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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: STATE OF GEORGIA, Plaintiff V.

STATE OF SOUTH CAROLINA

CASE NO: 74, ORIG.

PLACE: Washington, D.C.

DATE: January 3, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF GEORGIA, :
Plaintiff :
v. : No. 74, ORIG.
STATE OF SOUTH CAROLINA :
-----x

Washington, D.C.
Monday, January 8, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

PATRICIA T. BARMEYER, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Plaintiff.
THOMAS E. McCUTCHEN, JR., ESQ., Columbia, South Carolina; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 74, Original, the State of Georgia v. the
5 State of South Carolina.

6 Ms. Barmeyer, you may proceed.

7 ORAL ARGUMENT OF PATRICIA T. BARMEYER

8 ON BEHALF OF THE PLAINTIFF

9 MS. BARMEYER: Mr. Chief Justice, and may it
10 please the Court:

11 This original action was initiated by Georgia in
12 1977 in order to resolve disputes concerning the boundary
13 between Georgia and South Carolina in the lower Savannah
14 River, the mouth of the river and the lateral seaward
15 boundary. Both Georgia and South Carolina have filed
16 exceptions to the reports of the Special Master.

17 In order to outline the exceptions, I'd like to
18 ask the Court to turn to Appendix B to Georgia's brief and
19 exceptions. Appendix B is a map of the relevant area.

20 QUESTION: What color is it?

21 MS. BARMEYER: They are all beige.

22 QUESTION: They are all beige. Okay, Appendix B
23 where?

24 MS. BARMEYER: Appendix B to Georgia's
25 exceptions and brief (inaudible).

1 QUESTION: That's the 1855 shoreline on chart?

2 MS. BARMEYER: That is correct, Your Honor.

3 This is a modern-day map which is shown in gray, and
4 superimposed on the modern-day, 1983 map, is --

5 QUESTION: Appendix which?

6 MS. BARMEYER: Appendix B.

7 QUESTION: Is this exception to the brief of
8 South Carolina?

9 MS. BARMEYER: Exceptions and brief of the State
10 of Georgia.

11 QUESTION: And it's in the back?

12 QUESTION: And it's B as in boy?

13 MS. BARMEYER: B as in boy, and it folds out.

14 QUESTION: Or in baker or one of those things?

15 MS. BARMEYER: Barmeyer.

16 QUESTION: Is this it?

17 MS. BARMEYER: Yes, sir. Yes, Your Honor, that
18 is it. All right.

19 This map is a modern-day map which is shown in
20 the lighter color gray. Superimposed on the gray, in
21 black, is an outline of the 1955 shoreline. The Special
22 Master found that the 1955 map was the earliest
23 authoritative map of the area, and it was on the 1855 map
24 that he drew the recommended boundary line.

25 On this map the Savannah River flows from

1 upstream, which is at the left, to the Atlantic Ocean,
2 which is on the right. The State of South Carolina is at
3 the top of the map. The State of Georgia is at the bottom
4 of the map. The city of Savannah is on the left.

5 The Special Master's recommended boundary line
6 is shown in yellow, and Georgia's exceptions are shown in
7 red.

8 QUESTION: I know this much already: you're in
9 big trouble.

10 (Laughter.)

11 MS. BARMEYER: I'm trying to be sure we're all
12 together at the outset.

13 QUESTION: I think we're with you.

14 QUESTION: It may take more than that.

15 MS. BARMEYER: Before I go to the specific areas
16 in dispute, I'd like to remind the Court of the
17 controlling document here, which is the Treaty of Beaufort
18 in 1787, which was entered into by Georgia and South
19 Carolina.

20 QUESTION: Is the whole -- is the entire treaty
21 anywhere in your briefs?

22 MS. BARMEYER: Yes, sir. It is Appendix A,
23 actually Articles 1 and Articles 2 are Appendix A to
24 Georgia's brief and exceptions.

25 QUESTION: But that's not the entire treaty. Is

1 the entire treaty anywhere in the briefs?

2 MS. BARMAYER: It is in evidence, Your Honor,
3 and those exhibits have been sent to the Court.

4 By the treaty, the boundary between Georgia and
5 South Carolina is the most northern branch or stream of
6 the river, expressly reserving all islands in the river to
7 Georgia.

8 This Court had occasion to consider the Treaty
9 of Beaufort in the case of Georgia v. South Carolina in
10 1922, and the Court further explicated that boundary and
11 determined that the boundary is the geographic middle of
12 the boundary stream, irrespective of the navigation
13 channel or thalweg of the river. The Court reaffirmed
14 that all islands in the Savannah River are in Georgia.

15 The Court also stated in 1922 that the boundary
16 stream may be narrow and shallow and insignificant, as
17 compared to the main body of the river, but that doesn't
18 matter if it is the northernmost branch or stream of the
19 river.

20 Now, first I would like to direct your attention
21 to the Barnwell Island area. It is about two miles
22 downstream from the city of Savannah, and on this map it
23 is directly north of the inset map, which is simply a
24 slightly larger view of the Barnwell Island area.

25 The Barnwell Islands were islands of marsh in

1 the Savannah River and were in Georgia by the terms of the
2 Treaty of Beaufort in 1787. By the evulsive actions of
3 the Corps of Engineers, they became attached to the South
4 Carolina shore. With the continued improvement and
5 dredging for navigation purposes, improvement of the river
6 and the deposit of dredged material on these marshy
7 islands, they have --

8 QUESTION: That's a curious way of putting that,
9 evulsive actions of the Corps of Engineers. I didn't know
10 they were engaged in evulsion.

11 MS. BARMAYER: Well, Your Honor, they have
12 evulsed up and down the Savannah River. They have blocked
13 the boundary stream by the creation of dams which blocked
14 off the northernmost branch or stream of the river, and
15 that --

16 QUESTION: And you claim that is the evulsion?

17 MS. BARMAYER: That is right, Your Honor. And
18 the Special Master agreed with that.

19 QUESTION: Because it is a sudden change rather
20 than a gradual one that comes from accretion.

21 MS. BARMAYER: That is right, Your Honor. That
22 is correct.

23 QUESTION: Excuse me, you don't claim the -- the
24 evulsion is just the creation of a barrier to the flow.
25 It's the dredging and depositing it on the shore, isn't

1 it? I mean, would just building a jetty out into the flow
2 constitute evulsion? Wouldn't that jetty simply create
3 not evulsion but accretion further downstream? If
4 accretion should happen because of the jetty, that
5 wouldn't be called evulsion, would it?

6 MS. BARMEYER: That is right, Your Honor. The
7 distinction, we believe, between evulsion, which we had in
8 this case, and accretion is accretion is the deposit of
9 material by the gradual action -- by the water dropping
10 sediment.

11 QUESTION: Even if that water has been diverted
12 by a jetty or some action by the Corps of Engineers.

13 MS. BARMEYER: That is correct.

14 QUESTION: It would still be accretion.

15 MS. BARMEYER: That is correct.

16 QUESTION: In this case what we had was the
17 Corps of Engineers dredging material from the river bottom
18 and placing it blocking the -- this boundary stream.

19 With Barnwell Island, the issue is prescription
20 and acquiescence. South Carolina contends that actions
21 which are primarily transactions by and among members of
22 one family and isolated and intermittent actions by local
23 county officials have operated to change the boundary
24 between Georgia and South Carolina and to put Barnwell
25 Island in South Carolina, in the face of South Carolina's

1 continued reiteration of the Treaty provisions that all
2 islands are in Georgia, and in spite of actions by the
3 United States and actions by the State of Georgia on maps
4 and other official actions showing Barnwell Island in
5 Georgia.

6 Moving downstream to the next areas in dispute,
7 there are two areas of made land on the north shore of the
8 Savannah River which South Carolina has excepted -- where
9 South Carolina has excepted to the Master's recommended
10 line. They are not labeled here, since this went with
11 Georgia's exceptions, but there are two places. One just
12 to the left or upstream of Jones Island, where the
13 boundary line crosses on to the northern bank, and then
14 another area downstream of Jones Island, which is called
15 Horseshoe Shoal, although, again, it is not labeled here.

16 QUESTION: Where on the map, from left to right,
17 where is Jones Island? Is it --- oh, I see it. It is
18 roughly in the middle from left to right, isn't it?

19 MS. BARMEYER: Roughly in the middle. It is a
20 triangular island.

21 Both upstream and downstream there are these two
22 areas of made land. South -- the Special Master concluded
23 that the change in the bound -- in the Savannah River, was
24 by evulsive actions by the Corps of Engineers, and as a
25 result the boundary did not move. South Carolina has

1 excepted to that recommendation.

2 The next area I would like to direct your
3 attention to is Oyster Bed Island, which is at the point
4 where the yellow line and the red line diverge. Oyster
5 Bed Island was not in existence in 1787. It emerged
6 gradually and naturally from the bed of the Savannah River
7 in the late 19th century. It is now attached to South
8 Carolina by more dumping of dredged material by the Corps
9 of Engineers.

10 The Special -- Georgia contends that it is in
11 Georgia, either because all islands are in Georgia, even
12 if they formed after the Treaty of Beaufort, so long as
13 they formed naturally, or, in the alternative, that Oyster
14 Bed Island must be in Georgia because it is south of the
15 geographic middle between the islands that were in
16 existence in 1787, which is Cockspur Island, Georgia, just
17 to the south, and Turtle Island, Georgia -- Turtle Island,
18 South Carolina.

19 The Special Master was following a geographic
20 middle in this -- his yellow line, until he got to the
21 point at the southern tip of Turtle Island, when he,
22 rather inexplicably we contend, jumped from a geographic
23 middle boundary to delineation of a boundary in the
24 navigation stream -- navigation channel of the river.

25 QUESTION: Did he give any explanation at all

1 for his change?

2 MS. BARMAYER: His conclusion was that the
3 decision in 1922 that the thalweg did not apply, he
4 concluded that that did not control in the mouth of the
5 river area. And he concluded that the framers must have
6 had the navigation channel in mind when they drew the
7 treaty.

8 QUESTION: Well, if Oyster Bed Island hadn't
9 come into being, this line probably wouldn't have jiggled
10 the way it did.

11 MS. BARMAYER: I think that is correct, Your
12 Honor.

13 QUESTION: Well, but he had to choose which side
14 of the island to go on, didn't he?

15 MS. BARMAYER: That is right.

16 QUESTION: And which side to -- he did go
17 halfway between Oyster Bed Island and some other place,
18 didn't he?

19 MS. BARMAYER: Between Oyster Bed Island and
20 Cockspur Island?

21 QUESTION: Yeah.

22 MS. BARMAYER: Roughly, he did, Your Honor.

23 QUESTION: Well, why shouldn't he do that rather
24 than go on the north side of Oyster -- Oyster Bed Island?

25 MS. BARMAYER: Well, his, his conclusion was

1 that the geography in 1855 was what was controlling. And
2 using that theory and using his theory that he was going
3 to follow the 1922 decision so long as there were islands
4 in the river, I think he necessarily should have continued
5 that geographic middle, at least until he passed Cockspur
6 Island, Georgia, which everybody concedes is an island in
7 the Savannah River and in Georgia. If he had only
8 continued that a little bit further to the eastern end of
9 Cockspur Island then, although we would have disagreed
10 with it, he could then have made a dog leg to the
11 navigation channel of the river, and Oyster Bed Island
12 would have been in Georgia rather than in South Carolina.

13 QUESTION: Ms. Barmeyer, is it -- is it true
14 that he would have, would not have done this if Oyster
15 Island didn't exist? I am under the impression he would
16 have done it anyway. I thought that he was regarding the
17 shoal that is north of Oyster Bed Island as the substitute
18 for a headland in defining the mouth of the river, and
19 that the reason he went into the navigation channel at
20 that point is simply effectively he was saying that is
21 where the river ends.

22 MS. BARMAYER: That's further east, Your Honor -
23 -

24 QUESTION: And he would have done that whether
25 the island was there or not.

1 MS. BARMAYER: In that area, that's the mouth of
2 the river. But that's further east. If I could get you
3 to follow his line a little further east, you see Tybee
4 Island, Georgia. He found that the mouth of the river was
5 just north of Tybee Island, and he referred to a large
6 prominent shoal opposite Tybee Island, and did, I believe,
7 more or less substitute that shoal for headland. But that
8 decision really had nothing to do with the Oyster Bed
9 Island area.

10 Georgia contends that he should have stayed in
11 the geographic middle throughout the boundary waters, that
12 he should have determined the line based on the nearest
13 point in Georgia and the nearest point in South Carolina
14 until he reached the seaward limit of the internal waters
15 of Georgia.

16 QUESTION: And what is that limit, in your view?

17 MS. BARMAYER: I would direct your attention,
18 Justice Stevens, to this oblique line that goes from
19 Hilton Head Island --

20 QUESTION: I know, you think the mouth of the
21 river is Hilton Head at the north and Tybee Island at the
22 south.

23 MS. BARMAYER: That is right. That is certainly
24 the closest point in -- South Carolina and the closest
25 point in Georgia.

1 QUESTION: Do the parties agree that the Tybee
2 Island is -- is the point from which you measure the
3 southern boundary of the mouth of the river?

4 MS. BARMEYER: The parties are in agreement on
5 that.

6 QUESTION: They are in agreement on that?

7 MS. BARMEYER: Yes, sir.

8 QUESTION: So you either have to draw a rather
9 horizontal line or else go up to Hilton Head.

10 MS. BARMEYER: That's correct, Your Honor. All
11 the record and evidence of the 18th century perception was
12 that the framers understood the mouth to be at Tybee
13 rather than in this Oyster Bed Island area.

14 QUESTION: And your position is the mouth is the
15 entire area between Hilton Head and Tybee?

16 MS. BARMEYER: That is right. Even if the
17 entire area is not technically the mouth, it is our
18 position that the 1922 case said you don't look at the
19 thalweg, you don't look at the navigation channel, you
20 find the geographic middle between the island shore in
21 Georgia and the closest point in South Carolina, and that
22 you can draw a very simple -- simply plotted geographical
23 mathematical line by using those closest points. And in
24 this case it would be Turtle Island, South Carolina,
25 Daufuskie Island, South Carolina and Hilton Head Island.

1 QUESTION: The river has a very big mouth.

2 MS. BARMAYER: It has a very --

3 QUESTION: Everything inside of that is inland
4 waters?

5 MS. BARMAYER: Everything inside of that, this
6 oblique line, is the closing line drawn by the United
7 States. On the left we have internal waters, and to the
8 right we have the territorial sea.

9 QUESTION: Is there any historical evidence that
10 Hilton Head was considered a headland for this purpose?

11 MS. BARMAYER: Yes, yes, Your Honor, there are
12 two key references here. One is by General Oglethorpe,
13 who was the founder of the colony of Georgia, who referred
14 to Hilton Head as being at the mouth of the Savannah
15 River. And a subsequent key reference is from the United
16 States coast survey which, in describing the mouth of the
17 Savannah River, referred to Hilton Head Island.

18 QUESTION: Everybody ignores the New River and
19 the Wright River? Do they have a mouth, or do they just
20 go into the Savannah?

21 MS. BARMAYER: Well, Your Honor, they are tidal
22 rivers. We call them rivers, but they really are arms of
23 the sea. This is a -- is an estuary where the fresh
24 waters meet the ocean, and this is an entire area of
25 mixing.

1 But given the fact that everybody agreed that
2 Tybee Island was the mouth of the river on the south, both
3 Tybee Island and Hilton Head Island are really barrier
4 islands that form the boundary between the ocean and the
5 estuary. And Hilton Head Island is as much an island at
6 the mouth of the Savannah River as Tybee Island is, we
7 submit.

8 QUESTION: What about Calibogue Sound? Is that
9 a sound up there, Calibogue Sound? Is that what it is?

10 MS. BARMEYER: It is --

11 QUESTION: That's also in the mouth of the
12 river?

13 MS. BARMEYER: It's an arm of the sea. It is a
14 place where these waters enter and flow out, and it flows
15 around Tybee Island.

16 QUESTION: Well, whatever, it's an awfully big
17 mouth of the river if it embraces the -- the entrance to a
18 sound and the entrance to two other rivers, whether
19 they're tidal or not.

20 MS. BARMEYER: Well, it is. Its shape is --
21 gives a little pause because it is elongated. In the
22 territorial sea, the Special Master, just to go through
23 the exceptions, the Special Master has -- recommended a
24 boundary which is basically an equidistant line with some
25 minor modifications. South Carolina has excepted to the

1 Master's line in the territorial sea, contending that it
2 cuts off South Carolina's coastal front.

3 Georgia believes that the recommended boundary
4 in the territorial sea is imminently correct, if the
5 Special Master has used the correct starting point. If
6 the starting point is incorrect, then Georgia would submit
7 that the line should be redrawn using the same principles
8 of law.

9 I would like to focus first on the Barnwell
10 Island area, which all parties agree is the most important
11 and valuable area in dispute. And there the question is
12 prescription and acquiescence. This Court, in many cases,
13 has invoked the doctrine of prescription and acquiescence
14 as an aid in determining the correct location of a
15 boundary which is otherwise uncertain. In such cases the
16 Court has looked for proof of continuous undisturbed
17 exercise of sovereignty for a period which is long enough
18 to lead to a general, indeed a virtually universal
19 conviction as to the boundary location.

20 It's Georgia's position that South Carolina's
21 claim of prescription and acquiescence is refuted by the
22 actions of South Carolina, the actions of the United
23 States and the actions by the State of Georgia.

24 Turning first to the actions by South Carolina,
25 we have South Carolina's solemn agreement by the Treaty of

1 Beaufort that all islands are in Georgia. And South
2 Carolina continued to reaffirm that absolute, unequivocal
3 language of the Treaty of Beaufort: all islands are in
4 Georgia. There were discussions between the two states in
5 the 19th century about where exactly the line was. Was it
6 on the South Carolina bank, was it on the island bank?
7 Discussions about fishing rights, navigation rights,
8 taxation of structures and so forth.

9 And in all those discussions, correspondence
10 between the governors and the attorneys general, cases in
11 this Court, there was never so much as a whisper from
12 South Carolina that there is any exception to the blanket
13 reservation of all islands in the Savannah River to the
14 State of Georgia.

15 QUESTION: Yes, but that is just a condition
16 that was prior to the prescription, isn't it?

17 MS. BARMAYER: Well, but that, that was -- South
18 Carolina --

19 QUESTION: I mean, you start with that these
20 islands did belong to Georgia originally, but then by
21 prescription they became the property or sovereign
22 property of South Carolina.

23 MS. BARMAYER: That is right. But every time
24 Georgia and South Carolina met to debate the boundary,
25 South Carolina says to Georgia all islands are in Georgia.

1 You don't need to worry about it. At the same time, they
2 are now saying well, but we were prescribing on this tract
3 of land, Barnwell Island, but we never really told you
4 about it and we never had a formulation of the treaty that
5 would encompass those islands.

6 In most of the cases by the court we are dealing
7 with some construction of a boundary document which is a
8 rational basis, a reasonable basis for the exercise of
9 prescription or the exercise of possession and
10 jurisdiction. Here we think South Carolina's continued
11 statements refutes the claim of prescription and
12 acquiescence. Indeed its statements, its pleadings to
13 this Court in 1922, and the 1922 case was dealing with an
14 island which was only 35 or 40 feet from the South
15 Carolina shore, and South Carolina never took the position
16 in that case that islands close to the South Carolina
17 shore are in South Carolina.

18 QUESTION: That was considerably upstream,
19 wasn't it? The 1922 case?

20 MS. BARMEYER: Yes, Your Honor, it was. It was
21 not in this particular area.

22 One key fact is that Barnwell Island continued
23 to be islands, and perceptible as islands in the river,
24 until well in the 20th century, as shown by Appendix D to
25 our brief, which is an aerial photograph in 1931.

1 The actions by the United States we believe are
2 critical, because the United States continuously
3 understood and published maps showing Barnwell Island in
4 Georgia. For these maps I would note that we have a
5 chronology, which is Appendix J to our rebuttal brief,
6 where some of these key facts and key publications are set
7 forth. But I will outline some of them briefly.

8 In 1866 the United States performed a survey on
9 Barnwell Island, and labeled that survey as Barnwell
10 Island, Georgia. There are no maps in the 19th century
11 with boundary line --

12 QUESTION: Ms. Barmeyer, do you say that
13 prescription can't occur if the United States has
14 published a map showing something is in Georgia rather
15 than in South Carolina?

16 MS. BARMEYER: No, Your Honor, not just one map.
17 But what the cases look for is a general conviction.
18 Prescription and acquiescence is used to ratify what is
19 already well understood. And in this case we think the
20 continued publication of maps showing Barnwell -- by the
21 United States and indeed by Georgia, showing Barnwell
22 Island in Georgia, is sufficient to refute South
23 Carolina's contention that there was a general conviction
24 that Barnwell Island was in South Carolina.

25 QUESTION: Well, what is your strongest case,

1 the strongest case for your position on prescription, do
2 you think?

3 MS. BARMEYER: There is really no case just like
4 this, Your Honor. There is no case where a state is being
5 divested of an area of land that is currently in its
6 possession, as Barnwell Island is currently in the
7 jurisdiction of the State of Georgia. The closest case is
8 Arkansas v. Tennessee. It is really the only case we
9 found where there is an island -- this is Arkansas v.
10 Tennessee in 1940, where there was an island in the river
11 which was clearly in Arkansas by the boundary document,
12 but prior to the admission of Arkansas into the Union, it
13 became affixed to the Tennessee shore.

14 And from then on there was a universal treatment
15 of that land as being in Tennessee. Generations of people
16 grew up on that island; they were educated in schools on
17 the island, operated by Tennessee. They voted in
18 Tennessee elections; they were married by justices of the
19 peace in Tennessee. So there really was a course of
20 conduct, universal treatment of the land as being in
21 Tennessee, without any objection by the State of Arkansas.

22 Of course in this case, Georgia did not
23 acquiesce. Georgia went into court in 1953, the first
24 time that Georgia was aware that anybody was claiming that
25 the land was in South Carolina. Georgia went into court

1 and intervened, claiming Georgia dominion, sovereignty and
2 title over Barnwell Island. The case was thrown out by
3 the district judge for lack of jurisdiction. The case was
4 appealed by the United States and by Georgia to the Fifth
5 Circuit, and the Fifth Circuit ruled there is, there can
6 be no doubt that Barnwell Island is in Georgia. We
7 certainly think that goes also to refute a general
8 conviction that Barnwell Island is in South Carolina.

9 Back to the maps of the United States, in 1911,
10 1920, 1932, 1957, 1959, 1970, 1971, 1974, these are
11 official published maps, circulated maps by the agencies
12 of the United States, without ever any protest by the
13 State of South Carolina that the map -- they contended the
14 boundary was incorrect.

15 QUESTION: Would you refresh my recollection?
16 The facts in this are awfully hard to keep in mind.

17 Am I correct in recalling that as far as the
18 records of title ownership and the like, that they were
19 all kept in South Carolina, and that Georgia had no deeds
20 recorded in Georgia, and the taxes were paid in South
21 Carolina?

22 MS. BARMAYER: That is correct, Your Honor.
23 Those deeds and those transactions --

24 QUESTION: So if a lawyer wanted to go buy the
25 property and register it, he probably would have gone into

1 the South Carolina jurisdiction rather than Georgia.

2 MS. BARMAYER: If that -- if anybody had wanted
3 to buy it. In fact, what we have is transactions --

4 QUESTION: Well, apparently somebody does now.
5 I guess somebody wants to buy it now.

6 MS. BARMAYER: Yes, sir, it has more value now
7 than it did then. But the transactions which are of
8 record are only among members of one family, and in fact
9 there are really only a handful of deeds --

10 QUESTION: But they thought they lived in South
11 Carolina. They thought they lived in South Carolina.

12 MS. BARMAYER: That family clearly thought the
13 islands were in South Carolina. They never resided on the
14 islands. They farmed them for a brief period in the 19th
15 century as part of a rice plantation that they had on the
16 mainland. So there were never any residents on the
17 island. But it is clear that family -- but we contend it
18 was very limited to that family in terms of a perception
19 that the islands were in South Carolina.

20 QUESTION: But they were apparently the only
21 people who were interested.

22 MS. BARMAYER: Well, that's right. They
23 couldn't find a buyer for the land. They finally
24 abandoned it and then it was seized for non-payment of
25 taxes by the sheriff.

1 There really wasn't much that ever happened on
2 these islands, and we think again that distinguishes this
3 case from Arkansas v. Tennessee in 1940 and the other
4 cases where the court has used prescription and
5 acquiescence to change the jurisdictional location of a
6 tract of land.

7 QUESTION: It was seized by the South Carolina
8 sheriff?

9 MS. BARMAYER: That's right, Your Honor.

10 QUESTION: If we rule in your favor, is it still
11 owned by South Carolina?

12 MS. BARMAYER: Well, if you rule in our favor I
13 think it is clear that it is owned by the State of
14 Georgia, if it's -- although those questions would be
15 decided by the courts in the respective states, whichever
16 state is to prevail.

17 The South Carolina claim fails, we contend, on
18 both points, both on prescription, because the acts that
19 were shown to have been performed regarding Barnwell
20 Island are so sparse and generally not of record,
21 generally not of widespread notice or notoriety, and
22 because there hasn't been acquiescence by the State of
23 Georgia as indicated both by Georgia maps and by the maps
24 by the United States.

25 I would like to save the remainder of my time

1 for rebuttal, if I may.

2 QUESTION: Very well, Ms. Barmeyer.

3 Mr. McCutchen.

4 ORAL ARGUMENT OF THOMAS E. McCUTCHEN, JR.

5 ON BEHALF OF THE RESPONDENT

6 MR. McCUTCHEN: Mr. Chief Justice, and may it
7 please the Court:

8 While several questions are here before the
9 Court, the major issue, the major financial issue is the
10 Barnwell Island islands. And South Carolina seeks the
11 approval of the Master on that issue.

12 By interrogatory number 3, Georgia admitted that
13 it asserted no jurisdiction or sovereignty over the
14 Barnwell Islands between 1760 and 1956, 196 years. And by
15 interrogatory number 55, Georgia admits that there was no
16 dispute, public or private, regarding the territorial
17 jurisdiction of Barnwell Island between 1787 and 1955, 168
18 years. South Carolina exercised the unquestioned
19 jurisdiction during that period.

20 Georgia's only exercise of sovereignty over the
21 Barnwell Islands in any way between 1732 and 1955 was a
22 1760 grant which was abandoned and a possible property
23 taxation in 1825, 1830 and 1831. The Special Master found
24 that this 1760 grant or his estate effectively abandoned
25 this property within several years. The grant actually

1 was never recorded. There is no recorded grant in Georgia
2 of the Barnwell Islands at any time.

3 QUESTION: Mr. McCutchen, suppose I owned a
4 piece of private land out in the country somewhere, and I
5 had never even camped out on it in 50 years, and you --
6 you had gone under dark of night and camped there a couple
7 of nights, but I never knew about it. Would you be making
8 the same argument, that, you know, Scalia has never been
9 on that land for 50 years, and I have been there
10 frequently.

11 MR. McCUTCHEN: No, Your Honor --

12 QUESTION: Doesn't there have to be a notoriety?
13 Isn't the whole point that I have to have knowledge that
14 you are on my land and you are asserting juris -- you are
15 asserting ownership of my land?

16 MR. McCUTCHEN: Your Honor, there is no trouble
17 there, because the owners were Savannah people living in
18 Savannah, who owned the land and went to South Carolina to
19 obtain the grant. They put rice plantations on there for
20 a period of over three decades.

21 This property is only 500 or 600 yards across
22 the river from Fort Jackson. It's easily seen from
23 Hutchinson Island. It is seen and admitted by Georgia,
24 from the city of Georgia itself. The documents which were
25 being recorded for over 100 years were by people who own

1 lands and property in South Carolina and in Georgia, and
2 they recorded these documents in Georgia. There were
3 mortgages involved. They had Georgia factors paying the
4 taxes to South Carolina. So the notoriety of this is
5 totally consistent for all this period of time.

6 QUESTION: Well, do you -- do you say it is
7 enough to bring home the claim of the occupation to
8 Georgia citizens, or does it have to be brought home in
9 some way to the government of Georgia?

10 MR. McCUTCHEN: Well, it was brought home to
11 everybody who was around, including the aldermen, to the
12 city council. It was perceived -- we say the islands were
13 perceived as being in the State of South Carolina. The
14 grant which Georgia attempted in 1760, 17 years before the
15 treaty, Georgia never did it again because of the
16 perceptions that followed certainly after that treaty.
17 And it was only a few years after 1787 that South Carolina
18 granted this property the first time to Hezekiah Roberts,
19 in 1795, a grant which expired because it wasn't recorded.
20 But in 1813 South Carolina granted it again to Archibald
21 Smith. He was in Savannah, a native of Savannah, a very
22 prominent farmer, and he perceived that he had to go to
23 South Carolina to get the grant of the Barnwells. And so
24 from that time forward it has been perceived as being in
25 South Carolina.

1 We have quoted 20 different observations of the
2 people and the time, historically, as where they saw that
3 these properties were. Of course, at this long period of
4 time we don't have the live bodies, so we have to go back
5 to the times and how they were perceived.

6 QUESTION: And you think the Special Master was
7 absolutely correct?

8 MR. McCUTCHEN: Absolutely correct.

9 QUESTION: In all phases. You don't -- you are
10 supporting his report entirely with respect to Barnwell?

11 MR. McCUTCHEN: With respect to Barnwell, we are
12 supporting it. Now, Georgia, as I said, after 18 -- 1787,
13 never made any act of attempt of a granting. No one has
14 ever gone to Georgia to try to perfect any grant. Nobody
15 has gone back to Georgia and asked for another grant. And
16 when the South Carolina granted the islands to Archibald
17 Smith in 1813, it granted three islands, described as
18 islands, as marsh islands. Incidentally, when the first
19 grant occurred by Georgia in 1760, it was only described
20 as two marsh islands, and there were only two in
21 existence.

22 The tax books in Georgia perhaps show payment of
23 taxes in 1825, 1830 and 1831. And described in that is
24 land marsh, land marsh and three marsh islands. May or
25 may not have been these islands. But the grant by which

1 it would had to have been if it were at all was the 1813
2 grant, of course, of the Barnwells from South Carolina.
3 Had Georgia even brought this suit in 1900, the claims of
4 the Barnwells would have been foreclosed by acquiescence
5 and prescription.

6 And further, South Carolina in this century sold
7 these Barnwell Islands for non-payment of taxes in the
8 1930s. And the commission in South Carolina which
9 acquired them then subsequently conveyed them. And the
10 chain of title is consistent from 1813 down till this very
11 day in South Carolina. And there is no chain of title in
12 Georgia.

13 And Georgia's argument that no one could have
14 seen them in exercising this sovereignty cannot be true
15 because of the unobstructed view of 500 or 600 yards away
16 and because of the intense interest of people in rice
17 plantations and in farming. The Barnwells were used for
18 rice plantations and planting for decades. And these dike
19 fields and all are shown, easily are visible, cannot be
20 ignored. Rice lands were extremely valuable, nothing more
21 valuable in that area. They were as prominent and
22 valuable as a 10-story building would be today. No one
23 thought that the Barnwells were ungranted.

24 No one appeared in Georgia and said give me a
25 grant, and no one in Georgia said we have got untaxed land

1 out there, the Barnwells. No one applied for taxation.

2 The Barnwells were located at the intersection
3 of the superhighway of that day in Georgia, the Savannah
4 River and the land, the road which carried from Savannah
5 to Charleston, the most prominent city in South Carolina.
6 This is not a remote, hidden area. It was opposite the
7 city of Savannah and --

8 QUESTION: There was a bridge over the river at
9 this point?

10 MR. McCUTCHEN: Pardon me, Your Honor?

11 QUESTION: There was a bridge over the river at
12 this point?

13 MR. McCUTCHEN: No, sir, but the ferry that came
14 from Savannah lands right by the Barnwell Islands. It is
15 a ferry road and so designated back at that time. And
16 that was the route to Charleston. So from Savannah you
17 went right by the Barnwells, and of course any boat going
18 from Savannah had to go by the Barnwells to get on out to
19 the sea.

20 So over and over the Smiths and the Barnwells
21 were according, in Chatham County, Georgia, their
22 property, because they own it in both states. It was Ped
23 and Archibald Smith's estate when he died in Savannah. He
24 was not a stranger. And, of course, later on there were
25 acknowledgements of the division of the lands among the

1 children in the 1860s, even a mortgage in the 1890s
2 between them. And a prominent Savannah merchant was a
3 factor who was paying the taxes to South Carolina for the
4 Barnwells.

5 QUESTION: What about the Fifth Circuit case in
6 1955?

7 MR. McCUTCHEN: South Carolina was not a party
8 to that case, and there is nothing in the record to show
9 that South Carolina knew anything about that until that
10 case was decided. And, of course, the Fifth Circuit has
11 no jurisdiction on boundary matters. South Carolina was
12 not served in that case. But in 18 -- in 1955 --

13 QUESTION: Would Georgia's actions in that case
14 be a prescriptive act of its own?

15 MR. McCUTCHEN: Well, even if it were considered
16 that way, that is 1955. First, South Carolina filed in
17 this Court a petition to decide the boundary in '55;
18 Georgia opposed it. It was refused. South Carolina filed
19 again in 1957. Georgia opposed it. It was refused. This
20 case we are here for today started 12 years ago. So you
21 have got a period of only 20 years at most in which
22 Georgia could have done, or whatever it has done to
23 reacquire what it had lost. And I say to you it cannot
24 obliterate the past of almost 175 years or more.

25 QUESTION: Mr. McCutchen, why did it take so

1 long for this case to get here?

2 MR. McCUTCHEN: Well, Your Honor, we bifurcated
3 the trial, and the case did start in 1977, and filed the
4 reports, and, Your Honor, I could not go beyond that in
5 saying that it has been a lengthy matter.

6 The record is full of perceptions of individuals
7 that these islands were in South Carolina. In the 20th
8 century South Carolina has continued to exercise
9 jurisdiction by law enforcement, by South Carolina
10 wildlife personnel patrolling the Barnwell Islands, by
11 issuing shad fishing licenses for nets on the Barnwells.

12 And Georgia really has no explanation or excuse
13 for her prolonged inactivity. Georgia has now abandoned
14 Rabbit Island. All of the Barnwell Islands were right
15 next to the shore. Rabbit was one of them; it is in a
16 line there. Whatever reasons have existed for Georgia to
17 abandon its claim to Rabbit Island, vigorously contested
18 in the trial below.

19 QUESTION: Is Rabbit the one right next to the
20 two described as Barnwell Islands?

21 MR. McCUTCHEN: Yes, Your Honor. It is the one
22 farthest upstream. And whatever its reasons to have
23 abandoned Rabbit appear totally inconsistent with its
24 efforts today to assert its claim as to the other islands.
25 You see, Rabbit was one of the two that was in the Tannant

1 grant in 1760, the only time Georgia exercised any
2 dominion. The other islands, other than the one next to
3 it, did not even exist then. There's more evidence of
4 inhabitation and cultivation on Hog Island, which Georgia
5 still claims, than on Rabbit Island. Georgia did nothing
6 different as to Hog Island or Long Island than it is to
7 Rabbit Island, which is abandoned.

8 And Georgia says in its brief on page 13, note
9 6, that Rabbit Island is in South Carolina. But it says
10 it's not there because of accretion. It is only there,
11 apparently, there is no other reason given, by virtue of
12 prescription and acquiescence. And the Master said that
13 only Rabbit and Hog existed in 1787. And after the
14 Master's report Georgia abandons one of the only two which
15 existed at treaty time.

16 If you refer to Appendix E to the exceptions and
17 brief of Georgia and its rebuttal index also prepared by
18 Georgia, you will see the clear and continuous chain of
19 South Carolina's claim to the Barnwell Islands,
20 notwithstanding the efforts of Georgia to list, for
21 instance, 60 years of paying taxes in South Carolina as a
22 one-line entry, and Georgia wants to list these three
23 years in 1825, '30 and '31 as three entries to bolster an
24 attempt to finite some exercise over the islands.

25 If you refer to pages 39 to 66 of the first

1 report of the Master, every phase of the Barnwells is
2 covered by him, from perception and historical and title
3 and so forth.

4 Now, in this 1955 circuit case which Georgia
5 seeks to claim gives it some rights, the Special Master
6 object -- rejected that, saying it was neither collateral
7 estoppel, and it was not res judicata. And he found that
8 record very sparse, which it was. There is no evidence,
9 as I said, that South Carolina knew about that until the
10 litigation was over. It was not a party, not served. And
11 Durfee v. Duke certainly clearly teaches us that the Fifth
12 Circuit couldn't bind South Carolina or Georgia to the
13 location of a boundary between them.

14 QUESTION: (Inaudible).

15 MR. McCUTCHEN: There is not even one title deed
16 --

17 QUESTION: Mr. McCutchen, certainly if
18 prescription had not occurred by the time that that suit
19 was brought, that would have been an act of Georgia at any
20 rate that would have refuted its acquiescence.

21 MR. McCUTCHEN: Except that Georgia was not even
22 in the case in the beginning and petitioned in it after
23 certain preliminary motions had been brought. And Georgia
24 in its brief before the Fifth Circuit said to the Fifth
25 Circuit, the boundary between South Carolina and Georgia

1 is not involved in this case. And Georgia made that
2 representation in its brief to the Fifth Circuit, and the
3 Fifth Circuit in its decision says the boundary between
4 South Carolina and Georgia is not involved in this case.
5 And we think South Carolina can stand on that, should
6 stand on it just as the Fifth Circuit accepted it.

7 Georgia now seeks to fault South Carolina for
8 participating and saying we lost rights. But it would be
9 unconscionable for the -- Georgia to have gone to the
10 Fifth Circuit and made that active representation, saying
11 there is no boundary involved at all and now seek to have
12 South Carolina precluded in some way by virtue of that
13 decision. And again, Georgia opposed our efforts to file
14 a case in this Court in '55 and '57 to determine the
15 boundary.

16 After the 1880s, the next 75 years, South
17 Carolina continued its taxing and sovereignty, and Georgia
18 did nothing during this prolonged period. The record
19 before this Court is the 1787 treaty, and what has
20 happened since. It is the first and only record of the
21 200 years of acquiescence, of notice, of records, of the
22 exercise of jurisdiction and sovereignty, of law
23 enforcement, of grants by South Carolina, of continuity of
24 title, of taxes paid to South Carolina, and of Georgia's
25 total unerupted acquiescence and abandonment for well over

1 100 years. This is South Carolina's first day in court on
2 that boundary.

3 I would like to turn to Denwill and Horseshoe
4 Shoal. The Corps of Engineers has been working since 1840
5 to keep the port of Georgia open, deeper, more accessible.

6 QUESTION: The port of Savannah?

7 MR. McCUTCHEN: Pardon me?

8 QUESTION: You said the port of Georgia. You
9 mean the port of Savannah?

10 MR. McCUTCHEN: Excuse me, the Corps of
11 Engineers to keep the port of Georgia open. And there has
12 never been a South Carolina port there.

13 QUESTION: Where is the port of Georgia?

14 MR. McCUTCHEN: Savannah, Georgia. Savannah,
15 Georgia, the port. Excuse me, Your Honor.

16 So, all the dredging and all the erection of
17 wing dams and the blocking of channels and the diversion
18 of streams and the side dams and the training walls have
19 been solely for the city of Savannah and its port in
20 Georgia. And Georgia now seeks to obtain not only the
21 benefit of this scouring and diversion and deviation of
22 water in blocking the channels, but it wants to say that
23 deposits now, which have come up on the South Carolina
24 side on Denwill, is Georgia land.

25 Denwill has always been fast land in South

1 Carolina on the northern shore. Due to the training walls
2 and silting and damming and deposits, an area which was
3 underwater as a part of the Savannah River immediately
4 adjacent to the South Carolina bank, has now become fast
5 land, totally attached to the South Carolina fast land.
6 And the Master did recommend that this area, over a mile
7 long, belonged to Georgia.

8 Now, Georgia does not deny that this new land
9 resulted in part from natural sedimentation, reply brief
10 of Georgia 5 and 7. But here, because of these manmade
11 devices in part, the contention is that a different result
12 obtains. If this be corrective course on this type of
13 system, you could take 15 miles from that city on down to
14 the ocean and block South Carolina off from every bit of
15 its land. South Carolina did not place this fill or
16 construct these training walls, so it is not involved in
17 this act. It was not an evulsive change as we see it. It
18 occurred over a period of probably 40 years.

19 QUESTION: Under the act, is there anyway South
20 Carolina could have prevented the Corps of Engineer from
21 dumping the sediment there?

22 MR. McCUTCHEN: Your Honor, I guess some relief
23 may have been able to be sought. Of course, I understand
24 today the Secretary of Commerce may -- have the
25 determination of whether the Corps can do something or

1 not, but no action was brought during this period.

2 QUESTION: I mean, I -- I just don't know how
3 that works. The Corps of Engineer can just dump the stuff
4 anywhere it wants up and down the river? Just say here's
5 a good spot, and --

6 MR. McCUTCHEN: Well, or the city of Savannah
7 suggested it need -- keep its scouring, and certainly
8 South Carolina during this period did not attempt to stop
9 the Corps of Engineers in its -- whatever authority it has
10 with regard to navigability.

11 Whether the fill started at the South Carolina
12 mainland and moved into the river, or whether it started
13 in the river and moved to the mainland, it doesn't make
14 any difference, because it is now fast land.

15 The strip on Denwill and the strip on Bird
16 Island, which we show on page 6 of our exceptions and
17 brief as an illustration in our exception, is the same
18 sort of basis. We excepted the Master's report as to
19 Denwill, and we excepted that it is fated to give South
20 Carolina Bird Island, because Bird Island, many, many
21 times larger than it was in 1787, now has accretions also
22 due to these wing dams. Same argument is made with both.
23 I want to say to Your Honors it ought to be rejected as to
24 both, because the accretions to Bird ought to be Georgia,
25 and the accretions to Denwill ought to be South Carolina.

1 We did this because of the inconsistency in the report.

2 Now, South Carolina has asserted that islands
3 which formed on the South Carolina side of the river after
4 1787 belonged to South Carolina. That involves a little
5 unnamed island upstream of Pennyworth, and unnamed island
6 just south of Pennyworth known as Tide Gate, Oyster Bed
7 Island and of course all the Barnwells except the first
8 two. There was perhaps a shoal as to the -- as to Oyster
9 Bed in 1787, but nothing more. The Masters found that it
10 emerged in the 1880s or '90s.

11 Now, if islands emerging after 1787 were
12 included in the treaty, then there would have been no
13 boundary set at that time at all, and the language doesn't
14 say after emerging islands, it says in, which is at
15 present. So it would have taken a boundary loop to even
16 gone up and gotten the Oyster Bed shoal in 1787.

17 QUESTION: Suppose a line -- suppose an island
18 pops up right in the middle of the -- what is the Latin
19 phrase, the filum? You had a lot of good Latin in the
20 briefs there, what was it? It is right in the middle --

21 MR. McCUTCHEN: (Inaudible).

22 QUESTION: -- where the boundary line is placed
23 in the northernmost stream, up comes an island right in
24 the middle, and the boundary goes right in the middle of
25 the island. What would be the situation there? South

1 Carolina would own half and Georgia would own half?

2 MR. McCUTCHEN: That's a possibility. And I am
3 not saying that Georgia may not, if it went in the center,
4 have even some greater right of interpretation there.

5 QUESTION: Well, now, but -- do you know any
6 other interstate boundary that works like that, where an
7 island in the middle of the river is --

8 MR. McCUTCHEN: This is unusual language. It
9 said islands in the stream. We think that the Georgia
10 people went there with the idea they had conveyed and
11 granted the islands. They knew what they had in 1787 and
12 what they had granted, and they wanted to be sure they
13 retained it. But the Masters found that Oyster Bed Island
14 didn't crop up in the middle of the stream. It cropped up
15 on the northern side of what the boundary line, as he was
16 in 1787, and so we contend that it is now in South
17 Carolina. It is in fact a national wildlife preserve.

18 QUESTION: I am not asserting it was in the
19 middle of the stream. I am just asserting that the
20 principle you are arguing for has some rather embarrassing
21 and silly consequences.

22 MR. McCUTCHEN: Well, the language that was
23 drawn of course did an unusual thing in reserving islands
24 without further enlargement of the language. South
25 Carolina excepts to the lateral seaward boundary as drawn

1 by the Special Master.

2 QUESTION: I take it that both sides object to
3 that, don't they?

4 MR. McCUTCHEN: Yes, sir.

5 QUESTION: Go ahead.

6 MR. McCUTCHEN: The boundary recommended by the
7 Special Master extends entirely into waters which lie
8 opposite the coast of South Carolina. No part of the
9 recommended boundary is opposite --

10 QUESTION: (Inaudible) perpendicular to the
11 closing line, didn't he?

12 MR. McCUTCHEN: Yes, sir, he did. He did not
13 use an equidistant line. He started out as if it is an
14 equidistant line, and he --

15 QUESTION: Well, where did he -- where did he
16 start that line from? Did he, was that halfway on the --
17 halfway between Hilton Head and the --

18 MR. McCUTCHEN: Well, It's shown on the same
19 exhibit in which the former -- he just moved up that line
20 --

21 QUESTION: How far?

22 MR. McCUTCHEN: -- and then went out.

23 QUESTION: Well, how far -- where did he start
24 it, though? Where did he start the line? What was his
25 principle? The line extending seaward --

1 MR. McCUTCHEN: Well, he took the mouth and then
2 he moved up, and he decided -- he started it, a line that
3 South Carolina had drawn as an equidistant line --

4 QUESTION: Between what?

5 MR. McCUTCHEN: Between Georgia -- the bound --
6 the land -- land formations of Georgia and South Carolina.
7 And he started out on an equidistant line, but as shown in
8 our detailed map, the line of equidistance would have then
9 bent southward, but the Master did not have it bend
10 southward.

11 QUESTION: Are you talking about the basically
12 north sound -- south line that connects Tybee Island to
13 Hilton Head Island?

14 MR. McCUTCHEN: No, sir. I am talking about the
15 --

16 QUESTION: The east-west --

17 MR. McCUTCHEN: Exhibit B, Exhibit B, which is
18 in the second and final report of the Special Master.
19 Exhibit B of the Master shows a series of lines. And the
20 Master started out with line number 5.

21 QUESTION: And what was his explanation for
22 starting there, or did he give any?

23 MR. McCUTCHEN: Well, he just said under all
24 conditions it was at the mouth and that is where he would
25 start. But he started on an equidistant line, as drawn by

1 5, and the Master didn't draw his line on any map after
2 that. He just said you take number 5 as if is
3 perpendicular and you'd move on out to sea.

4 QUESTION: On that perpendicular line.

5 MR. McCUTCHEN: On that perpendicular line.

6 QUESTION: Regardless of whether it is
7 equidistant between the coasts.

8 MR. McCUTCHEN: And it is not equidistant,
9 because line number 5, the beginning of it dips down. Now

10 --

11 QUESTION: Well, what does your opponent insist?

12 MR. McCUTCHEN: Well, the opponent wanted to
13 slide on up the line towards Tybee for three miles and
14 then start.

15 QUESTION: Naturally.

16 MR. McCUTCHEN: And the Master didn't pay any
17 attention to that.

18 QUESTION: Well, what is your theory that it
19 should -- where should it start? Where should that line
20 start?

21 MR. McCUTCHEN: We think -- our theory, Your
22 Honor, is that the coast of Georgia is at 20 degrees. The
23 coast of South Carolina is at 47 degrees. The coastal
24 fronts, if you overlap them, going out you have the area
25 in -- we see in dispute. And so we are saying that if you

1 divide that between those coastal fronts you would have an
2 area of 123.5 degrees. And that is where we see as the
3 area of dispute for the overlapping nature of the coastal
4 fronts.

5 QUESTION: And what is involved? Jurisdiction
6 over those waters?

7 MR. McCUTCHEN: Yes, sir.

8 QUESTION: This is in -- this is within the
9 three mile --

10 MR. McCUTCHEN: Yes, sir, but we do not know
11 what significance this line will have in the future days
12 as to the 200-mile outrun. And of course every degree
13 that it goes up is going to make that the difference. For
14 instance --

15 QUESTION: Well, is that area that is in dispute
16 of commercial value now?

17 MR. McCUTCHEN: For shrimping.

18 QUESTION: Fishing? Shrimping?

19 MR. McCUTCHEN: Shrimping. Heavy shrimping
20 area. And that is one of the reasons this suit apparently
21 started.

22 QUESTION: And the interest is in which state
23 can regulate it?

24 MR. McCUTCHEN: Regulate it. Control whatever
25 is underneath. There has been some oil exploration.

1 QUESTION: Tax it?

2 MR. McCUTCHEN: If granted. If owned by any
3 individuals.

4 The line of the Master is six degrees farther
5 north than even the most favorable line which is
6 perpendicular to the Georgia coast.

7 QUESTION: Well, who could -- which -- I suppose
8 some state can tax the income from that shrimping?

9 MR. McCUTCHEN: Yes, sir. And there are
10 licensed shrimpers in South Carolina and licensed
11 shrimpers in Georgia. And by that, of course, that is
12 what happened. Georgia arrested the South Carolina
13 shrimper to precipitate this suit. And that is a very
14 valuable enterprise in that area.

15 QUESTION: Mr. McCutchen, looking at Appendix B
16 on, in Georgia's brief, I -- how did the -- and you
17 support the Master's -- the Master's decision to jog the
18 line south just before Oyster Bed Island.

19 MR. McCUTCHEN: Yes, sir.

20 QUESTION: I don't understand what the basis for
21 that angle was.

22 MR. McCUTCHEN: He took that position --

23 QUESTION: You see where the yellow line goes
24 south and where Georgia would prefer the red line -- yes,
25 the red line.

1 MR. McCUTCHEN: The Master simply said that the
2 area that he had north of that was north of the boundaries
3 that existed in 1787, and there was slight water going in
4 that area. And so he put that line as being where it was.
5 These maps, the accretions that have all have occurred
6 since 1787 are very substantial in some of these matters.
7 But the Master said that Oyster Bed was on the northern
8 side of the stream, as it was in 1787.

9 QUESTION: He thought that was dry land up
10 there, that that line represented the mid point between
11 dry land on both sides in 1787?

12 MR. McCUTCHEN: He said that's the way he would
13 have fixed it, the boundary, as of that time, based on the
14 best evidence that he had before him as of that time.

15 QUESTION: As I recall, it didn't have to do
16 with dry land. It had to do with his thinking that the,
17 that the navigation channel was south of there, and that -
18 -

19 MR. McCUTCHEN: Well, he said the northern
20 stream.

21 QUESTION: -- it was so close to the mouth at
22 this point that we will just follow the navigation
23 channel.

24 MR. McCUTCHEN: That's true. That's true. The
25 boundary was the northern stream. But he said Oyster Bed

1 Island was north of the northern stream as it existed in
2 1787. And our position, of course, on the lateral seaward
3 boundary is that it should start at the historical mouth,
4 and the mouth --

5 QUESTION: The mouth -- the mouth is different
6 from that closing line between Hilton Head and Tybee,
7 isn't it?

8 MR. McCUTCHEN: Yes, sir. The mouth is really
9 between Tybee and what you might see as a shoal just north
10 of that, and it has been historically understood for over
11 250 years and has been treated by all of the observers
12 through the period of time. William DeBrahm, for
13 instance, the most informed engineer --

14 QUESTION: The mouth is where, now? North of
15 Tybee?

16 MR. McCUTCHEN: Right at Tybee. Right where the
17 intersect, as it goes from Tybee on, as the closing line
18 starts north. And all the historical reports have said
19 the mouth is at Tybee. Sir James Wright, the governor of
20 Georgia in 1773, placed the mouth of the Savannah at
21 Tybee.

22 QUESTION: Well, Tybee is a big -- what, at what
23 place on Tybee?

24 MR. McCUTCHEN: That is the language they used,
25 and he, Sir -- Sir James Wright used actual coordinates

1 that placed it there, as did William DeBrahm, who -- the
2 surveyor who put it --

3 QUESTION: Well, the mouth isn't a point, is it?
4 It's a --

5 MR. McCUTCHEN: It's a place where the water
6 from the river enters into the ocean.

7 QUESTION: I agree with you. I --

8 QUESTION: South Carolina agrees that the south
9 boundary of the mouth is at Tybee. The question is where
10 is the north boundary.

11 MR. McCUTCHEN: The north boundary has always
12 been considered to be at Tybee just above where the south
13 boundary is. It's confined in there on the ocean floor by
14 virtue of a channel which has been there historically, and
15 that has been the place in which ships have entered --

16 QUESTION: How far above where the south
17 boundary is? I mean, that is the only question we are
18 talking about.

19 MR. McCUTCHEN: Half a mile.

20 QUESTION: On this Appendix B, can you -- I --
21 I'm not clear on that. On Georgia's Appendix B, where,
22 where north of Tybee is the -- is the northern point of
23 the line that constitutes the mouth?

24 QUESTION: Is it at those dotted lines?

25 MR. McCUTCHEN: That is where we place it, along

1 in there.

2 QUESTION: The dotted lines? Straight north?

3 MR. McCUTCHEN: Yes, straight north.

4 QUESTION: Straight north, or along that closing
5 line?

6 MR. McCUTCHEN: Right along that closing line,
7 anywhere right in there would be the -- where it is.
8 Because it has always been referred to as at Tybee. And
9 that was the way it was perceived in that time.

10 The Special Master, in the boundary which he
11 gave to the islands of Georgia, used --

12 QUESTION: Well, he started his line just at the
13 -- just at sort of just a little north of where you say
14 the mouth was. You started his -- the Master started his
15 perpendicular seaward boundary just a little north of
16 where you say the mouth was?

17 MR. McCUTCHEN: No, sir. He didn't start it
18 there. If we could, if you turn back to Appendix B in the
19 Master's report, you would see the beginning of that line
20 is south of where Your Honor is mentioning. It is in
21 about the midpoint of that mouth.

22 If you look at Appendix B --

23 QUESTION: And you say that is right, where he
24 started it? It's just that -- he just -- it's just that
25 he went off in the wrong direction.

1 MR. McCUTCHEN: Yes, sir. We say he started at
2 the correct place.

3 QUESTION: Well, then Georgia's -- Georgia's
4 Exhibit B is -- Appendix B just isn't right.

5 Well, anyway --

6 MR. McCUTCHEN: Well, I see --

7 QUESTION: Thank you, Mr. McCutchen.

8 Ms. Barmeyer, you have four minutes remaining.

9 REBUTTAL ARGUMENT OF PATRICIA T. BARMEYER

10 ON BEHALF OF THE PLAINTIFF

11 MS. BARMEYER: Thank you, Your Honor.

12 Georgia agrees with the point made by the Chief
13 Justice that South Carolina must show prescription and
14 acquiescence as of 1953, because, of course, otherwise it
15 would be defeated by the action taken by Georgia in
16 intervening and pursuing the case, the condemnation case
17 that went to the Fifth Circuit.

18 The question is, as of 1953, was there the
19 cumulative notoriety that's required in the cases to
20 change the location of Barnwell Island from Georgia to
21 South Carolina? Was there any notice to Georgia?

22 Now, Georgia asserted to the Fifth Circuit that
23 Georgia did not know that the boundary was in dispute,
24 because South Carolina had never made any claim to
25 Barnwell Island that was brought home to the State of

1 Georgia until in 1955, when South Carolina sought to file
2 an original action in the court. That was the first time
3 that South Carolina appeared on the scene and said yes, we
4 claim Barnwell Island. As of 1955 --

5 QUESTION: But South Carolina had been on the
6 scene all along, because that's been where the deeds were
7 recorded and the taxes were paid, and this land was being
8 obviously used.

9 MS. BARMEYER: Deeds were recorded and taxes
10 were paid in South Carolina, but those are primarily
11 passive acts by the clerk of court. If you go to the
12 clerk of court and you record a deed in its improper form,
13 it is going to be recorded. If you say I own 1,000 acres
14 in Beaufort County, and here are my taxes, they are going
15 to accept it. There wasn't any affirmative exercise of
16 South Carolina --

17 QUESTION: I don't think so. I don't think the
18 clerk in Fairfax County here would accept a deed to
19 Maryland land for filing.

20 MS. BARMEYER: If it was in --

21 QUESTION: I don't think so at all.

22 MS. BARMEYER: If it said it was in Virginia.
23 If the deed on its face said it was in Virginia, I submit
24 they would record it.

25 QUESTION: I don't think so, but maybe -- maybe

1 the clerks aren't as quick there, but --

2 MS. BARMEYER: In South Carolina they recorded
3 it.

4 QUESTION: I think our Fairfax county clerks
5 would know that --

6 QUESTION: Did Georgia ever try to collect any
7 taxes on either?

8 MS. BARMEYER: Taxes were paid in Georgia in the
9 early 19th century: 1825, 1830 and 1831.

10 QUESTION: Well, when last did they try to
11 collect them?

12 MS. BARMEYER: In 1831 taxes were received and
13 accepted.

14 QUESTION: Well, does that have any significance
15 to us, to this case, now?

16 MS. BARMEYER: Well, I think all of these facts
17 have significance, but what the Court does is take all of
18 them and determine is there enough to say that there was a
19 general --

20 QUESTION: Well, I don't know of anything more
21 important to a state government than taxes.

22 MS. BARMEYER: Taxes are key, but I would point
23 out that the way these lands were reported for taxes in
24 South Carolina was I am Charlotte Barnwell, I tell the tax
25 collector I own 152 acres, and I pay the tax on it. There

1 is nothing on the tax records --

2 QUESTION: Well, is there any place -- is there
3 any other Georgia land that pays taxes to South Carolina?

4 MS. BARMEYER: There may well be, Your Honor.
5 At least until the 20th century and the '60s, when the
6 clerks were able to get these photogrammetric tax maps
7 where you could really superimpose the property boundaries
8 on the land, in Georgia and other states that were not
9 granted, and South Carolina, that were granted randomly
10 with irregular parcels, there wasn't a chart that somebody
11 could go to to see whether or not this township, this
12 range, whether or not the land had been granted, whether
13 or not taxes had been paid.

14 I think it's key that South Carolina did not
15 even know of the grant by South Carolina to this land.

16 QUESTION: How do you get to the Special
17 Master's findings of historical facts on deference? What
18 should be our standard? Clearly erroneous, or do we de
19 novo, look at all this record and make our own findings,
20 or what?

21 MS. BARMEYER: Your cases have said that the
22 Master's findings are entitled to a tacit presumption of
23 correctness. But the role of the Court is to make a de
24 novo review, an independent review of the record, and to
25 assure itself that a correct decision has been made.

1 QUESTION: Well, I suppose if we accepted all of
2 his historical facts there would still be left the
3 question of whether they add up to prescription.

4 MS. BARMeyer: Yes, sir, that is correct.

5 On the --

6 QUESTION: Thank you, Ms. Barmeyer.

7 MS. BARMeyer: Thank you, Your Honor.

8 CHIEF JUSTICE REHNQUIST: The case is submitted.

9 (Whereupon, at 11:58 a.m., the case in the
10 above-entitled matter was submitted.)

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CERTIFICATION

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#74, ORIG. - STATE OF GEORGIA, Plaintiff V. STATE OF SOUTH CAROLINA

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BY Leona M. May
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