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No. 9, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Plaintiff,

VS.

STATE OF LOUISIANA, et al.
(Alabama and Mississippi Boundary Cases)

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN SUPPORT OF THE UNITED STATES' OPPOSITION TO THE EXCEPTIONS OF THE STATE OF MISSISSIPPI

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INTEREST OF THE STATE OF ALASKA

Pending before a Special Master is another action in this Court, *United States v. Alaska*, No. 84, Original, which seeks a determination of the boundary between the submerged lands owned by Alaska along its north coast and the Outer Continental Shelf Lands owned by the Federal Government beneath the Arctic Ocean.¹ The Special Master has held several weeks of trial in the

¹Alaska's title to the submerged lands lying within three geographical miles of its coast line derives from the fact that its Statehood Act, Pub. L. No. 85-503, §§ 2, 6(m), 72 Stat. 339 (1958), incorporated the provisions of the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315. The Federal Government's title to the lands of the "Outer Continental Shelf" derives first from the Truman Proclamation of 1945, Proc. No. 2667, 59 Stat. 884, and second, from President Reagan's Exclusive Economic Zone Proclamation of 1983, Proc. No. 5030 of March 10, 1983, 97 Stat. 1557-1558. See 92 I.D. 459 (1985) (opinion of the Solicitor of the Department of Interior that lands of the Outer Continental Shelf extend at least to a distance of 200 nautical miles

Alaska litigation. Much of it has concerned the application to the north Alaskan coast of the 10-mile straight baseline rule this Court described in its earlier decision in this case, *Alabama and Mississippi Boundary Case*, 470 U.S. 93, 106-107 (1985).

The principles of this case thus have already shown a profound impact on the *Alaska* case. We have read the Supplemental Report of the Special Master, dated March 16, 1987, and the Exceptions of the State of Mississippi, dated July, 1987, and find them to contain uneven discussions, on a scanty record, of issues central to the *Alaska* case. We are, candidly, anxious that these issues not be taken up by the Court in this state. That is our concern; the Court's would seem to be that the Special Master construed his reference too narrowly, and could well have instead recommended to this Court the resolution urged before him by the United States.

INTRODUCTION AND SUMMARY

This Court in an earlier phase of this case held in 1985 that Mississippi Sound is historic inland waters of Mississippi and Alabama. *Alabama and Mississippi Boundary Case*, 470 U.S. 93. The case was then before the Court on the United States' exceptions to the first Report of the Special Master. The Court, following decision, referred the matter back to the Special Master, where the parties, if they were unable to agree on the form of a "proposed appropriate decree," were to submit proposals "to the Master for his consideration and recommendation." 470 U.S. at 115.

With respect to the western portion of Mississippi's boundary, the parties were unable to agree (their respective lines are shown on Figure 1²), leaving it incumbent on the Special Master to

from the coast lines of the states of the United States). Congress has exercised its powers under the Property Cause with respect to certain of these lands in the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1330-1356.

²Figure 1 is a sketch of the Mississippi and Louisiana coast line, derived in part from Figure 2, on page 30 of the Special Master's Report, and from decrees of this Court in other cases.

recommend a line. While both parties suggested lines enclosing northern Chandeleur Sound, the Special Master nonetheless took the position that the waters of Chandeleur Sound were beyond this Court's reference to him. If the Master was correct in this conclusion (and there is much to suggest he was not), he should have recommended that the status of northern Chandeleur Sound as inland waters be left for resolution another day. What he did, however, was recommend that Chandeleur Sound be declared *not* to constitute inland waters, without having heard the evidence of historic title Mississippi might well have adduced.

Even from the scanty record present, though, the line recommended by the Master is untenable. For one, he criticizes the line advocated by Mississippi for producing what he refers to as an unacceptable "offset" between the decreed inland-water closing line for Chandeleur Sound on the Louisiana side of the interstate boundary and the line advocated by Mississippi. Report, p. 15. Yet the Master's recommended line would produce an offset of much grosser proportion, one that has the possibility of achieving real mischief with the finality thought to inhere in this Court's 1975 *Louisiana* decree.

Finally, while Alaska believes a proper course would be to refer the matter back to the Master with explicit instructions that northern Chandeleur Sound is within his reference, a preferable alternative course is to adopt the line proposed by the United States to the Special Master as a stipulated coast line for Mississippi.

ARGUMENT

I

THE SPECIAL MASTER'S RECOMMENDATION THAT CHANDELEUR SOUND IS NOT INLAND WATERS OF MISSISSIPPI SHOULD NOT BE ACCEPTED BECAUSE THE STATUS OF CHANDELEUR SOUND WAS NEVER IN ISSUE BEFORE HIM; AT MINIMUM, THAT QUESTION SHOULD BE REFERRED BACK TO THE MASTER WITH EXPLICIT DIRECTION TO CONSIDER THE STATUS OF CHANDELEUR SOUND.

From their positions before the Special Master (at least for the purpose of resolution by agreement), it is clear that the United States as well as Mississippi recognized that northern Chandeleur Sound may be treated as inland waters of Mississippi under the Submerged Lands Act. *See* Report, p. 30. The Special Master, for reasons we describe below, nevertheless determined that the status of northern Chandeleur Sound as inland waters was beyond his reference. Instead of thus recommending that this Court treat the status of those waters as a question for another day, however, the Master's Report inexplicably recommends that those waters be adjudicated not to constitute inland waters. The Report goes on to recommend that this Court adjudicate, as Mississippi's western coast line, a line that, we assume, even the United States cannot bring itself to endorse.³

Even if the Master was correct that his reference did not authorize him to consider the status of northern Chandeleur

³To be sure, the Report is not easy to follow in these respects. In paragraph 3 of the Master's Recommendations, Report, p. 27, a line is described as being the "eastern portion of Mississippi's seaward boundary" The Report, however, is clearly referring to the "western" portion of what is the Mississippi "coast line," not its boundary. In the language of the Submerged Lands Act, the line marking the "seaward limit of inland waters" (in this case, of Mississippi Sound) is part of the "coast line" of the coastal state, whereas the state's seaward "boundary" is the line three geographical miles (in Mississippi's case) from the coast line. Submerged Lands Act of 1953, § 2(b) and (c), 43 U.S.C. § 1301(b) and (c); *United States v. Louisiana*, 363 U.S. 1 (1960).

Sound (a debatable proposition), at most he should have recommended that the status of those waters could not, under that reference, be adjudicated in the proceeding before him.

The case is nearly indisputable that Chandeleur Sound is inland waters for domestic purposes (see Point III, below), and the case for the line proposed by the United States is almost equally so. Nevertheless, the Special Master balked at recognizing that line. He did so on the ground that his reference was limited to a consideration of the status of Mississippi Sound, and that the line proposed by the United States enclosed not the waters of Mississippi Sound, but those of Chandeleur Sound.

In the strictest of senses, the Special Master may have been correct. He notes that the pleadings as well as his reference refer to "Mississippi Sound" and not to "Chandeleur Sound," and he observes that this Court once called out the boundaries of Mississippi Sound in a way that would exclude what we now refer to as "Chandeleur Sound."⁴

⁴The Master noted that this proceeding was instituted by Mississippi's Motion for a Supplemental Decree, which alleged that the "coast line of Mississippi is the line of ordinary low water along the seaward side of the chain of islands marking the outer limit of the inland waters of *Mississippi Sound*, this being the baseline from which the three-mile marginal belt into the Gulf of Mexico is measured." (Emphasis added.) The Master noted that, in the 1985 decision in this case, the Court held:

[Mississippi] Sound is a body of water immediately south of the mainland of the two States. It extends from Lake Borgne at the west to Mobile Bay at the east, and is bounded on the south by a line of barrier islands. These islands, from west to east, are Isle au Pitre, Cat Island, Ship Island, Horn Island, Petit Bois Island, and Dauphin Island. . . .

The two States contend that the whole of Mississippi Sound constitutes "inland waters." Under this view, the coast line of the States consists of the lines of ordinary low water along the southern coasts of the barrier islands together with appropriate lines connecting the barrier islands. These latter lines mark the seaward limit of *Mississippi Sound*. [Emphasis added.]

Report at 10-11, quoting from 470 U.S. at 96.

Having considered all this, the Master concluded that his reference did not include a charge to consider the status of the waters of Chandeleur Sound.

Mississippi's present position appears to be that the western extremity of its seaward boundary should be the closing line of Chandeleur Sound

[I]t is apparent that Mississippi's position is tenable only if the waters south of Cat Island and West Ship Island are inland waters. But there is no justification for this *under the Court's most recent opinion* which holds only that waters within the barrier islands can be considered as part of Mississippi Sound. Therefore, a decree can include waters south of those islands [Chandeleur Sound] only by consent of the parties, by concession by the United States beneficial to Mississippi, *or based upon a holding of the Court in some other opinion.*

Report, pp. 12-13 (emphasis added.)⁵

We think, however, that the Master too literally construed his reference. It seems to us that this Court's intent was that he consider and recommend a decree comprising the full Mississippi coast line from the common boundary with Louisiana to the boundary with Alabama, without leaving the relatively small area of northern Chandeleur Sound for adjudication another day. We think it altogether reasonable that when this Court referred to the

On page 94 of this Court's 1985 opinion, it announced its conclusion that Mississippi Sound constituted an historic bay and that the waters of the Sound are, thus, inland waters. The Court's description of the islands marking the seaward limit of Mississippi Sound was taken from this Court's decision in *Louisiana v. Mississippi*, 202 U.S. 1 (1906).

⁵The actual reference to the Master is contained in this Court's 1985 decision, at page 115,

"The parties are directed promptly to submit to the Special Master a proposed appropriate decree for this Court's consideration; if the parties are unable to agree upon the form of the decree, each shall submit its proposal to the Master for his consideration and recommendation."

Master the question of the status of Mississippi Sound, its purpose was to develop a decree that would describe the entire coast line in front of Mississippi, separating that state's inland waters (whether of Mississippi Sound or of some other body of water) from the waters of the Gulf of Mexico.

Moreover, even if this Court's intent was not so fully formed in 1985, there is ample precedent for a Master to consider such ancillary matters as the status of a relatively small body of water, especially when, as here, both parties have assumed those matters were part of the case.⁶

Having said all that, we nevertheless acknowledge that the Master's reference, read as narrowly as possible, may have conferred no authority on him to consider the status of Chandeleur Sound. But if the Master is correct in this, he then had utterly no ground to recommend that Chandeleur Sound be decreed *not* to constitute inland waters. Yet he does this, on page 27 of his Report.

It would be one thing if, having construed his reference so narrowly, he recommended a decree that Mississippi's inland waters extend *at least* as far as his recommended line, leaving open the question whether they extend further, into Chandeleur Sound. But he does not do this; instead, his recommended decree (correcting for the use of "boundary" when "coast line" is meant) would end the matter of the status of Chandeleur Sound

⁶In *United States v. Alaska*, No. 84, Original, the Special Master, at the behest of the Solicitor General and of Alaska, is considering the status of water bodies placed in issue by a counterclaim filed after his reference had been made. In *California v. Arizona and the United States*, No. 78, Original, the Special Master permitted Arizona to file a Cross-Claim against the United States and heard it on the merits without a specific modification of his reference. See decree at 452 U.S. 431 (1981). A similar procedure was employed by Judge Tuttle as Special Master in *Arizona v. California*, No. 8, Original, when, without submitting the matter to the Court, he permitted five Indian tribes to intervene. The attempt to obtain interlocutory review of his action was rejected by the Court's Order of January 7, 1980. 444 U.S. 1009; see also *Arizona v. California*, 460 U.S. 605, 613 (1983).

without it ever having been, in the Master's view, properly put in issue before him.

Indeed, no factual record regarding the status of Chandeleur Sound as inland waters has ever been developed in this Court. By virtue of the United States' concession of the Louisiana portion of the Sound to that State, Louisiana was not required to present evidence on the issue. *See United States v. Louisiana*, 394 U.S. 11, 66-67 n. 87 (1969); *United States v. Louisiana*, 363 U.S. 1, 67 n. 108 (1960). Mississippi was not afforded that opportunity here because of the Master's overly narrow reading of his reference.

For this reason alone, the Special Master's recommendation that Chandeleur Sound is not inland waters of Mississippi should not be accepted. An appropriate disposition of the matter would be simply to refer it back to the Master with explicit direction to consider whether the portion of Chandeleur Sound north of the Louisiana-Mississippi boundary constitutes inland waters for purposes of the Submerged Lands Act and, if so, to recommend an appropriate closing line.

II

THE SPECIAL MASTER'S RECOMMENDATION REGARDING THE COAST LINE OF MISSISSIPPI WEST OF WEST SHIP ISLAND MUST NOT BE ACCEPTED BECAUSE IT CANNOT BE RECONCILED WITH THE ALREADY-DECREED COAST LINE OF LOUISIANA.

While the Special Master ultimately concluded that the status of Chandeleur Sound as inland waters was beyond the scope of his reference (and then inexplicably recommended that it be held not to constitute inland waters), he considered the parties' recommended closing lines for Chandeleur Sound at some length. He rejected the line proposed by Mississippi — running from the current location of the northernmost of the Chandeleur Islands to the east tip of East Ship Island — because it would result in an "offset" from the coast line of Louisiana as set out in the Decree in *United States v. Louisiana*, 422 U.S. 13 (1975). *See Report*, 14-16.

The *Louisiana* Decree line runs from the former location of the northernmost of the Chandeleur Islands (a short distance northwest of the current location) to a point near the middle of West Ship Island. The "offset" discussed by the Master would result from the fact that Mississippi's proposed line and the *Louisiana* Decree line do not cross the lateral Louisiana-Mississippi boundary at the same place. See Fig. 1, attached hereto.

As the Master noted, Report, p. 16, the United States vigorously protested such a result because any change in the lateral Louisiana-Mississippi boundary would result in a change in ownership of adjacent federal outer continental shelf ("OCS") land. Characterizing such a result as "intolerable," *id.*, p. 16, the Master rejected Mississippi's suggestion. What the Master failed to recognize is that his recommendation would result in an even greater "offset" than Mississippi's line. See Fig. 2, attached hereto. If the result which would be produced by Mississippi's suggestion is "intolerable," the result which would be produced by the Master's recommendation is even more so.

The difficulties the Master's recommendation would produce do not end there, however. A second problem relates to the area north of the lateral Louisiana-Mississippi boundary in Chandeleur Sound which lies more than three miles from the Mississippi coast line recommended by the Special Master. In *Louisiana v. Mississippi*, 202 U.S. 1, 58 (1906), this Court decreed that the lateral boundary between the two States runs "through Mississippi sound, through South pass, between Cat island and Isle a Pitre, to the Gulf of Mexico." The Master recommended that Mississippi's coast line end where the line between Cat Island and Isle a Pitre crosses the lateral Louisiana-Mississippi boundary. Report, p. 27. Under this recommendation, Mississippi would thus be entitled to a three-mile belt of submerged land within Chandeleur Sound north of the Louisiana-Mississippi boundary. 43 U.S.C. 1311(a). But what is the status of the submerged lands in Chandeleur Sound which are north of the Louisiana-Mississippi lateral boundary, more than three miles from the Mississippi coast line as recommended by the Master, and landward of the Louisiana coast line as set out in the 1975 *Louisiana* decree? Are they Louisiana's under the United States early concession as to

Chandeleur Sound? Is the lateral Louisiana-Mississippi boundary then a part of Louisiana's coast line such that Louisiana is entitled to a three-mile belt of submerged lands to the north? Are they federal Outer Continental Shelf lands? None of these results makes any sense whatsoever.

For the foregoing reasons, the Special Master's recommendation regarding the location of the Mississippi coast line west of West Ship Island cannot be accepted.

III

PREFERABLY, THIS COURT COULD DECREE THE LINE PROPOSED BY THE UNITED STATES IN ITS OFFER BEFORE THE SPECIAL MASTER WITHOUT THE NECESSITY OF A REFERENCE BACK TO THE MASTER.

As stated earlier, we believe the Master too narrowly read his reference from this Court, and should have fully considered the evidence of Chandeleur Sound's inland-water status and its proper closing line. The parties appear to have assumed he would, and indeed each urged a line to resolve this dispute that in fact encloses the waters of Chandeleur Sound. It seems to us that only a very constrained reading of the Master's reference (not to mention a lack of regard for judicial economy⁸) would suggest a reference back to the Special Master for a third trial in this proceeding. At the same time, there is much to recommend a decree incorporating the line proposed by the United States.⁹

While the Master's Report does not in full recite it, the evidence from this Court's decisions is that Chandeleur Sound has been treated, for domestic if not international purposes, as inland waters for at least 36 years. In 1951 the "Chapman Line," drawn by the Federal Government as the most landward line the

⁸Two trials have already been held on Mississippi's Motion for a Supplemental Decree in this case.

⁹Mississippi in its Exceptions and Brief offers little in support of the line it advocates, and we are also unable to advocate its merits on this record.

United States would claim as the coast line in the Gulf of Mexico, enclosed the waters of Chandeleur Sound.¹⁰

On October 17, 1951, Secretary of the Interior Oscar L. Chapman wrote the Governor of Mississippi that the "Chapman Line," were it to be extended to the Mississippi coast, would enclose the waters of Chandeleur and Mississippi Sounds. 470 U.S. at 106-107, n. 9. Specifically, Chapman's letter asserted that the line claimed by the United States ran from the northernmost of the Chandeleur Islands to the west tip of the westernmost of the Ship Islands.¹¹

Following passage of the Submerged Lands Act of 1953, the United States on several occasions reaffirmed its position that Chandeleur Sound was inland water. It did so before this Court in February of 1957, in a brief filed in the *Louisiana* litigation.¹² It did so again in May of 1958 in another brief in the *Louisiana* case,¹³ a fact this Court noted in its decision in that case, *United States v. Louisiana*, 363 U.S. 1, 67 n. 108 (1960). The status of Chandeleur Sound, we should mention, had in each instance been raised with the State Department, which approved both briefs prior to their filing.¹⁴

¹⁰1 Shalowitz, *Shore and Sea Boundaries* 109, n. 8, and accompanying text (1962); *Alabama and Mississippi Boundary Case*, 470 U.S. at 109, n. 11. The "Chapman Line" was named for then-Secretary of the Interior, Oscar L. Chapman.

¹¹Report, p. 20. The full text of Chapman's letter is in evidence in the *Alaska* case, No. 84, Original, as Exhibit AK 85-092.

¹²Brief for the United States in Support of Motion for Judgment, *United States v. Louisiana*, No. 11 (now No. 9), Original (October Term, 1956), pp. 68-69.

¹³United States Brief in Support of Motion for Judgment on Amended Complaint, *United States v. Louisiana*, No. 11, Original, pp. 177-178.

¹⁴Letter from Solicitor General J. Lee Rankin to Rear Admiral H. Arnold Karo, Director, United States Coast & Geodetic Survey, February 29, 1960, in evidence before the Special Master in No. 84, Original, as AK 85-086.

Certain other reiterations by the Federal Government may be omitted, but in 1968 the United States had occasion to suggest a minor modification of the closing line it had since 1951 urged for Chandeleur Sound. The line asserted by Secretary Chapman in 1951, as we have noted, proceeded from the northernmost of the Chandeleur Islands to the west tip of West Ship Island. the United States in 1968 suggested a line commencing at the same place, but terminating on the southern coast of what is now West Ship Island, some distance easterly of its former terminus (that is, a line more favorable to Mississippi).¹⁵ That line was adopted by this Court in its 1975 decision in *Louisiana* (it presumably terminates, of course, at the Louisiana-Mississippi lateral boundary¹⁶), and was incorporated in the final 1981 decree in the *Louisiana* litigation. *United States v. Louisiana*, 422 U.S. 13 (1975); *United States v. Louisiana*, 452 U.S. 726 (1981).

Whether the United States' line is regarded as the use of a straight baseline, or as evidence of historic title, or even as simple

¹⁵Brief of the United States on Cross-Motion for the Entry of a Supplemental Decree as to the State of Louisiana (No. 2) *United States v. Louisiana*, No. 9, Original, filed August 15, 1968, p. 130.

¹⁶This Court's decree in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), traced the boundary between Louisiana and Mississippi from the upland, through Lake Borgne, and through Cat Island pass to an indeterminate point in "the Gulf of Mexico." Appended to the Court's decree implementing the 1906 decision is a map that shows the interstate boundary apparently extending beyond the borders of the map — but perhaps not. In the sketch attached to this brief as Figure 1, we have attempted to place the point at which the Court's line terminates for illustration purposes only. There has been no subsequent adjudication of the extension of that line, nor any interstate compact between the parties. A limited determination of the lateral seaward boundary between the two states was, however, made in 1980. That adjudication was made by the National Oceanic and Atmospheric Administration under section 308 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1456a, for the limited purposes of that Act. Alaska understands both parties to the present proceedings to agree that this 1980 administrative determination has no bearing on the Louisiana-Mississippi boundary insofar as the Submerged Lands Act is concerned.

recognition that Chandeleur Sound should be treated consistently for both Louisiana and Mississippi, makes little difference in the resolution of this dispute. The Federal Government's long adherence to it (as slightly modified in 1968), together with the lack of an articulated rationale for Mississippi's line, recommend the line proposed by the United States.

It is true that Mississippi was not a party to the proceedings which resulted in the 1975 *Louisiana* decree line. The significance of that line, however, is not so much its effect as precedent, but rather notice to affected States of the formal adoption of that line as the appropriate closing line for Chandeleur Sound for Submerged Lands Act purposes. Cf. *Alabama and Mississippi Boundary Case*, 470 U.S. at 108 (significance of 1906 *Louisiana v. Mississippi* decision is not its effect as precedent, but its effect as notice to foreign nations).

Should Mississippi advance a plausible rationale for the line it proposes, then a reference back to the Special Master may perhaps be in order. But as it is, the adoption of the line proposed by the United States may be the most appropriate, and certainly would be the most expeditious, and judicious, course of action.

CONCLUSION

For the foregoing reasons, Amicus Curiae State of Alaska respectfully suggests that this Court, at a minimum, refer the cause back to the Special Master with explicit direction that he is to recommend a decree respecting the entire coast line of Mississippi, including a closing line for Chandeleur Sound if he, upon a consideration of the evidence, concludes it comprises inland waters of Mississippi for purposes of the Submerged Lands Act. Alternatively, we suggest it would be appropriate — indeed preferable — for this Court to obviate the need for a third reference to the Master by entering a decree that adopts the closing line for Chandeleur Sound urged by the United States.

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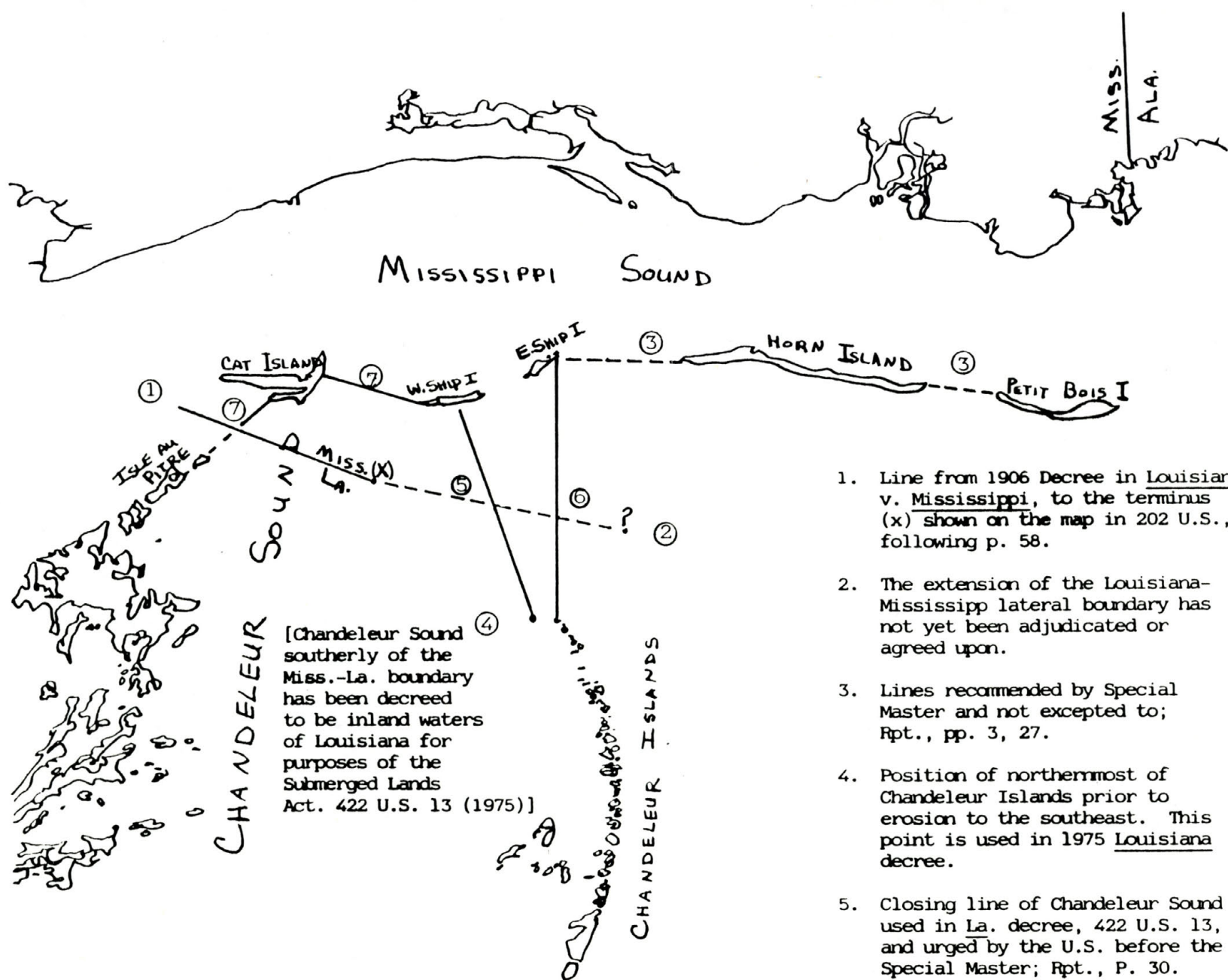


FIGURE 1
(Adapted from Figure 2
to Special Master's Report,
p. 30)

1. Line from 1906 Decree in Louisiana v. Mississippi, to the terminus (x) shown on the map in 202 U.S., following p. 58.
2. The extension of the Louisiana-Mississippi lateral boundary has not yet been adjudicated or agreed upon.
3. Lines recommended by Special Master and not excepted to; Rpt., pp. 3, 27.
4. Position of northernmost of Chandeleur Islands prior to erosion to the southeast. This point is used in 1975 Louisiana decree.
5. Closing line of Chandeleur Sound used in La. decree, 422 U.S. 13, and urged by the U.S. before the Special Master; Rpt., P. 30.
6. Line urged by Mississippi.
7. Lines proposed by the Special Master as the coast line of Mississippi; Rpt., p. 27.

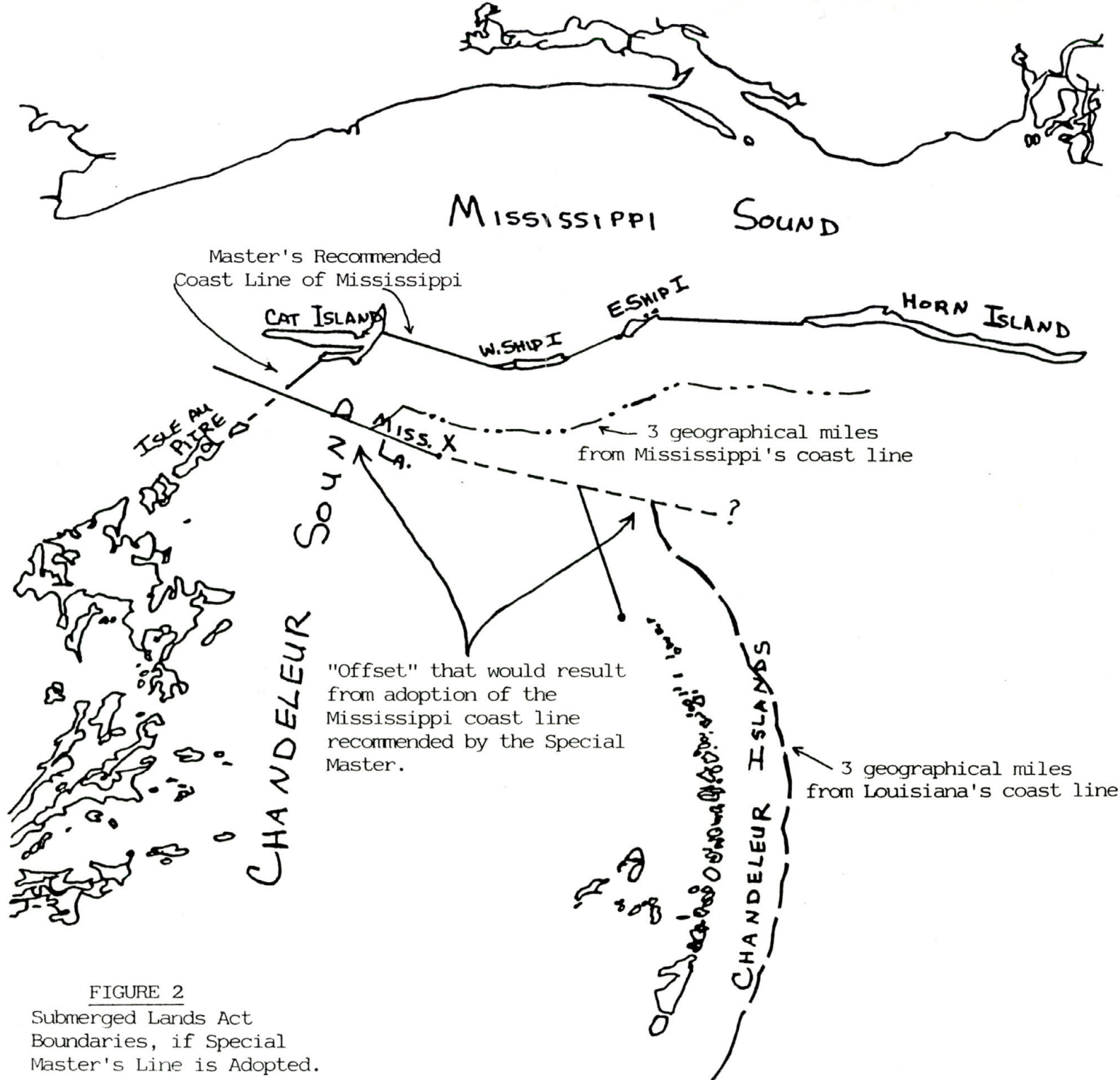


FIGURE 2

Submerged Lands Act
Boundaries, if Special
Master's Line is Adopted.

