin 1, 2 (1971). As such, Mississippi Sound possesses qualities similar to Mobile Bay, but quite different from the open sea of the Gulf of Mexico. When compared to other Alabama estauries for fertility:

> Mississippi Sound ranked third [behind Mobile Bay and the Mobile delta] in nitrate-nitrogen, total phosphorous and fertility index. A difference of only 6 in the bottom and surface fertility index indicated fairly through [*sic*] mixing water. The fertility of the area is influenced by the waters of the Gulf of Mexico which are relatively low in fertility. However, some eutrophic materials enter from Mobile Bay, Bayou La Batre, Bayou Coden and Dauphin Island. Pascagoula Bay in Mississippi may also be a significant source of nutrients.

Bault, *Hydrology of Alabama Estuarine Areas—Cooperative Gulf of Mexico Estuarine Inventory,* 7 Alabama Marine Resources Bulletin 1, 6 (1972). This higher fertility factor makes Alabama's estuaries an extremely valuable resource. It was reported in 1967 that:

> estuarine species make up about 97.5 percent of the total commercial fisheries catch of the Gulf States where the catch of estuarine species amounted to 1.332 billion pounds during 1961. Shrimp, oysters, crabs, croakers and mullet (all estuarine dependent) landed in Alabama during 1969 were valued at $9,905,737 dockside and constituted 93.8 per cent of Alabama landings.

6 Alabama Marine Resources Bulletin, supra, at 3 (citation omitted).

Many mobile marine life species breed in coastal streams, estuaries and sounds. Seven such species are listed for the Mississippi Sound and adjacent area. TerEco Corp., Literature Review of the Mississippi Sound and Adjacent Area, A Report to the Department of the Army, Prepared Under Contract No. DACW1-78-C-0244, 99 (Feb. 1979). This document also lists nineteen such species which use estuaries, salt marshes or tidal creeks for nursery areas compared to three which use continental shelf waters. *Id.* at 102-103. An excellent example of the distinction between Mississippi Sound and the Gulf of Mexico is demonstrated in a diagram of the life cycle of the croaker. *Id.* at 86. Adult croakers spawn offshore in the Gulf of Mexico. Eggs enter the Sound through inland passes. The newly hatched larvae move closer to the shore and grow to very young juveniles. Juvenile croakers live in the sound and leave it as young adults. Most growth takes place in the estuary.

Some general conclusions about estuary habitation were derived from reviewing Mississippi Sound literature. It was stated:

> Although these habitats [nearshore habitats] are not being addressed specifically in the present report, it is important to recognize that the estuaries and sounds and their related environments are the features of greatest biological and ecological importance to the entire coastal region. Furthermore, together with passes and beaches, they are the most sensitive to disturbance.

Id. at 114.

Physical differences exist between the Mississippi Sound and the Gulf of Mexico other than the obvious ones involving depth, volume and area. Mississippi Sound and Gulf of Mexico salinity figures show one such difference. Surface salinity studies in 1976 indicated that salinity "ranged from 19 ppt [parts per thousand] near the east end of Dauphin Island to 31 ppt ten miles offshore." *Id.* at 41. Similar studies in 1975 showed that "surface salinities

near the Mississippi River and Dauphin Island measured between 27 and 28 ppt while those further [*sic*] offshore were between 34 and 35 ppt." *Id.* These variances are due to fresh water entering the Sound. It was reported that:

> The freshwater entering the Sound creates a hydraulic head, and being lighter than seawater, the freshwater tends to form a surface lens on top of the denser saltwater. Some vertical mixing occurs in the Sound, especially in the central and eastern sectors, and rarely does the water pass the barrier islands in unmixed conditions. An exception is encountered in the western sector. The Pearl River may discharge into Lake Borgne up to 400,000 cfs, and during the times of high flow the freshwater surface layer extends onto the shelf wall beyond the barrier islands. Higher salinity water from the shelf intrudes into the sound through the well-defined inter-island passes.

Id. at 40.

The ecological separation of one body of water from another is significant in determining historic bay status. Ecological systems such as the Sound require intensive management in many areas. One governing body must be allowed to control the area if treatment is to be responsible. Alabama has accomplished this in the past and should be allowed to continue its programs. The relationship between the Court's criteria one, two and three and Alabama's suggested criterion four is clear. Alabama has exercised authority over its portion of the Mississippi Sound, this exercise has been continuous and the United States has acquiesced to it. Alabama's assertion of authority has included management of marine life, enforcement of laws and control over oil tract leasing. The Sound is an ecologically separate system from the Gulf of Mexico and Alabama's approach to it must be different from its approach to the Gulf.

IV.

CONCLUSION

Mississippi Sound is inland waters under the *Pollard* rule and the Submerged Lands Act. Alabama's coastline is the line of ordinary low water along that portion of Alabama's coast which is in direct contact with the Gulf of Mexico and the line marking the seaward limit of the Mississippi Sound.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General

BENJAMIN G. COHEN
Assistant Attorney General

MARK EDWARD BRANDON
Assistant Attorney General

ROBERT A. MACRORY
Assistant Attorney General

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

(205) 834-5150

PROOF OF SERVICE

I, Benjamin G. Cohen, Assistant Attorney General, State of Alabama and a member of the Bar of the United States Supreme Court hereby certify that all parties to this action required to be served have been served with three copies of the State of Alabama's Motion for Entry of Supplemental Decree and Memorandum in Support of Motion for Supplemental Decree by placing said copies in the United States Mail, this 21st day of February, 1980, air mail, postage prepaid and properly addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Attorney General of Florida
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

Attorney General of Louisiana
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

EXHIBIT 5

In Reply Refer to: 1874-Ala.(100)

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Land Management

New Orleans, La. 70130

January 12, 1978

Mr. John W. Hodnett, Commissioner
State of Alabama
Department of Conservation &
Natural Resources
64 North Union Street
Montgomery, Alabama 36130

Dear Mr. Hodnett:

We have reviewed your 24 August 1977 oil and gas notice and accompanying charts calling for nominations of tracts seaward of your shore.

It is evident from this review that your charting of the boundary between State waters and Federal waters (the three-mile line) does not agree with the Federal depiction.

We suggest that we meet with a representative of your State to begin the process leading to the resolution of this problem. Please contact either John Rankin, Harold Sieverding, or William Overstreet of this office, telephone (504)589-6541, to make such arrangements.

Sincerely,

/s/ H. P. Sieverding
H. P. Sieverding
Acting Manager

cc: Director (700)
Director (420)

EXHIBIT 6

STATE OF ALABAMA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

Montgomery, Alabama 36130

February 14, 1978

Mr. H. P. Sieverding, Acting Manager
Bureau of Land Management
New Orleans Outer Contintental Shelf Office
Hale Boggs Federal Building
500 Camp Street—Suite 841
New Orleans, Louisiana 70130

Dear Mr. Sieverding:

The Commissioner has asked me to reply to your letter of January 12, 1978, suggesting that representatives of this State meet with your people concerning the charting of the boundary of state and federal waters offshore Alabama.

While we feel that the maps recently issued by the State are fully representative of the true three-mile line as defined by the several decisions of the United States Supreme Court, we will be pleased to meet with you as soon as a time and place can be formalized. In this regard I will call you within the next few days in order to arrange an appointment.

Sincerely,

/s/ William G. O'Rear
William G. O'Rear
Chief Counsel

cc: Mr. Edward H. Reynolds
Commissioner Hodnett

EXHIBIT 7

STATE OF ALABAMA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

Montgomery, Alabama 36130

June 1, 1978

MEMORANDUM TO:

Mr. Edward H. Reynolds,
Director
State Lands Division

On Tuesday, May 30th, I visited the Bureau of Land Management office in New Orleans and talked with Messrs. Rankin and Overstreet concerning the federally claimed "enclaves" in Alabama's Mississippi Sound.

I outlined to these gentlemen Alabama's position that all the water bottom lands in the Alabama portion of Mississippi Sound belong to the State of Alabama by virtue of the "Tidelands Act" and subsequent court decision pertaining thereto, and specifically that the Sound was an "historic bay." Mr. Overstreet advised that the "enclaves" were derived by a committee made up of the State Department, Geodetic Survey and Interior Department and that this group literally followed the three-mile criteria. That is, they projected the State's ownership three miles from every land body. Any area more than three miles, was automatically federally designated.

I inquired as to what would be the probable results if the State of Alabama on its own initiative advertised areas within the enclave. It was Mr. Overstreet's opinion that the federal government would likely do nothing but suggested that we set up a meeting to resolve the question before an antagonistic situation arose. He promised that he would contact the proper federal people in order to develop such a meeting and that he would keep us advised.

As there are some seven or eight thousand acres involved I believe it behooves us to make an attempt to settle the question at the earliest possible date.

/s/ William G. O'Rear
William G. O'Rear
Chief Counsel

cc: Mr. John W. Hodnett, Commissioner

EXHIBIT 8

STATE OF ALABAMA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

Montgomery, Alabama 36130

October 11, 1978

Mr. B. W. Hostrop
Chief of Division
Cadastral Survey
United States Department of
the Interior
Bureau of Land Management
Washington, D. C. 20240

Dear Mr. Hostrop:

Recently this office received a copy of your official protraction diagram, N.H. 16-4 Mobile Sheet, dated 1978, which map defines certain enclaves as territorial sea areas within the Mississippi Sound off the State of Alabama and Mississippi.

We have discussed the subject map with Mississippi officials, and it is my understanding that they feel as we do that the Mississippi Sound is an "historic bay."

This concern was related to the Bureau of Land Management Office in New Orleans, specifically to Mr. John Rankin and Mr. Bill Overstreet, with the suggestion of a meeting of the parties for the purpose of attempting a settlement of the problem. Mr. Overstreet indicated that I should contact your office and attempt to finalize a meeting in New Orleans.

I would greatly appreciate receiving your comments concerning this request at the earliest possible date and would further appreciate your sending a copy of your reply to the Hon. Jean Richey, Assistant Attorney General,

Jackson, Mississippi.

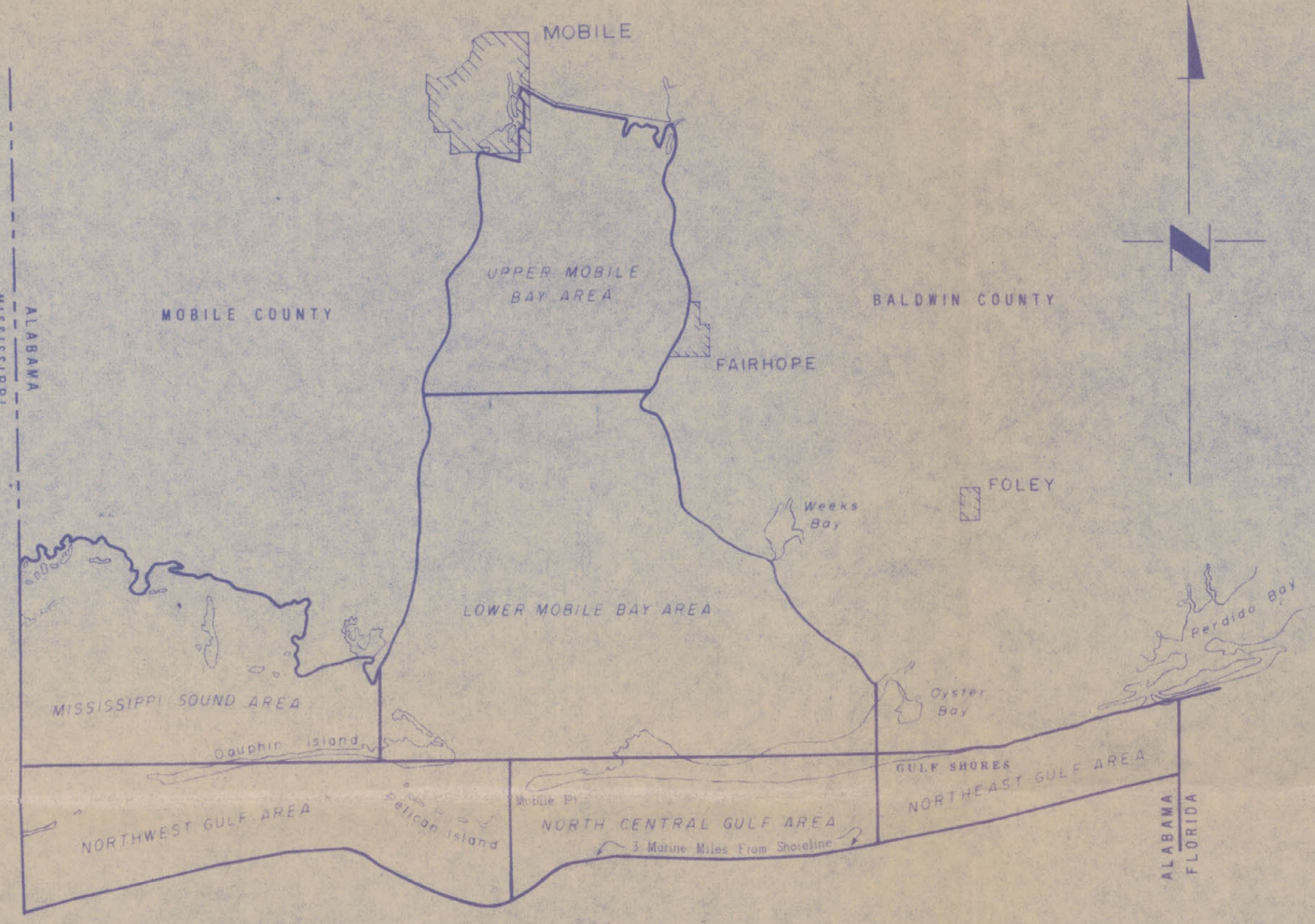
Sincerely,

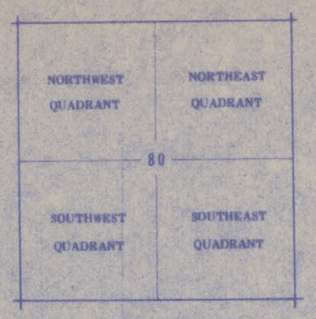
/s/ William G. O'Rear
William G. O'Rear
Chief Counsel

cc: Mr. Orin Collier, U.S. Department of the Interior, Bureau of Land Management
Mr. Bill Overstreet, Bureau of Land Management, New Orleans, Louisiana
Mr. John Rankin, Bureau of Land Management, New Orleans, Louisiana
Mr. J. E. Thomas, Executive Director, Mississippi Marine Resources Council, Long Beach, Mississippi
Hon. Jean Richey, Assistant Attorney General, Jackson, Mississippi

EXHIBIT 4

STATE OF ALABAMA
CHART OF
SUBMERGED STATE LAND OIL LEASE TRACTS
WITHIN 3 MARINE MILES OF SHORELINE





SAMPLE ONLY:
IDENTIFICATION OF TRACTS

NOTE:

AREA OF STANDARD TRACT WAS DETERMINED BY CALCULATION TO BE APPROXIMATELY 5,165 ACRES. WHILE THE AREA OF ALL OTHER TRACTS WERE DETERMINED BY PLANIMETERING

SHORELINES ON CHARTS ARE DIRECT TRACINGS OF A COMPOSIT MAP CONSISTING OF UNITED STATES GEOLOGICAL SURVEY 15 MINUTE SERIES QUADRANGLE MAPS OF THE AREA. THE 15,000 FOOT GRID LINES ARE TRACED FROM LINES DRAWN IN INTERPOLATED POSITIONS ON COMPOSITE MAP. GRID LINES IN GULF SOUTH OF LIMITS OF COMPOSITE MAP ARE THE RESULT OF THE EXTENSION OF THE GRID PATTERN. QUADRANGLE MAPS USED IN PREPARING COMPOSITE MAPS WERE MOBILE 1940, FAIRHOPE 1940 GRAND BAY 1941, CEDAR POINT 1941, WEEKS BAY 1941 FOLEY 1941, FORT BARRANCAS 1941, PETIT BOIS ISLAND 1941, FORT MORGAN 1941.

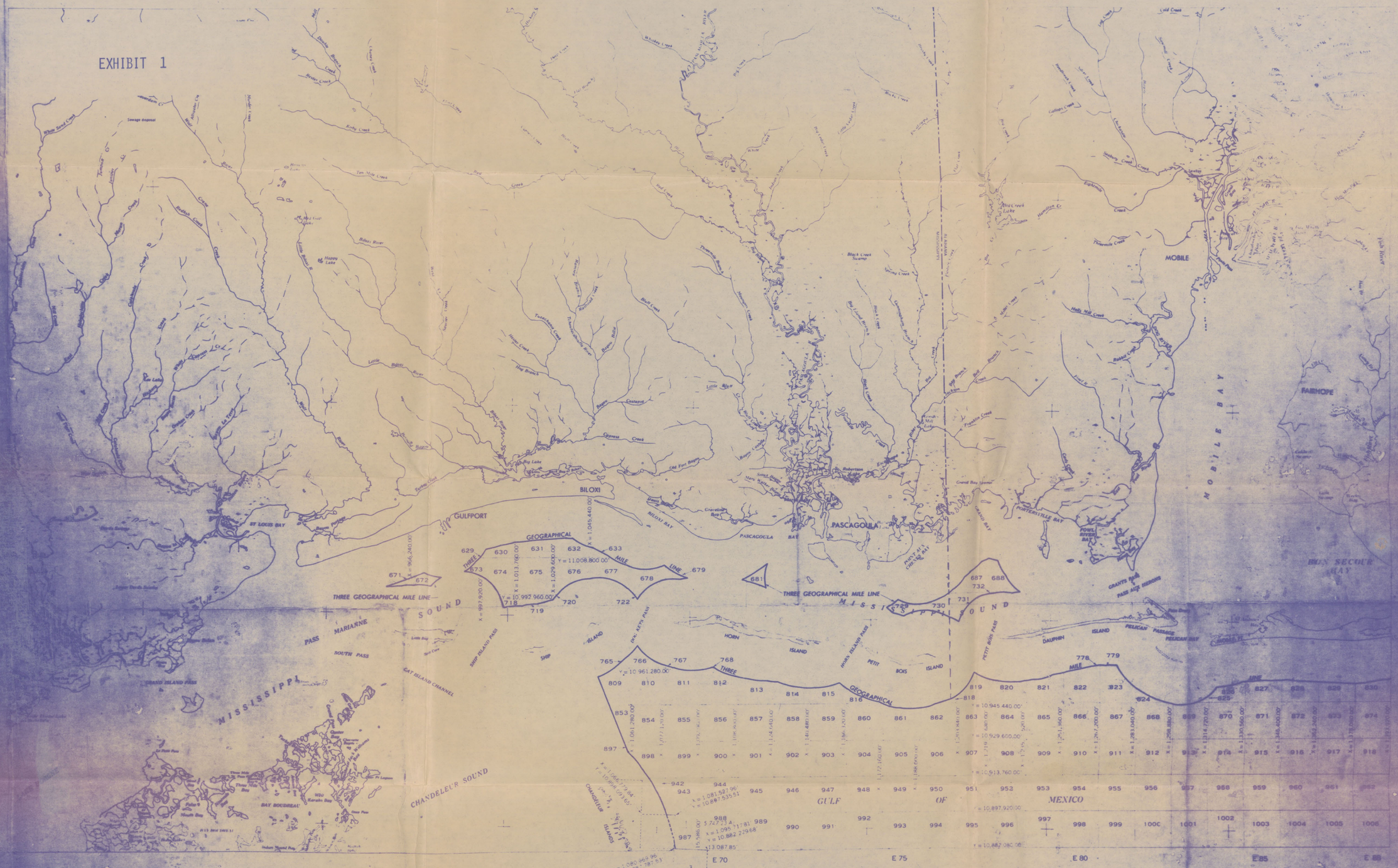
NOTE:

TRACTS DESIGNATED ON THESE CHARTS DEPICT THE STATE OF ALABAMA'S INTERPRETATION OF ITS SUBMERGED LAND OWNERSHIP AS ADJUDICATED BY THE UNITED STATES SUPREME COURT IN THAT CERTAIN CASE STYLED UNITED STATES v. LOUISIANA et al, 363 US 1, 4 L ed 2d 1025, 80 S Ct 961, DECIDED MAY 31, 1960.

NOTE:
REVISED SEPTEMBER 1977

STATE OF ALABAMA		
DEPARTMENT OF CONSERVATION		ENGINEERING SECTION
DESIGN BY F. H. T.	SUBMERGED STATE LAND OIL LEASE TRACTS WITHIN 3 MARINE MILES OF SHORELINE	DATE MARCH 1956
DRAWN BY F. H. T.		SCALE: 1"=5,208'
APPROV. BY C. B. R.		PROJ. NO: 2, 5-L-2

EXHIBIT 1



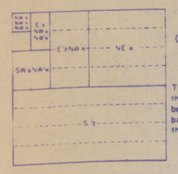
All blocks are based on the Universal Transverse Mercator Grid System, Zone 16 with X origin = 1 640 416 67 feet (500 000 International meters) at 87° West Longitude, and Y origin = 0 at 0° Latitude. Each regular block contains 5,760 acres. Areas of the irregular blocks abutting leasing blocks under lease and leasing origin are as shown. The areas of the fractional blocks abutting the three geographical mile line have not been determined.

The identification of the blocks is based on numerical sequences of N (North) starting at Y = 0 and E (East) starting at X = 0. Example N 986–E 74

On shore planimetric base compilation is from USGS 1 250 000 series (United States) topographic sheets with coast line revised to agree with current (as of date of this map) NOS nautical charts.

The light broken lines indicate the approximate depth of water in meters.

This revised diagram supersedes protraction diagram NH 16-4 MOBILE approved October 10, 1972.



Subdivision of Blocks on the Outer Continental Shelf

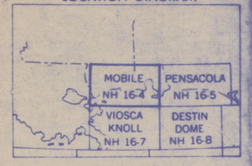
Typical method of subdivision of the regular blocks, each subdivision being an aliquot part of the total, based on midpoint subdivision throughout

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

OUTER CONTINENTAL SHELF OFFICIAL PROTRACTION DIAGRAM

20 Statute Miles
30 Kilometers
10 Nautical Miles

LOCATION DIAGRAM



This diagram is prepared in accordance with 43 CFR 3301.1.

For the Director

Bernard W. Stapp

Chief, Division of Cadastral Survey

Washington, D.C. Date December 21, 1977

REVISED

EXHIBIT 3

STATE OF ALABAMA
CHART OF
SUBMERGED STATE LAND OIL LEASE TRACTS

AREA LOCATION MAP

KEY
AREA CHARTS

CHART NO.	NAME
1	UPPER MOBILE BAY AREA
2	LOWER MOBILE BAY AREA
3	MISSISSIPPI SOUND AREA
4	NORTHWEST GULF AREA
5	NORTH CENTRAL GULF AREA
6	NORTHEAST GULF AREA
7	SOUTHWEST GULF AREA
8	SOUTH CENTRAL GULF AREA
9	SOUTHEAST GULF AREA

NOTE: Area of standard tract was determined by calculation to be approximately 5.165 Acres, while the areas of all other tracts were determined by Planimetering.

Shorelines on charts are direct tracings of a composite map consisting of United States Geological Survey 15 Minute Series Quadrangle maps of the area. The 15,000 foot grid lines are traced from lines drawn in interpolated positions on composite map. Grid lines in Gulf south of limits of composite map are the result of the extension of the grid pattern. Quadrangle maps used in preparing composite maps were Mobile 1940, Fairhope 1940, Grand Bay 1941, Cedar Point 1941, Weeks Bay 1941, Foley 1941, Fort Barrancas 1941, Petit Bois Island 1941, Fort Morgan 1941.

PREPARED BY
STATE OF ALABAMA
DEPARTMENT OF CONSERVATION
ENGINEERING SECTION
MARCH, 1956
DRAWING NO. 2.5-L-2

EXHIBIT 2

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

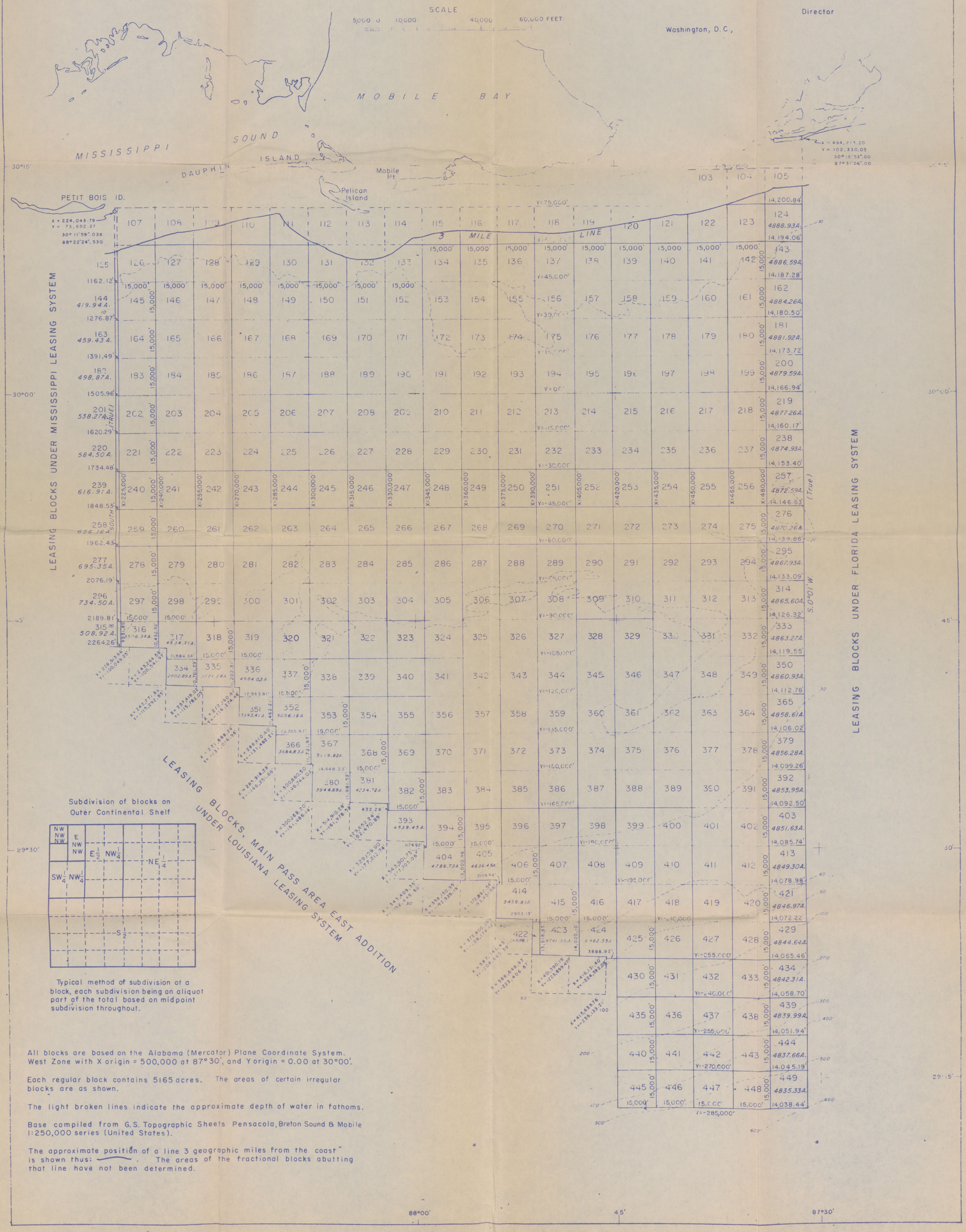
OUTER CONTINENTAL SHELF LEASING MAP
ALABAMA

MOBILE AREA

This map, prepared in accordance with 43 CFR 3380.2 is approved for use in leasing areas on the Outer Continental Shelf.

Director

Washington, D.C.,



All blocks are based on the Alabama (Mercator) Plane Coordinate System. West Zone with X origin = 500,000 at 87°30', and Y origin = 0.00 at 30°00'.

Each regular block contains 5165 acres. The areas of certain irregular blocks are as shown.

The light broken lines indicate the approximate depth of water in fathoms.

Base compiled from G.S. Topographic Sheets Pensacola, Breton Sound & Mobile 1:250,000 series (United States).

The approximate position of a line 3 geographic miles from the coast is shown thus: ——. The areas of the fractional blocks abutting that line have not been determined.

EXHIBIT 1
EXHIBIT 2
EXHIBIT 3
EXHIBIT 4