No. 74, Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF GEORGIA,

Plaintiff,

v.

STATE OF SOUTH CAROLINA,

Defendant.

RESPONSE OF THE STATE OF SOUTH CAROLINA TO GEORGIA'S EXCEPTIONS & BRIEF

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RESPONSE OF THE STATE OF SOUTH CAROLINA TO GEORGIA'S EXCEPTIONS & BRIEF

STATEMENT

This brief responds to Georgia's contentions that part of the Barnwell Island area, Oyster Bed Island and several unnamed islands are in Georgia and that the mouth of the Savannah River is an area over five miles wide between Hilton Head Island, South Carolina, and Tybee Island, Georgia. Georgia has abandoned the claims it pressed strenuously before the Special Master to Jones Island and to part of the Barnwell Island area.

There is no question that the area known as "Barnwell Island" is by far the most valuable parcel of land in

this boundary dispute.[1] It consists of at least 450 acres of high ground on the South Carolina (north) side of the Savannah, fronting the channel of the river only 2 to 3 miles downstream from the City of Savannah. Although presently subject to Corps of Engineers spoil easements, the area is clearly capable of future economic development and could become accessible to highway traffic by roads which could connect it, via other high ground, to the South Carolina portions of U. S. Highway 17A and Interstate Highway 95, only a few miles away, and to South Carolina State Route 170, which leads to Hilton Head Island.[2]

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[1] All four of the original Barnwell Islands have been part of the South Carolina mainland for many years (except, perhaps for part of Barnwell Island No. 3 which may have eroded), but relatively recent maps of the 1950's and later denote a portion of this now-mainland area by the singular term "Barnwell Island." For clarity, this brief will usually refer to the individual islands by the names given them by the Barnwell family. Rabbit Island, no longer claimed by Georgia, is the most upstream, followed by Hog Island ("Barnwell Island" on older U.S. Coast Survey maps), Long Island (Barnwell Island No. 2 on older U.S. Coast Survey maps), and Barnwell Island No. 3 (actually the fourth island, and not present when the Barnwell family had reason to name the islands). *See* S.C. Ex. GM-39 and GM-40 (Ex. GM-40 is one of many exhibits depicting how the islands are now incorporated into the mainland).

[2] Economic development could come not only as a port site, but also as a resort or residential development. In the past year, the States of Georgia and South Carolina have considered the issuance of permits for a massive residential resort development on a former Corps spoil disposal site on Hutchinson's Island, in an area almost directly across the river from the Barnwell Island area. That development could represent an investment of several hundred million dollars.

Oyster Bed Island is the most downstream island on the north side of the river. It is part of the Tybee National Wildlife Refuge.

The location of the mouth of the Savannah River is important because it divides the water area in dispute, and provides both the termination point of the inland boundary and the starting point for the lateral seaward boundary.[3]

South Carolina submits that the Special Master's recommendations as to all areas to which Georgia has excepted are supported by the overwhelming weight of the uncontradicted evidence. South Carolina was able to show that for over 150 years, the Barnwell Islands were consistently treated as South Carolina lands by both officials and citizens. Likewise, the mouth of the river has consistently been regarded as being just off Tybee Island ever since colonial times. Finally, Oyster Bed Island and two unnamed islands clearly were formed to the north of the midpoint of the river, and for that reason are in South Carolina under well-established principles.

Against an extensive and nearly unanimous historical record, Georgia presented virtually nothing in response, and indeed did not dispute most of the evidence presented by South Carolina. The boundary claimed by South Carolina, on the other hand, represents a continuation of the status quo as it has existed for 140 to

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[3] Georgia's Exception to the location of the lateral seaward boundary is based solely on the location of the mouth of the river. The location of the mouth of the river is addressed in Question III herein, and no separate response to Georgia's position on the lateral seaward boundary is necessary.

200 years. To award any area in dispute to Georgia would be to grant Georgia a windfall, awarding her lands never seriously claimed by her for any length of time. Accordingly, South Carolina submits that the Special Master's recommendations as to the Barnwell Island area, Oyster Bed Island, and the mouth of the river should be confirmed.

SUMMARY OF ARGUMENT

I.

In a 1955 condemnation action, *U.S. v. 450 Acres of Land*, 220 F.2d 353 (5th Cir. 1955), the United States acquired a spoil easement over some of the Barnwell Island property. South Carolina was not a party to this essentially-private action. For purposes of determining ownership, the Fifth Circuit decided, based on the slender record in the case, that the property was in Georgia. The Fifth Circuit had no subject matter jurisdiction to determine an interstate boundary, and under established precedent, its decision cannot bind South Carolina in any way, whether directly or indirectly.

II.

South Carolina has established undisputed possession and control over the Barnwell Island area for over 150 years, from 1795 through at least 1955, when *U.S. v. 450 Acres* was decided. During that period, the chain of title was exclusively in South Carolina. Georgia has conceded that South Carolina taxed the property for over 80 years, from 1870 to 1955. Georgia's long inaction, together

with numerous instances indicating South Carolina's possession and control of the area, demonstrate Georgia's acquiescence in South Carolina's sovereignty over the area. Georgia's concession that one of the Barnwell Islands is in South Carolina is a recognition of the strength of South Carolina's proof, and should be extended to the other Barnwell Islands as well, since the evidence was nearly identical as to all.

III.

The mouth of the Savannah River has been recognized for 250 years as consisting of an area just north of Tybee Island. This is in accord with the natural configuration of the area because nearly all the waters of the Savannah River enter the Atlantic Ocean at that point. No waters of the Savannah River touch Hilton Head Island, nearly six miles north of Tybee Island, and Hilton Head Island therefore has never been recognized as forming part of the mouth of the river.

IV.

Three islands which formed on the South Carolina side of the Savannah River after the Treaty of Beaufort was signed in 1787 are in South Carolina, under clearly settled rules pertaining to emerging islands. To hold otherwise, as Georgia contends, would mean the boundary would always be unsettled, and when changed, would always change in Georgia's favor.

V.

The right-angle principle adopted by the Special Master is the most reasonable approach to the unique problem of boundary delimitation which occurs in this case whenever the boundary line must be drawn around islands which have existed on the South Carolina side of the river since before 1787.

ARGUMENT

I. The condemnation action in the 1950's, to which South Carolina was not a party, can have no effect on the issues in this case because only this Court has subject matter jurisdiction to resolve such issues.

Before the mass of evidence showing South Carolina's undisputed possession and control of the Barnwell Islands for over 150 years can be discussed, it is necessary to examine Georgia's contentions as to the effect of *U.S. v. 450 Acres*, 220 F.2d 353 (5th Cir. 1955), on the issues in this case. That case was decided with the active participation of the State of Georgia but without notice to the State of South Carolina. Because the Fifth Circuit lacked subject matter jurisdiction to bind the states on the location of the boundary, the 1955 case can have no effect, directly or indirectly on the present case. The only function of *U.S. v. 450 Acres* was to determine who would be compensated for the taking of the area for dredge spoil purposes. South Carolina's absence as a party, through no fault of her own, underscores the inappropriateness of according the case any effect. This action presents South Carolina with

her first and only opportunity since 1955 to press her claim in this Court to these islands against Georgia.

The 1955 case had its origin in 1952, when the City of Savannah requested the Corps of Engineers to condemn the Barnwell Island area (except Rabbit Island, condemned in South Carolina in 1959) for dredge spoilage purposes. *See* S.C. Ex. B-58. As a result, the United States filed an *in rem* action against the property in late 1952. The only South Carolinians served were persons whose names appeared in the chain of title (as will be seen herein, the only chain of title to the property had originated in South Carolina 140 years earlier and had been recorded there, and only there, ever since). Ga. Ex. 378. In contrast, however, three officials of the State of Georgia, including the Attorney General, were served only a month after the Complaint had been filed, as were three Chatham County officials with no known connection to the property then or now, no chain of title having existed in Georgia. *Id.* Georgia shortly thereafter was permitted to intervene. Since South Carolina never received notice of the action through the time of its resolution in the Fifth Circuit, and never was served at any time, the entire action was effectively a series of *ex parte* communications by Georgia to the courts without an opportunity for South Carolina to be heard.

There was, of course, no question that the land would be condemned. The only issue was whether it was in Georgia or South Carolina. The resolution of this issue determined whether the landowner, E. B. Pinckney, would be compensated for the taking, since his chain of title stemmed from and existed only in the State of South

Carolina. If the land were in Georgia, it would be implausibly presumed not to have been granted by that state over the centuries, and hence still the property of the State of Georgia.

The District Court concluded that the islands were in South Carolina through prescription and acquiescence and dismissed the action. The Fifth Circuit reversed, noting that "[t]he boundary line between Georgia and South Carolina is not in dispute as between these sovereigns." 220 F.2d at 356. Almost the same sentence is to be found in Georgia's brief to the Fifth Circuit, S.C. Ex. S, p. 2, a statement which actively (and successfully) induced the Court to believe that South Carolina had no interest in the outcome of the case. The Court concluded that the evidence of prescription and acquiescence was insufficient, and for that reason placed the islands in Georgia pursuant to the 1787 Treaty of Beaufort. The Court's conclusion resulted from the meager record in the case. Pinckney, who had a deed (S.C. Ex. B-10(14)), did not introduce it, and the Court presumed that he did not in fact have a deed. 220 F.2d at 356.[4] Certiorari was sought by Pinckney, opposed by Georgia, and denied. 350 U.S. 826 (1955).

Georgia has at various times taken both sides on the effect to be given the 1955 case. In its brief to the Fifth Circuit, Georgia, seeking to minimize the case's effect on the boundary, represented to the Court that "[t]he bound-

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[4] The Special Master noted that the record in the present case is "voluminous," in contrast to the "indeed scanty" record in the 1955 case. *First Report* at 13, 14.

ary line . . . is not in dispute as between these sovereigns," and that "South Carolina had not claimed jurisdiction over the land in controversy." S.C. Ex. S, pp. 2, 3, 4. South Carolina, of course, was given no notice of the case, and therefore had no opportunity to controvert this manifestly-incorrect assertion.[5]

In opposition to Pinckney's Petition for Certiorari, the State of Georgia stated to this Court that the State of South Carolina, among others, was "cited to appear," but that only Pinckney had appeared. Ga. Ex. 378, Brief for the State of Georgia in Opposition at 4. Counsel for Georgia had to have known that service on South Carolina was never even attempted. The peculiar phrase "cited to appear" was apparently chosen to give the impression that South Carolina either had defaulted or otherwise was uninterested.

While the certiorari petition was pending, South Carolina, acting through its Attorney General, sought to file a complaint in the original jurisdiction of this Court in order to confirm South Carolina's jurisdiction and sovereignty over the Barnwell Islands. Ga. Ex. 379. Georgia opposed the motion, *id.*, and it was denied. 350 U.S. 812 (1955).

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[5] Service on a State is effected only by serving the chief executive officer or by other manner prescribed by the law of the State. *Grayson v. Virginia*, 3 Dall. (3 U.S.) 320 (1796) (common law rule); Rule 4(d)(6), Federal Rules of Civil Procedure. The South Carolina statutes provide for no other manner of service in cases involving boundary disputes. If *U.S. v. 450 Acres* is regarded as a title suit, the statute in effect at the time required service on the Attorney General. 1952 *Code of Laws of South Carolina*, §10-433.2.

In 1957, South Carolina again sought leave to file a complaint in this Court, and again the motion was denied. 352 U.S. 1030 (1957). Georgia, in opposition, characterized South Carolina's motion as one "to set aside" the judgment of the Fifth Circuit. Ga. Ex. 380, Brief of Georgia in Opposition at 3. This heavy reliance by Georgia on the Fifth Circuit's judgment as effectively concluding the interstate boundary dispute was a complete reversal of Georgia's position before the Fifth Circuit two years earlier that the boundary was not at issue between the two states.

Following the 1957 denial, South Carolina took no further action until 1977, when it supported Georgia's motion for leave to file complaint and, once the complaint was filed, counterclaimed for the Barnwell Islands and other tracts.

Before the Special Master in the instant case, Georgia contended that the 1955 case was entitled to preclusive effect, or, in the alternative, should be considered persuasive precedent. The Special Master recognized that the case was "not in any sense binding upon the principles of *res judicata* or collateral estoppel. . . ." *First Report* at 13. And in contrasting the "sparse" record in that case with the voluminous record in the present case, he obviously chose not to accord the 1955 case any persuasive value.

Having failed below to have the 1955 case accepted as having any impact on the present case, Georgia now seeks to give the case bootstrap effect on yet another ground, claiming that since the case purported to put Georgia in possession of the property, South Carolina

may not now press its claim of prescription and acquiescence. No authority cited in support of this theory involved similar facts.

There is no question that the resolution of an interstate boundary dispute by a court other than this Court cannot have preclusive effect on either of the states involved. Thus, in *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918), this Court held:

> It is hardly necessary to say that *State v. Muncie Pulp Co., supra*, and *Stockley v. Cissna*, 56 C.C.A. 324, 119 Fed. 812, relied upon in defendant's answer as judicial determinations of the boundary line, can have no such effect against the State of Arkansas, which was a stranger to the record in both cases.

South Carolina was likewise a stranger to the record in *U.S. v. 450 Acres.*[6]

In *Durfee v. Duke*, 375 U.S. 106 (1963), a private title case in which the courts of one state (Nebraska) concluded that the property was in Nebraska, this Court noted that

> [i]t is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question as between the parties to the litigation there. Nothing there decided, and nothing that

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[6] As discussed above, the record in that case indicates that South Carolina was never served even though Georgia was served soon after the case was brought. Various Beaufort County, South Carolina, officers and authorities were served, but only as predecessors in title under the tax forfeiture which occurred in the chain of title in the 1950's. As noted above, such service did not constitute proper service on the State, which can be served only through the Governor, or in some cases, the Attorney General.

> could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to their respective sovereignty over the land in question. *Fowler v. Lindsey*, 3 Dall. 411; *New York v. Connecticut*, 4 Dall. 1; *Land v. Dollar*, 330 U.S. 731, 736-737. Either state may at any time protect its interest by initiating independent judicial proceedings here.

375 U.S. at 115-116.

The obvious reason for placing disputes between states in the exclusive jurisdiction of the one tribunal with nationwide jurisdiction was to avoid even the appearance of partiality which might flow from having courts in one state deciding the substantive rights of another state. This function of this Court's jurisdiction "was essential to the peace of the Union." *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934), citing *The Federalist*, No. 80. *See* 28 U.S.C. §1251(a). If *U.S. v. 450 Acres* were to be given any effect whatever against the State of South Carolina, this fundamental principle would be violated.

In claiming that South Carolina may not claim a prescriptive right as a result of the 1955 case, Georgia makes an argument which is flawed for at least two reasons. First, such a result would allow Georgia to use the 1955 case indirectly for preclusive effect when the case cannot directly preclude South Carolina's claim. Second, Georgia's argument ignores the fact that this Court was effectively closed to South Carolina from 1955 to 1977, a fact which has been held in other analogous situations not to be prejudicial to the party in South Carolina's position.

As to the purported indirect preclusive effect which Georgia would accord to the 1955 case, there can hardly be any question that if the judgment itself is not binding on South Carolina's sovereignty, its incidental effects likewise cannot translate the judgment into one which binds South Carolina. The only issue which needed to be decided in the 1955 case was who was to be compensated for the taking. Since Georgia claimed that the land was ungranted land still held by that state, and E. B. Pinckney claimed under a South Carolina chain of title extending back for many years, it was necessary as a subsidiary matter to determine the titleholder.[7] But the only persons bound in any way to their detriment are Pinckney's successors in title, who may no longer claim compensation for the taking; that issue was litigated and lost by Pinckney, their predecessor in title.

The second flaw in Georgia's argument is that it seeks to bind South Carolina by a judgment which South Carolina was powerless to remedy through court action. South Carolina petitioned this Court twice, in 1955 and again in 1957, to have the Barnwell Island area boundary question resolved. Both petitions were opposed by Georgia and denied by this Court.

Since this Court has exclusive jurisdiction over interstate boundary disputes, and since this Court twice refused to hear the case, South Carolina's only forum was effectively closed until 1977, when the present action was

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[7] Although Pinckney apparently was unaware of it at the time, his was an unbroken chain of title extending back 140 years to a grant from South Carolina. This chain of title will be more fully discussed under Question II, infra.

permitted to be filed. South Carolina's position was therefore analogous to that of one who could not sue because the courts were closed to her, *Hangar v. Abbott*, 6 Wall. (73 U.S.) 532 (1870), or where no forum existed at all, *O'Hara v. State*, 112 N.Y. 146, 19 N.E. 659 (1889). Many other similar situations exist, all typified by the existence of some paramount authority preventing a person from exercising a legal remedy. *See, e.g., Osbourne v. U.S.*, 164 F.2d 767 (2d Cir. 1947) (plaintiff was a prisoner of war while statute of limitations ran); *Yoder v. Nu-Enamel Corp.*, 145 F.2d 420 (8th Cir. 1944); *Ayo v. Johns-Manville Sales Corp.*, 771 F.2d 902 (5th Cir. 1985) (applying Louisiana law); *Weaver v. Davis*, 2 Ga.App. 455, 58 S.E. 786, 789 (Ga.App. 1907). Indeed, in view of Georgia's active efforts to dissuade this Court from hearing this case, South Carolina's position between 1955 and 1977 was not far from that of a party who has been enjoined from enforcing his rights by another party who then seeks to have the claim declared barred by the passage of time. *Yoder v. Nu-Enamel Corp., supra; Davis v. Andrews*, 88 Tex. 524, 30 S.W. 432 (1895); *Lee v. Epperson*, 168 Okla. 220, 32 P.2d 309 (1934).

In summary, Georgia first sought to convince the Fifth Circuit that the boundary was not in dispute, and ever since then has sought to use the Fifth Circuit's decision as a binding ruling on the boundary issue. As this Court has clearly held, however, the Fifth Circuit's decision can be given no *res judicata* or collateral estoppel effect. Nor can any incidental effect of the case be used against South Carolina, because this would indirectly give the case the same effect as *res judicata*. When this

Court held in *Durfee v. Duke, supra,* that "nothing . . . decided, and nothing that could be decided" in a private action can bind states on boundary questions, the concept obviously applied to the indirect effects of the prior decision as well as all other effects. To hold otherwise would be to sanction Georgia's knowing unilateral evasion of the exclusive jurisdiction of this Court to hear and decide interstate boundary disputes.

II. Georgia has asserted no acts of dominion or control over the Barnwell Island area from 1787 until the 1950's and has acquiesced in South Carolina's jurisdiction through long inaction in the face of South Carolina's continuing and obvious exercise of dominion since 1795.

It is obvious that Georgia's principal argument before this Court as to the Barnwell Islands is the one based on giving indirect *res judicata* effect to the 1955 case. The presence of that case is the only difference in the evidence as to Rabbit Island, on the one hand, and Hog and Long Islands on the other. Rabbit Island was not condemned in the 1955 case.[8] Hog and Long Islands, by then merged with the South Carolina mainland, were part of the acreage in *U.S. v. 450 Acres.* It is important, even crucial, to note that there is absolutely no qualitative difference from 1795 to the 1950's in the type of proof offered by South Carolina for Rabbit Island and the other two. The three islands were granted together, often conveyed together, and taxed in the same manner throughout the

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[8] Instead, it was condemned for spoil purposes in the South Carolina District Court in 1959. S.C. Ex. B-71.

period. Rabbit Island and Hog Island were both diked and farmed for rice during the same 30 to 40 year period, *First Report* at 54-55; indeed, Hog Island was cultivated for a slightly larger period than Rabbit Island. The proof of police activity is greater for Hog Island than for either of the other two. Yet Georgia has conceded only that Rabbit Island is now in South Carolina, while continuing to maintain that Hog and Long Islands are not. Georgia's Exceptions and Brief at 13. Moreover, Georgia was careful to note that it did not agree with the Special Master's conclusion that one reason for placing Rabbit Island in South Carolina was that it had accreted to the mainland. *Id.* at n. 6. Accordingly, Georgia's concession as to Rabbit Island should either be read as a concession as to the strength of the evidence of South Carolina's dominion and Georgia's acquiescence, or as a contention that only the 1955 case can support Georgia's claim to Hog and Long Islands. Georgia's argument concerning the evidence of prescription and acquiescence on Hog and Long Islands must therefore be read in light of Georgia's concession that the same evidence was sufficient to place Rabbit Island in South Carolina. This means, essentially, that unless Georgia can prevail on the effect of the 1955 case, Georgia has already conceded that South Carolina's evidence is sufficient to place the Barnwell Islands in South Carolina.

In order to place the facts as to the Barnwell Islands in context, it should be noted first, that Georgia has conceded that it asserted no jurisdiction or sovereignty over the Barnwell Islands from 1760 to 1956,[9] and second,

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[9] Plaintiff's Response to Defendant's Second Interrogatories, No. 3(b)(II), S.C. Ex. G-15.

that the Special Master held that "the evidence is sadly lacking as to any issue in dispute [as to the state in which the islands were located] between 1831 . . . and the time the complaint was filed in *U.S. v. 450 Acres.*" *First Report* at 63-64. In other words, the South Carolina status of these islands was never seriously questioned for over 120 years. As the Special Master's comment above would suggest, Georgia has so little evidence in support of its claim that the claim is practically specious. Even assuming that the Barnwell Islands were islands in the Savannah River, they have been unquestioningly regarded as part of South Carolina for so long (since 1795) that the Special Master was led inevitably to the conclusion that they have become South Carolina's through prescription and acquiescence.[10]

The history of these islands has been extraordinarily well documented, both through tax and conveyancing documents and through the private correspondence of the Barnwell family between 1866 and 1924.

The official history of these islands begins in 1760, 27 years before the 1787 Treaty of Beaufort. In that year,

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[10] In Appendix E to its Brief and Exceptions, Georgia sets forth a chronology of the Barnwell Islands that is literally incredible in its attempted manipulation of the evidence. Far from showing a majority of instances placing the islands in Georgia, as Georgia contends, the record shows at least 112 specific instances placing the islands in South Carolina before 1955, and only 16 in Georgia. Between 1795 and 1955, Georgia can show only three possible instances of taxation (in 1825, 1830 and 1831) and several scattered maps, mostly of federal origin. Georgia's Appendix E is discussed more fully in the Appendix to this brief.

Georgia granted the two islands then existing (Rabbit Island and Hog Island) to Edmund Tannant. *See* Ga. Ex. 94. However, Tannant died several years later, apparently without ever having used the islands. *First Report* at 40. His executrix advertised the islands once in 1764, *id.* (the reference to 1774 in the *First Report* is apparently a typographical error), but there is no other documented reference to Tannant's title at any later time. As the Special Master noted, and as Georgia has conceded, no deeds from Tannant or his estate were found, nor did Georgia seek to regrant the islands. Indeed, after 1760 Georgia exercised no act of control or ownership over these islands until 1956, with the exception of the islands' possible appearance on Georgia tax rolls for 1825, 1830 and 1831. Even then, the title stemmed from a South Carolina grant, *First Report* at 40-41, and it is not by any means certain that the 1825, 1830 and 1831 references pertained to the islands.

In sharp contrast to Georgia's nearly 200 years of inactivity and silence regarding these islands, South Carolina's activity began early and lasted until after the 1955 condemnation action to which the State of South Carolina was not a party.

South Carolina's exercise of dominion over the islands began in 1795, when the State of South Carolina granted the then-two islands to Hezekiah Roberts. S.C. Ex. B-3. Both the granting documents and the accompanying plat refer to the islands as situated in the "district [i.e., county] of Beaufort," which was and is in South Carolina. S.C. Ex. B-1, B-2, B-3. As the Special Master found, Roberts did nothing with these grants, which means that they effectively lapsed. *First Report* at 41. The

practice of receiving grants but never actually using the land was not uncommon for rural lands in this era.

The grant which finally established a chain of title was made by South Carolina to Archibald Smith in 1813. S.C. Ex. B-5, B-6. By this time the third island had appeared, and the grant and accompanying plat conveyed all three. Again, the granting documents referred to the property as lying in the Beaufort District, South Carolina. From 1813 until the present, the chain of title is completely documented. After the 1813 South Carolina grant to Archibald Smith, the islands passed to his children upon his death in 1830, S.C. Ex. B-10(1), to any future children of his daughter in trust in 1832, S.C. Ex. B-10(2), and to five of her six children (Archibald Smith's grandchildren) absolutely in 1868.[11] The interests of the children through various conveyances became consolidated in the two longest-surviving, Eliza Ann Barnwell and Charlotte Cuthbert Barnwell. These two held the islands until their deaths in 1915 and 1922, respectively. Apparently, another family member paid the taxes on the property until 1932. The Sheriff of Beaufort County, South Carolina, seized the land for nonpayment of taxes in the

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[11] As the Special Master noted, First Report at 47-49, only three of the five 1868 deeds were ever recorded, but the titles of the other two children are confirmed through various documents such as the 1868 acknowledgement of receipt of deeds, S.C. Ex. B-10(3), the plat made a month earlier depicting each child's share of the islands, S.C. Ex. B-10(4), B-10(5), and various family letters; see, S.C. Ex. B-21(38). S.C. Ex. B-28 describes the shares of the children, which were taken by drawing lots.

late 1930's and in 1940 transferred the islands to the County Forfeited Land Commission, the county entity which disposed of land seized for taxes, S.C. Ex. B-10(13). That entity in 1942 sold the property to E. B. Pinckney, S.C. Ex. B-10(14). Pinckney conveyed Rabbit Island to L. J. Thomas in 1956, S.C. Ex. B-10(19), and, after the 1955 case, quitclaimed the remainder of the area to three individuals in 1960, S.C. Ex. B-10(17). The Thomas family and the three individuals are still the South Carolina record titleholders of the property.

From all of the above, it is beyond dispute that the title was perceived to be in South Carolina as early as 1795, and that the chain of title which began with a South Carolina grant in 1813 continued in South Carolina without question until the 1950's and still is the source of a present-day private claim of title to the islands. The Special Master concluded likewise after an extensive review of the record. *First Report* at 50-51.

The evidence reveals that it was reasonable for persons in the late 18th and early 19th centuries to perceive the islands as being in South Carolina. The entire area was low marsh during that period; the islands were separated from Georgia by the wide and deep waters of the Savannah, but were separated from South Carolina only by small streams so shallow that they were described as "sometimes dry." S.C. Ex. B-8. Various 19th century maps show depths so shallow as to permit wading to the South Carolina mainland. *See, e.g.*, Ga. Ex. 136, 156. At least one of these watercourses was referred to as a "creek." S.C. Ex. B-8. Even Georgia's main geographical witness, Dr. DeVorsey, testified to the ambiguity of the situation of these islands by stating:

> I'm not sure passing up the main channel that you would necessarily perceive that they [the Barnwell Islands] were even separated from the mainland behind them. It's all very low and marsh covered.

Tr. V, 628.

It was possible then, and even probable, that contemporaries of the Treaty would have perceived the larger part of the river as the boundary, and not the smaller "creeks" which ran behind islands close to the South Carolina shore. As South Carolina's expert, Dr. Arthur Robinson, an international authority on cartography, testified, the framers "could not possibly have been drawing a wiggly line among marsh lands and saying it in such a general fashion." Tr. XIX, 84. This was the contemporary view of river boundaries, as indicated by Chief Justice Marshall in *Handly's Lessee v. Anthony*, 5 Wheat. (18 U.S.) 374, 380 (1820):

> When the state of Virginia made the Ohio the boundary of states, she must have intended the great river Ohio, not a narrow bayou into which its rivers occasionally run.

In the 1922 case between these states, this Court held that the "northern branch or stream" of the river may either be wide or "it may be narrow and shallow and insignificant. . . ." *Georgia v. South Carolina*, 257 U.S. 516, 521 (1922). Were this still an open question, South Carolina would contend that the "great" river rather than small "creeks" constitutes the boundary; the Special Master agreed with this position absent the holding of the 1922 case. *First Report* at 12 n. 6. But since the issue has already been decided, South Carolina cites *Handly* and the testimony above only to show that viewing the islands as part of South Carolina was a reasonable construction, possibly

the most reasonable construction, of the Treaty in 1795 and in 1813, when South Carolina granted the islands. These grants were therefore not, as Georgia suggests, efforts to change the boundary from that "solemnly agreed to." Ga. Br. & Exceptions at 9.[12]

The next most important sovereign act after the sovereign grant itself is the taxation of the property. In the case of the Barnwell Islands, the proof that the islands were taxed by South Carolina is long and complicated, but leaves no doubt that the islands were consistently taxed from at least 1870 until the ownership of the islands became disputed beginning in the 1950's.[13] Georgia has conceded the fact of this taxation, Ga. Br. & Exceptions at 30, and the Special Master likewise concluded that the taxes were collected by South Carolina in the years stated above. *First Report* at 52-54. Conversely, the Special Master found that Georgia, except for possibly the early years of 1825 and 1831, "made no effort to assess or tax the three islands in question." *First Report* at 55. There is no evidence in the record which controverts this finding of fact.

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[12] Even the Georgia courts prior to 1922 construed the Treaty as making the boundary "the current or main thread of the Savannah River." *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893); *see also, James v. State*, 10 Ga.App. 13, 72 S.E. 600 (1911).

[13] Proof of taxation in South Carolina before 1865 is impossible because the Beaufort County records were destroyed in a fire that year. (The title nevertheless has been proven through documents recorded elsewhere or found in family papers.) The details supporting payment of taxes are found in Tr. XII, 85 through XII, 136.

Beyond granting, recordation and taxation, South Carolina authorities also exercised other acts of sovereignty over the islands. First, of course, there was the seizure and subsequent sale of the islands for unpaid taxes in the 1930's and 1940's, as already mentioned. In addition, the islands were regularly policed from at least the 1920's. The Sheriff of Beaufort County regularly patrolled the Barnwell Islands from at least 1926 (when the Sheriff whose deposition is in evidence was first elected) through 1950, when the Barnwell Islands and other parts of Beaufort County were annexed to Jasper County, South Carolina. S.C. Ex. C, pp. 14, 16, 22. In 1932, E. B. Pinckney (who apparently was using the then-vacant islands several years prior to acquiring title to them from the County authorities) was shot on Hog Island. The offenders were arrested in Savannah by the Beaufort County Sheriff with the cooperation of the Savannah Police Department and were subsequently convicted in the South Carolina Court of General Sessions. S.C. Ex. C, pp.16-17; S.C. Ex. B-56. In 1946, the Beaufort County Sheriff's Office arrested two men for stealing hogs on the Barnwell Islands. S.C. Ex. B-57. These two men subsequently pled guilty to grand larceny and were sentenced in the South Carolina Court of General Sessions. *Id.*

As the testimony of several South Carolina Wildlife officers indicated, those officers patrolled the property throughout the 1950's, 1960's and 1970's with the understanding that it is in South Carolina. Tr. XI, 117-118. Those officers never saw their Georgia counterparts engaged in similar patrolling. *Id.* The Sheriff of Jasper County investigated another livestock-related incident in the 1950's. Tr.

XI, 90-92. The South Carolina Department of Wildlife and Marine Resources issued licenses for the setting of shad nets in the early 1970's, S.C. Ex. B-62, and wrote citations for violations of fish and game laws in the same period. S.C. Ex. B-61.

The matters set forth above are only a truncated summary of a long and detailed amount of evidence, particularly as it relates to recordation and taxation. An examination of the authorities reveals that far less will suffice to establish sovereignty by prescription and acquiescence.[14]

The importance of a state grant is so clear that the fact of a grant is cited as self-evident proof of the granting state's dominion and control. *See Indiana v. Kentucky*, 136 U.S. 479, 517 (1890) ("numerous grants of parcels of land on the island were made by Kentucky . . . ."); *Missouri v. Kentucky*, 78 U.S. 395, 402 (1871) (lands were "surveyed under state authority, and have since then been sold and conveyed to the purchasers by the same authority."); *Arkansas v. Tennessee*, 310 U.S. 561, 567 (1940) (" . . . as early as 1823 entries of the Island were being made under the authority of Tennessee and surveys were made [by her] as early as 1824.").

As with the original grants, the taxation of land by one state and the absence of taxation by the other is regarded as proof of the first state's dominion and control. The consideration given to taxation in nearly every boundary case is proof of the weight of such evidence, no

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[14] Factors indicating Georgia's acquiescence will be discussed beginning at p. 26, infra.

doubt because taxation is often the principal continuing sovereign function over uninhabited or agricultural lands. *See, e.g., Louisiana v. Mississippi*, 202 U.S. 1, 55 (1906); *Arkansas v. Tennessee, supra*, 310 U.S. at 567-68. As to recordation, in *Indiana v. Kentucky, supra*, 136 U.S. at 510, the Court, listing the absence of acts by Indiana, noted that "[i]t is not shown that a deed to any of [the] lands is to be found on [Indiana's] records. . . ." *See also, Central R. Co. v. Mayor and Aldermen of Jersey City*, 209 U.S. 473, 480 (1908) ("the record of transfers of such lands were kept in New Jersey, not New York"); *Vermont v. New Hampshire*, 289 U.S. 593 (1933).

While South Carolina's activities obviously were not as intense as they would be for a populated area, they constituted the principal activities which a state could be expected to conduct with regard to rural land. As one authority has stated, "the frequency and intensity of the manifestations of State authority and the nature of the acts required as proof for the establishment of State authority vary according to the circumstances and the character of the territory in question." Y. Blum, *Historic Titles in International Law*, 118 (1965).

As the Special Master concluded, "South Carolina's claim of prescriptive right was undisputed at least between 1831 and the early 1950's, a period of approximately 120 years." *First Report* at 64. This is longer than in any of the above cases, and the record is devoid of any evidence that Georgia exercised any act of dominion or control during those 120 years.

Georgia concedes the existence of the chain of title and the 80 or more years of taxation, and seeks to avoid

the effect of these activities only by showing that she had no reasonable notice of South Carolina's actions and therefore cannot be said to have acquiesced in them.

The first answer to this is that inaction alone can constitute acquiescence when it continues for a sufficiently long period. In *Rhode Island v. Massachusetts*, 15 Pet. (40 U.S.) 233 (1841), the Court strongly suggested that the nonassertion of a claim for a long time is, unless proven otherwise, the result of "such negligence and inattention to [the State's] rights as would render it inexcusable, and should be treated, therefore, as if it had been acquiescence with knowledge . . . ." 15 Pet. (40 U.S.) at 274. In Y. Blum, *Historic Titles in International Law* (1965) at 133, it is stated that complete inaction "cannot be regarded as devoid of any meaning and from [such] conduct an inference of . . . acquiescence in the new situation may properly be drawn." *See also Indiana v. Kentucky*, 136 U.S. 479, 510 (1890); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933) (failure of one state to tax for over a century while the other state did tax the property "is of substantial weight in indicating acquiescence"); *First Report* at 64-65.

An even more compelling response to Georgia's claim of lack of notice is that the record contains abundant evidence of facts which should have put Georgia on notice of South Carolina's exercise of sovereignty, and a period of well over 100 years is certainly sufficient time to act on any facts so noticed. Thus, Georgia not only was inactive over a long period, but also was inactive in the face of facts which should have prompted an inquiry and the assertion of a claim if one were to be made. Moreover, the record reveals that South Carolina's jurisdiction over

the islands must have been actually known and accepted by Georgians.

The most outstanding feature of the islands in the nineteenth century was that they were cultivated for rice, as the Special Master found, for at least 30 to 40 years prior to the 1880's. *First Report* at 57. Moreover, the islands were plainly visible from the City of Savannah (two and one-half miles away) and from Fort Jackson on the Georgia side of the river, only one-half mile from Georgia. From either distance, "the general area, the buildings in the area, and the extent of cultivation were readily determinable." *First Report* at 43.[15]

This open cultivation of the easily-visible islands for decades is, as the Special Master found, "of the utmost importance in determining the knowledge by citizens of Georgia as to the occupation of the islands." *First Report* at 56. Georgia officials were charged with knowledge that the Treaty of Beaufort placed all the Savannah River

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[15] Rice cultivation required the use of dikes, and therefore it was a particularly obvious use of the land. Moreover, the dikes on the islands appeared on many, if not most, maps of the area as early as 1855 (Ga. Ex. 156), and as late as 1935 (Ga. Ex. 331). A 1921 reference to the absence of buildings suggests that buildings were formerly present, S.C. Ex. B-21(74), *First Report* at 56-57. Building symbols also appear on maps such as Ga. Ex. 153, drawn in 1853.

Georgia contends that activity on the islands must have been obscure because one moonshining operation was located there in the 1920's and 1930's. Exceptions and Brief of Georgia at 22-23. The obvious answer to this is that ricefields totalling between 120 and 200 acres at various times would be much easier to notice than one moonshining operation, hidden away on a fraction of an acre.

islands in Georgia, and also were charged with knowledge of their own records. Putting the two together, a Georgia official would have discovered that there was no record of taxation or other sovereign action over these lands by Georgia, except for the isolated and by no means certain instances in 1825, 1830, and 1831. If a Georgia official, through investigation, were to ascertain the names of the individuals who were cultivating the islands, a search of the Chatham County, Georgia, conveyancing records in the 19th century would have revealed the 1868 distribution under the marriage settlement, S.C. Ex. B-10(3), and the 1896 mortgage of the islands among family members. The 1868 document, which was recorded in Georgia because it also involves Georgia property, refers to "lands . . . in . . . South Carolina for which shares have been ascertained by a division . . . ." This should have prompted further inquiry from someone with knowledge of the identity of persons claiming the islands. The 1896 mortgage, also involving Georgia property in part, specifically mentions Hog, Rabbit and Long Islands, with all stated to be in Beaufort County, South Carolina. S.C. Ex. B-10(11). Either of these deeds would have prompted further inquiry as to which lands were actually conveyed. Accordingly, there can be no question that even a minimally diligent inquiry would have revealed that the islands were being claimed as property in South Carolina under a South Carolina grant.

In reality, however, the situation was not one of Georgians being unaware of activities on the islands, nor was it one of a Georgia official needing to conduct a record search in order to discover the status of the islands. The evidence instead reveals that many prominent Savannah

planters of the 19th century were aware of the Barnwell family's ownership and cultivation of the islands. This evidence is discussed in detail by the Special Master. *First Report* at 57-61. For example, the Screven family, prominent in Savannah for generations, held the adjoining land in South Carolina from a time before the original 1813 grant of the islands. *See* S.C. Ex. B-6. Agreements and other transactions between the Smiths and Barnwells and the Screven family in 1823 and 1850 indicate further awareness of that family with the Barnwell family claim. S.C. Ex. B-9, B-39. *First Report* at 57-58. In 1866, A. S. Barnwell, who owned one-third of Hog Island and probably supervised most of the rice planting on all three islands, was a member of the Rice Planter's Association in Savannah. *First Report* at 59. The agents of the Barnwell family for payment of South Carolina taxes and other business matters were Savannahians. *First Report* at 60. In 1875, a textbook intended for use in the Savannah school system listed the islands in the Savannah River, but did not include the Barnwell Islands; an accompanying map colored the Barnwell Islands in the color used for South Carolina. *First Report* at 60-61; S.C. Ex. GM-11, G-9. This listing is not exhaustive of everything in the record, and at a distance of 100 years or more, certainly is not likely to be all the evidence which may have existed.

As the Special Master found, "[c]learly, well known residents of Savannah and citizens of Georgia were possessed of information showing the three Barnwell Islands to be in South Carolina." *First Report* at 60. Further, even individuals whose affairs were primarily centered in Georgia "believed the islands to be in South Carolina." *Id.* at 57. Moreover, in view of the relatively small area and

population of the Savannah area in the 19th century, it would be unusual if many citizens and officials of Savannah did *not* know of the Barnwell family's ownership and cultivation of the islands.

Perhaps the most incredible aspect of the entire Georgia claim is that it requires one to believe that land of obvious value as riceland was allowed, in the eyes of Georgia and any local resident who might be interested, to stand vacant, ungranted and untaxed for almost 200 years. All farmland was particularly valuable in the 19th century, and rice was the aristocrat of crops. To claim that good riceland could go ungranted and untaxed is so contrary to common experience and to the documented local experience as to be unworthy of serious consideration. Nearly all the land in Chatham County, Georgia, had been granted out between the foundation of the colony in 1733 and the Revolution. Tr. VII, 869. The Barnwell Islands were granted in 1760, only 27 years after Georgia was founded, and twice more thereafter. The fact that even Jones Island, a salt marsh unfit for rice growing or any other economic use except as a spoil area, was first granted in 1768 is a strong indication that the colonists would seek a grant of any and all vacant land.

The cases previously cited as well as others in the *First Report* at 63-64 illustrate the well-known rule that the inaction or acquiescence of one state is as much a necessity as the exercise of dominion by the other. Georgia claims that "[n]either possession nor cultivation . . . made any statement that the islands were in South Carolina," Ga. Br. & Exceptions at 33, but this is clearly not the law. To the contrary, the cases hold that "open and notorious adverse possession is evidence of notice; not of

the adverse holding only, *but of the title under which the possession is held." Landes v. Brant*, 10 How. (51 U.S.) 348, 375 (1850) (emphasis added). This Court has described the rule as so settled that it was unaware that "a contrary doctrine is held in any state of the union." *Id.* The rule applies between sovereign as well as private individuals, *Marsh v. Brooks*, 14 How. (55 U.S.) 513, 522-3 (1852), and will place a sovereign on notice of the title of private landowners. *U.S. v. Bighorn Sheep Co.*, 9 F.2d 192 (D.Wyo. 1925). *See also, New Mexico v. Texas*, 175 U.S. 279, 300 (1928). Possession and cultivation of land is notice of the rights in the property, *Bowman v. Wathan*, 1 How. (42 U.S.) 189 (1843), and visible and open possession of property is the equivalent of recordation. *Noyes v. Hall*, 97 U.S. 34 (1878). Where the deed or conveyance underlying the possession is unrecorded, the possession constitutes notice of the instrument and creates a duty of inquiry as to the conveyances of record. *Landes v. Brant, supra; Merrill on Notice*, §103. Georgia has admitted that the continuing possession and cultivation of the property were visible from Fort Jackson and the city of Savannah. G-16, Nos. 21(a); 22(a). It therefore was under a duty to discover the basis for that possession.

Georgia must be charged with knowledge of what was visible and what was known. In the face of such knowledge, whether constructive or actual, Georgia has failed to grant or tax the property, failed to administer deeds and conveyances, and failed to attempt to enforce its laws in any way. As surely as South Carolina has dominated this land, Georgia has abandoned it. It is now far too late for Georgia to come forward with a claim denied by over a century of history.

III. The mouth of the Savannah River, which is where the river ends by entering the Atlantic Ocean, lies immediately to the north of Tybee Island.

The unusual aspect of the Savannah River's entry into the Atlantic Ocean is that the most seaward point of land on the southern side of the channel (Tybee Island) has no correlating point of high land on the northern side of the channel. The feature which lies to the north of the river opposite Tybee Island and which directs the river's flow to the southeast is a shoal. For 250 years, this shoal has been recognized as confining the river's flow. One has to look almost 6 miles north, past the mouths of two other rivers and Calibogue Sound, before finding a body of high land, Hilton Head Island, which is as far seaward as Tybee Island and thus opposite it in a sense.

Georgia claims that the mouth of the river extends the entire 5 to 6 miles between the two islands because "some feature must form the northern side of the mouth . . . ." Ga. Brief and Exceptions at 44. South Carolina agrees that this is often the case, but not where, as here, there is no feature, or at least no highland feature, at the northern side of the mouth. Hilton Head Island does not touch the waters of the Savannah River, and is claimed as a headland by Georgia only because it coincidentally is the first highland feature in South Carolina which extends as far seaward as Tybee Island. If it were not there, Georgia would presumably argue that the next northern island in South Carolina opposite Tybee would form the mouth. In fact, however, Georgia's argument has

no basis in geography, history, or law, and the Special Master correctly rejected it.[16]

Geographically, it is readily apparent that the water area between Hilton Head and Tybee Islands is simply an indentation of the sea rather than the outflow of a river; this indentation, or bay area, is entered by the channels of the Savannah River, the New River and Calibogue Sound. Until the last Ice Age ended and the level of the sea rose, all of these watercourses clearly had highland banks which are now submerged in the bay. Tr. XVI, 23-24. The now-underwater banks or shoals are sometimes referred to as sand flats; they are 1 to 15 feet deep at low tide. *See, e.g.*, Ga. Ex. 334.

It is also easily observable that most of the water of the Savannah River never leaves its relatively narrow channel, instead proceeding in a southeasterly direction as it passes Tybee Island. Tr. XVI, 79-80; 206. Even if it were to flow toward the northeast (which would be an anomaly in the northern hemisphere because of the Coriolis effect), it would quickly be pushed south again by the flow of Calibogue Sound. This situation has been the same for over 250 years, as the Gascoigne Chart of 1731, S.C. Ex. MM-4, shows. Indeed, the primary flow of water in the bay is from north to south rather than from east to

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[16] If the mouth were deemed to be the place where high land in South Carolina last touches the waters of the Savannah River, it would be several miles inland, with Turtle Island or perhaps even Jones Island forming the northern headland. However, even Georgia concedes, as the Special Master found, that the historical evidence refutes the mouth's being placed so far inland. Ga. Br. & Exceptions at 44; *First Report* at 110-111.

west. Georgia's proposed mouth of the river would therefore not only cross over the mouths of several other watercourses, but its northern headland, Hilton Head Island, would paradoxically be untouched by the waters of the river. Lastly, the mouth concept proposed by Georgia would cause Georgia waters to lie directly seaward of almost three miles of South Carolina's land and waters.

Maps and textual sources of the 18th century indicate that the perception of the era was similar to the geography in that it located the river mouth slightly above Tybee Island with virtually no mention of a second headland. (The eighteenth-century perception is relevant, of course, because that was the era in which the Treaty of Beaufort was signed.)

Perhaps the most precise and compelling eighteenth century references to the mouth of the river were made in a map and report by William DeBrahm, the most informed surveyor, engineer and geographer in the area at the time. Tr. III, 326-327. He was employed by the colony of Georgia in the 1760's. In a manuscript map prepared at that time entitled "Map of Coxpur Island in the Embouschure [mouth] of Savannah River," MM-1, DeBrahm depicted only Tybee Island, Cockspur Island and a relatively small amount of water to the north of Tybee Island. No reference to Hilton Head Island appears on DeBrahm's map of the mouth of the Savannah River.

Moreover, in his *General Report,* filed a few years later, DeBrahm stated that "Savannah Stream . . . mixes with the Ocean at latitude 31 degrees 57 minutes . . . ." (M-19). The "embouschure" map shows this line of latitude intersecting the lighthouse on Tybee Island and

leaves no doubt as to where DeBrahm, perhaps the most informed observer of his day, thought the mouth was.[17] The term "mixes with the sea" is synonymous with the concept of the mouth of a river. Tr. XVI, 69, 175-177, 205. DeBrahm's perception was essentially the same as that of Sir James Wright, the colonial governor of Georgia, who in 1773 referred to "Tybee Inlet at the entrance of Savannah River . . . in the latitude of thirty one and fifty five North lat: . . . ." S.C. Ex. M-9. That latitude is just south of the north end of Tybee Island; perhaps Wright intended to restate DeBrahm's latitude and was slightly in error, but in any event he did not place the mouth at any distance north of Tybee Island.

These colonial perceptions of the mouth's location are similar or identical to those held by numerous observers of colonial and later times whose statements in evidence refer to the mouth as lying "at" or "against" or "near" Tybee Island. South Carolina and its expert historical geographer found almost twenty eighteenth-century textual references to the mouth of the Savannah River. These are summarized in S.C. Ex. I. In those references, the consistent method of referring to the mouth of the river was to state that it lay "at Tybee" or "near Tybee" or "over against Tybee." *Id.* Occasionally, Tybee Island is

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[17] The flaws in Georgia's case are illustrated by the fact that Georgia's main witness, Dr. Louis DeVorsey, had edited two works of DeBrahm, including the *Report* discussed above, but failed to mention in his testimony either the "embouschure" map or the above-quoted portion of his own edition of DeBrahm's *Report*. A presentation which avoids mention of the most qualified scientific observations of the day suffers severe credibility problems.

referred to as lying "in the mouth." *Id.* Only one reference, an early one dating from 1733, states that Hilton Head Island (referred to as Trench's Island), "lies at the mouth of the Savannah River on the Carolina side." Ga. Ex. 65. This single reference comes from General Oglethorpe, who was not a disinterested observer. All of these references are discussed by South Carolina's historical geographer, who concluded that the mouth of the Savannah River was perceived to be at or against Tybee Island. Tr. XV, 56-77. These descriptions simply made no mention of a northern headland, nor of any need for one to exist in order for the mouth to be located.

A number of maps of the era in addition to the "embouschure" map are to the same general effect, with the words "Savannah Sound" extending southeasterly from Tybee Island. S.C. Ex. GM-2, GM-3, GM-5-A. On others, the words "Entrance of Savannah R." or "Savannah Sound" are in the vicinity of Cockspur Island, coming nowhere near Hilton Head Island. S.C. Ex. GM-6, GM-7, GM-8. There is no cartographic evidence which suggests that Hilton Head Island was ever perceived to be part of the mouth of the river; no map of the river mouth includes Hilton Head Island, and no navigation chart suggests that Hilton Head is any way connected with the Savannah River.

South Carolina is aware of no case in which geographic features such as these have come before a court for decision. None of the various authorities cited by Georgia, Ga. Br. & Exceptions at 45-49, deal with such geography; they simply state the general rule that where the two headlands in fact exist, they form the mouth of

the river.[18] One authority cited by Georgia, Article 13 of the Geneva Convention, does not even refer to the mouth of a river, but to the entirely different concept of a baseline. The Special Master noted this confusion in Georgia's presentation in another context. *First Report* at 104. Another authority cited by Georgia, while making no reference to the particular geography found in this case, cites instances of deltas and swamps to indicate how much variety may be encountered in geographic features when an attempt is made to locate the mouth of a river. Ga. Br. & Exceptions at 47 n. 26.

When a situation requires the application of law to geography, the goal is to reach a reasonable result in light of that geography, rather than to attempt to fit dissimilar types of geography into rules which arose in other geographic contexts. This is recognized in an analogous context in Article 12(1) of the Geneva Convention and decisions under it, placing heavy reliance upon special circumstances, especially geographic circumstances, in drawing lateral seaward boundaries. Georgia's approach, on the contrary, is to attempt to make all geography fit within a single rule, the headland-to-headland rule, regardless of whether two headlands are present or not. By claiming that "some feature must form the northern side of the mouth," Georgia is making an arbitrary attempt to have the facts follow the law. Since almost all

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[18] In *Washington v. Oregon*, 214 U.S. 105, 214 (1909), this Court refused to treat an underwater feature forming the ship channel as one side of the river mouth. However, the decision was based not on any flaw in using the underwater feature, but on the fact the entire river channel proposed by Washington was not the correct boundary.

waters of the river enter the sea just above Tybee, and ships enter the river at that location, that is where the mouth of the river lies, regardless of the absence of a highland feature to the north.[19]

The general area identified by the Special Master as the mouth of the river conforms to the geography of the area and to the nearly-universal perception in the eighteenth century as to the mouth's location. In practical effect, this places the mouth in the middle of the river channel just east of the two jetties near Tybee Island. *See Second Report*, Appendix D. If this moves the mouth to any extent at all from its eighteenth-century location, it is nevertheless the correct approach, as indicated by *Texas v. Louisiana* (II), 426 U.S. 465 (1976). In that case, one state argued that the boundary, to be drawn with precision for the first time in the 1970's, should be drawn with reference to conditions in 1845, when the boundary was generally defined. This Court instead drew the boundary considering current-day conditions, particularly jetties, noting that no precise boundary was drawn in 1845 and that "[t]he Court should not be called upon to speculate as to what Congress might have done [in 1845]." 426 U.S. at 469-470. In other words, when the time comes to draw with precision an historical boundary only generally

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[19] In a sense, the submerged bank which keeps most of the river's flow out of the bay to the north is the feature forming the mouth's northern bank. However, since the mouth is a general area and was defined by the Special Master as such, South Carolina does not claim that it is a prerequisite that the northern feature, whether underwater or above water, be precisely identified in this case.

defined in its inception, the boundary should consider the effect of present-day structures and conditions.[20]

IV. Islands which formed on the South Carolina side of the Savannah River after the boundary was set by the Treaty of Beaufort in 1787 belong to South Carolina.

As the Special Master held, when a new island forms in a river, "[t]he accepted principle of law is that the owner in fee of the bed of a river, or other submerged land, is 'the owner of any bar, island, or dry land which subsequently may be formed thereon.' *St. Louis v. Rutz*, 138 U.S. 226, 247 (1891)." *First Report* at 28. This rule applies whether the dividing line in the river follows the thalweg, *Kansas v. Missouri*, 322 U.S. 213, 229 (1944), or follows the geographic center. *Port of Portland v. An Island in Columbia River*, 479 F.2d 549 (9th Cir. 1973). *See also, Dartmouth College v. Rose*, 257 Iowa 533, 133 N.W.2d 687, 690 (1965); *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 189 (1959); *Davis v. Haines*, 182 N.E. 718, 721 (Ill. 1932); *Conran v. Griffin*, 341 S.W.2d 75 (Mo. 1960); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951), *reh. den.* 191 F.2d 705 (1951); *Wilson v. Watson*, 144 Ky. 352, 138 S.W. 283 (1911).

Georgia cites no authority in opposition to this well-settled body of precedent. Georgia's argument is that

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[20] Any variance in this case between the 18th century location of the mouth and its current-day location is miniscule compared to the differences caused by the jetties in *Texas v. Louisiana*.

when the Treaty of Beaufort placed "all" islands in Georgia in 1787, the framers intended it to realign the boundary in perpetuity whenever a new island formed, always awarding the new island to Georgia. This argument ignores the fact that the Treaty, once signed, vested the rights of the parties in their respective positions of the riverbed, subject to the equally well-settled rules of accretion and erosion. Moreover, the Special Master was probably correct in noting that the Treaty was entered into "without any thought as to islands which did not then exist." *First Report* at 30. South Carolina submits that to require all newly-formed islands to be placed in Georgia would permit the Treaty to create a floating boundary. This floating boundary would always subject South Carolina, but never Georgia, to divestiture. Surely, the framers did not intend to create a boundary which could never be known because it is always subject to change. Rather, they clearly intended to settle the boundary, setting a line which would determine what land was in what state, once and for all.

The rule which Georgia offers would place South Carolina in a constant state of temporary custody of its entire portion of the bed of the river; whenever an island formed, South Carolina's part of the river would be lost. Moreover, if the Corps of Engineers at Georgia's behest caused the gradual formation of an island on the South Carolina side of the river, Georgia could actively and intentionally acquire land on the South Carolina side of the river. In the past, the Corps' emphasis has been on assisting Georgia's port, with little regard for the effects of placing dredge spoil on the South Carolina side of the

river. If the island gradually accreted to the South Carolina side of the bank (or attached itself to the bank via other islands similarly formed), South Carolina would lose not only the riverbed but also all mainland river frontage in any area thus affected. In denying Georgia's claim to newly-formed islands, the Special Master recognized the above concerns. First Report at 29.[21]

In its application to this case, the well-established rule concerning the emergence of islands would unquestionably place the unnamed island upstream from Pennyworth Island in South Carolina, and would cause the boundary line to cross the now-highland site of the former unnamed island downstream from Pennyworth Island (this island, sometimes referred to as "Tidegate," is now part of a dam extending across the river, so the line would cross land in this area in any event). As to Long Island (Barnwell Island No. 2) and the now-nonexistent Barnwell Island No. 3, South Carolina submits that this rule is overridden by South Carolina's prescriptive right to Long Island and by the erosion of Barnwell Island No. 3.

The only area in which there is any factual question as to the application of the rule is in the area of Oyster

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[21] South Carolina agrees with the Special Master that the insertion of the words "formed by nature" in the 1922 case decree with reference to islands does not appear to have been done with any specific purpose. *First Report* at 22-23, n. 15. If anything were intended, it was probably only to exclude the possibility that a man-made island would change the boundary. In any event, the point was not at issue in the 1922 case, and for that reason this incidental language should not receive undue weight.

Bed Island. South Carolina submits that the evidence which is contemporaneous with the 1787 Treaty of Beaufort clearly shows that Oyster Bed Island arose from a shoal which lay to the north of the northern channel, containing that channel's flow. This confining shoal is plainly shown near the title word "Sound" on DeBrahm's 1772 "Chart of the Savannah Sound," S.C. Ex. MM-1, on the 1821 LeConte chart, S.C. Ex. MM-5, opposite Cockspur Island on the 1751 Yonge-DeBrahm map, S.C. Ex. GM-1, and on the 1831 Corps of Engineers chart prepared under the command of Robert E. Lee, S.C. Ex. MM-7. South Carolina does not contend that every drop of the Savannah River was contained by this shoal, but the vast majority of it was so contained, *See* Tr. XVI, 209, and any minor amounts of water which crossed this shoal should be regarded as *de minimis* for purposes of determining the boundary between the two states. In light of the various contemporary documents showing the shoal which later became Oyster Bed Island lying north of the northern channel, it is highly likely that the framers of the Treaty of Beaufort would have regarded that shoal as fronting on the Savannah River rather than lying in the river. As the Special Master noted, "the framers . . . never intended . . . to draw a boundary line extending northwardly and 'looping' around to the north of where Oyster Bed Island thereafter appeared." *First Report* at 96. Georgia relies only on evidence from the 1870's forward. Whatever that may tell about conditions in the river almost 100 years after the Treaty, when both man-made and natural changes may have occurred, it is of no assistance in

determining conditions in 1787.[22] As the Court held in *Rhode Island v. Massachusetts*, 4 How. (45 U.S.) 591, 629 (1846), "[i]n looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood at the time they transpired."

V. The Special Master's "right-angle" principle is the most reasonable approach to drawing the boundary line around islands.

The Special Master was presented with an issue clearly not determined by the Treaty framers with regard to how to delineate the boundary line with precision where islands appear in the northern channel of the river. The approach used by the Special Master in the absence of any authority whatever to support either state was to draw the line midway between the island and the South Carolina shore until the island ceased to lie opposite the South Carolina shore, at which point the line reverts to the midpoint of the northern channel. This method of demarcation is illustrated by the Special Master's treatment of the line around Pennyworth Island. *First Report*, Appendix F.

Despite Georgia's citation to the 1922 case, it is clear that that case did not attempt to demarcate the boundary in this respect in any detail. The Special Master's right-angle line simply connects the island-to-bank centerline with the bank-to-bank centerline in a manner constituting

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[22] This situation is unlike that of the mouth, where minor adjustments in location to reflect present-day conditions should be made. Georgia's claim to Oyster Bed Island would cause a large and eccentric loop in the line.

the shortest distance between the two points. It thereby avoids "depriv[ing] one State or the other of that portion of the bed of the river which was owned by that particular State." *First Report* at 25. South Carolina submits that this is the most reasonable approach to this unique delimitation problem and should therefore be confirmed.

CONCLUSION

For the foregoing reasons, South Carolina respectfully submits that the Special Master's recommendations should be confirmed as to the two Barnwell Islands still in issue, the two unnamed islands, Oyster Bed Island and the mouth of the Savannah River.

Respectfully submitted,

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APPENDIX

APPENDIX

Response to Georgia's Appendix E, "Barnwell Island Chronology"

The purported Barnwell Island chronology prepared by Georgia as Appendix E to its Brief and Exceptions is so misleading and inconsistent in its treatment of the evidence that its only value is to show that Georgia can shrink South Carolina's mass of evidence to a parity with Georgia's only by creating an uneven set of ground rules, and then not even playing by those.

The "chronology" purports to list incidents placing the Barnwell Islands in each state. As noted on p. E-1, it arbitrarily excludes a large quantity of evidence concerning the islands' location without explaining why its "unpublished [or] unrecorded" nature diminishes its value; however, it also omits a number of recorded deeds, such as S.C. Ex. B-10(2) through B-10(11). The contemporary statements of persons clearly constitute evidence as to the islands' location; none place them in Georgia, which is no doubt why they are omitted. Letters, diaries and other similar documents are rarely "published," but they represent communications about the islands' location. Rice cultivation, also omitted from the list although occurring for 30-40 years, is not "published," but is nonetheless an obvious fact. The addition of the excluded documents and the years of rice cultivation to the list would add a large number of references, all of which place the islands in South Carolina.

Even more glaring and one-sided is Georgia's disparate treatment of similar events in both states. South Carolina proved 85 years of unquestioned taxation of the

islands; this is treated as 2 events. Georgia has evidence of 3 years (in 1831 and earlier) of taxation, although it was not definitely proven that the taxed areas were the Barnwell Islands. Nevertheless, Georgia treats these three uncertain years as 3 events, while treating South Carolina's 85 unquestioned years as 2 events. In treating the 1760 grant and plat by Georgia to Tannant, Georgia lists this transaction as 2 events, plus a third one for the petition for the grant. Ga. Br. & Exceptions at E-1. However, two grants and two plats by South Carolina to Roberts are treated as one event, *Id.* at E-2, as are the South Carolina grant and plat to Smith. *Id.*

Georgia further pads its side of the list by counting general references to islands in the Treaty of Beaufort and the 1922 case. These, of course, do nothing to prove the specific exercise of sovereignty over particular islands, as must be shown when prescription is the issue. Moreover, even this is inflated: the Treaty of Beaufort swells to four transactions by counting all its ratifications.

Finally, over half of Georgia's collection of dubious events took place after 1952, when *U.S. v. 450 Acres* was brought. That case obviously had a practical effect on day-to-day events involving the area, and until this action was brought, South Carolina was without a remedy to correct those effects. Any listed posted-1952 events are so heavily colored by the existence of the 1955 case, which suspended the status quo, that these events have little probative value.

If the same events are treated consistently regardless of the state in which they occurred, if merely general

references are excluded, and if recorded documents omitted by Georgia are added, the number of pre-1952 events placing the Barnwell Islands in South Carolina would be at least 112, versus only 16 placing them in Georgia. Adding other documents and adding the years of rice cultivation and diking would increase South Carolina's number to close to 200, without adding anything to Georgia's side of the list.

Based on the foregoing, South Carolina submits that Georgia's Appendix is simply an effort to manufacture evidence where none exists. Its only value is to expose the paucity of evidence on the Georgia side of this case.