

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1972

No. 64, Original

THE STATE OF NEW HAMPSHIRE, *Plaintiff*

v.

THE STATE OF MAINE, *Defendant*

**MOTION FOR EXPEDITIOUS CONSIDERATION AND
MOTION FOR PRELIMINARY INJUNCTION**

WARREN B. RUDMAN
Attorney General

DAVID H. SOUTER
*Deputy Attorney General
Office of the Attorney General
State House Annex
Concord, New Hampshire*

ATTORNEYS FOR PLAINTIFF
State of New Hampshire

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THE STATE OF NEW HAMPSHIRE, *Plaintiff*

v.

THE STATE OF MAINE, *Defendant*

MOTION FOR EXPEDITIOUS CONSIDERATION

I

The State of New Hampshire, by its Attorney General, has filed the accompanying Motion for Preliminary Injunction in this case.

II

The Motion for Leave to File Complaint and Complaint herein was filed with the Court on June 6, 1973.

III

Under Rule 9 (5) the State of Maine may file a Brief in Opposition to the Motion within sixty days after receipt of copies of the Motion and under Rule 9 (8) the State of Maine would have a further sixty days within which to respond to a summons issued by the Court.

IV

Because of the conditions described in the accompanying Motion for Preliminary Injunction and in the Affidavits offered in support thereof, the State of New Hampshire submits that the preliminary injunction sought by it should be issued at the earliest possible time without waiting for the expiration of the periods described in the foregoing paragraph.

WHEREFORE, the State of New Hampshire asks the Court for immediate consideration of the accompanying Motion for Preliminary Injunction.

WARREN B. RUDMAN
Attorney General

DAVID H. SOUTER
Deputy Attorney General

June 11, 1973

**In the
Supreme Court of the United States**

OCTOBER TERM, 1972

No. 64, Original

THE STATE OF NEW HAMPSHIRE, *Plaintiff*

v.

THE STATE OF MAINE, *Defendant*

MOTION FOR PRELIMINARY INJUNCTION

The State of New Hampshire, Plaintiff, prays that for reasons set forth below the Court issue a Preliminary Injunction against the State of Maine, Defendant, with terms described at the conclusion of this Motion.

I

On June 6, 1973 the State of New Hampshire as Plaintiff filed its Motion for Leave to File Complaint and Complaint against the State of Maine, invoking the original and exclusive jurisdiction of this Court for the purpose ultimately of securing a declaration that a segment of the lateral marine boundary between the State of New Hampshire and the State of Maine is a straight line connecting the midpoint of the mouth of the Piscataqua River with the midpoint of the mouth of Gosport Harbor, situated in a group of islands known as the Isles of Shoals, located in the Atlantic Ocean a distance of approximately six geographical miles from the mouth of the Piscataqua River.

II

The Complaint states that the description of the relevant segment of the common boundary separating what are now the states of New Hampshire and Maine is contained in an Order in Council with respect to the Provinces of New Hampshire and Massachusetts Bay dated April 9, 1740, which provides, so far as is pertinent here, "[t]hat the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River . . . And that the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side." *Laws of New Hampshire*, Vol. 2, p. 790, 793, A. S. Batchellor, Ed., Concord, New Hampshire 1913.

III

The Complaint states that no area relevant to the Complaint is more than three geographical miles seaward from the ordinary low water mark of territory of one or the other of the two states or from the outer limits of inland waters of one or the other of the two states.

IV

The Complaint states that the State of Maine claims a lateral marine boundary line extending southerly and westerly of the straight lateral marine boundary described above, and further states that although the line claimed by Maine has been placed on a United States Geological Survey Map of the area in question, there is no legal basis for so placing the line and officials of the United States Geological Survey do not know why the line was so placed. A portion of the Geological Survey Map in question was reproduced as an Appendix to the Complaint, and is similarly attached to this Motion as Appendix E. The straight line labeled on that map as "Portsmouth Harbor-Gosport Harbor" represents the straight lateral marine boundary claimed by New Hampshire, and the crooked line labeled as "Maine New Hampshire Boundary Line" represents the line claimed by Maine.

V

The Complaint concludes that there is therefore a controversy between the states about the location of a significant segment of their lateral marine boundary, such that an area of approximately 2,400 acres is subject to conflicting claims of the two states as being within their respective territorial boundaries.

VI

The Complaint states that on May 23, 1973 officials of the State of Maine, in derogation of the sovereignty of the State of New Hampshire over the disputed area, arrested a New Hampshire lobsterman duly licensed by New Hampshire to take lobsters within that area and charged him with taking lobsters in the disputed area without being licensed to do so by the State of Maine, which charge is now pending. Wayne Vetter, a law enforcement official of the New Hampshire Fish and Game Department, in an affidavit attached hereto as Appendix B, states that he saw the New Hampshire lobsterman in the custody of Maine officials, and states that he saw Maine officials within the disputed area in the act of raising from the seabed and seizing that lobsterman's traps, for the placing of which the lobsterman was arrested.

VII

In connection with that arrest on May 23, 1973, law enforcement officials of the State of Maine attempted to seize the boat operated by the New Hampshire lobsterman arrested. The Affidavit of Wayne Vetter describes the circumstances under which the seizure of that boat was prevented, as does the Affidavit of Carl Ackerly, a senior law enforcement official of the New Hampshire Fish and Game Department, attached hereto as Appendix C.

VIII

Following that arrest on May 23, 1973, of a New Hampshire lobsterman by Maine officials on a charge of fishing within the

disputed area without being licensed by Maine, the Governor of New Hampshire requested all New Hampshire lobstermen to refrain from fishing in the disputed area and requested enforcement officials from the New Hampshire Fish and Game Department to refrain from enforcing New Hampshire law, including licensing requirements, against residents of the State of Maine within the disputed area. The Governor of New Hampshire took this action for the purpose of preventing violence which appeared possible if law enforcement officials of the two States within the disputed area had sought to enforce the laws of one State against those licensed by the other State. Since May 23, 1973, New Hampshire lobstermen have remained out of the disputed area, and New Hampshire officers have not taken enforcement action against Maine lobstermen in the area. These conclusions are supported by the Affidavit of His Excellency, Meldrim Thomson, Jr., Governor of New Hampshire, attached hereto as Appendix A.

IX

Also on May 23, 1973, the State of Maine, acting through its Attorney General as well as on behalf of one Marshall E. Alexander, described as a lobsterman, filed identical complaints against the Governor of New Hampshire and others in both the United States District Court for the District of New Hampshire and the United States District Court for the District of Maine seeking relief under 42 U.S.C. 1983 and 1985. Those complaints expressed the belief that violence to the person and property of Maine citizens was imminent, which belief the complaints purported to base in part on statements of the Governor of New Hampshire. Service has never been made under these complaints. At a conference of counsel for the States of Maine and New Hampshire before each of the District Courts held on the evening of May 23, 1973, the State of New Hampshire, with the approval of its Governor, undertook to refrain from enforcing its lobster licensing laws against Maine residents duly licensed by the State of Maine and fishing in the disputed area provided that the State of Maine would make an identical undertaking with respect to New Hampshire residents duly licensed by New Hampshire and fishing within the disputed area. Although

counsel for the State of Maine at first refused at that conference to make any reciprocal undertaking, counsel for the State of Maine later modified their position and joined with New Hampshire in a reciprocal undertaking but only for a period of forty-eight hours. Since the expiration of that time, although inquiries have been made by the Attorney General of New Hampshire in an effort to reinstate the reciprocal undertakings, the Attorney General of Maine has not as yet agreed to enter again into such reciprocal undertakings, which would avoid the need for the preliminary injunction which is now being sought. Affidavit of Deputy Attorney General David H. Souter attesting to the truth of statements made in this statement is attached hereto as Appendix D.

X

Paragraph VI, above, describes hardship to New Hampshire lobstermen who seek to fish in the disputed area at the risk of prosecution by Maine, and paragraph VII describes the danger of confrontations between officials which is raised by unregulated law enforcement in the disputed area. In addition, unregulated law enforcement is likely to foster litigation in the United States District Courts, as indicated in paragraph IX, above, and as further demonstrated by the recent filing of a complaint in the United States District Court for the District of Maine by a New Hampshire lobsterman (arrested by Maine officials in January, 1973, and charged with taking lobster in a place believed to be in the disputed area), *Heaphy v. Apollonio, et al*, No. 1444, charging Maine officials with a violation of 18 U.S.C. 1652 (piracy). Affidavit of Wayne Vetter, Appendix B, describes his knowledge of this action.

XI

The Complaint in this action states that for over one hundred years New Hampshire residents have fished within the disputed area, and more recently have been licensed by New Hampshire to do so, with the understanding that the area is within the State of New Hampshire.

XII

It would be inequitable that New Hampshire resident lobstermen be excluded from the disputed area prior to a resolution of the boundary controversy, in view of the fact that New Hampshire does not seek to exclude Maine lobstermen from the disputed area during that time. In particular it would be inequitable to deprive New Hampshire lobstermen of the right to fish in the disputed area when New Hampshire is willing and desirous of entering into reciprocal undertakings of the sort describe in paragraph IX, above.

XIII

Since efforts to obtain agreement from officials of the State of Maine to allow fishing in the disputed area by New Hampshire residents in return for similar fishing by Maine residents have proven fruitless, the State of New Hampshire is constrained to seek a preliminary injunction to effect the same object. Unless the State of New Hampshire were willing voluntarily to relinquish a jurisdiction which in good faith it claims in this action and unless certain New Hampshire residents were to relinquish voluntarily a portion of their means of livelihood of fishing in the disputed area, the only alternatives to an agreement or injunction are likely to be conflicting law enforcement activities harmful to the residents of both party states and perhaps even physical violence.

XIV

An injunction of the sort desired by New Hampshire will result in no hardship to the State of Maine or to Maine lobstermen, since the latter would continue to fish in the disputed area as they do now.

WHEREFORE, New Hampshire prays that this Court enjoin the State of Maine, Defendant, from seeking to enforce Maine state law within the disputed area against residents of New Hampshire duly licensed by New Hampshire to take lobsters within that area, with New Hampshire's consent to a similar order that it refrain from enforcing New Hampshire state law within the disputed area against residents of Maine duly licensed by the State of Maine to take lobsters within that area, and for such other and further relief as may be just.

THE STATE OF NEW HAMPSHIRE

By

WARREN B. RUDMAN
Attorney General

DAVID H. SOUTER
Deputy Attorney General

Counsel for Plaintiff

June 11, 1973

CERTIFICATE OF SERVICE

I, David H. Souter, Counsel for Plaintiff, do hereby certify that in reliance upon Rule 9(3), all parties required to be served have been served under Rule 33 (1) by mailing three copies each of the foregoing Motions to The Honorable Kenneth M. Curtis, Governor of the State of Maine and The Honorable Jon A. Lund, Attorney General of the State of Maine addressed to their respective offices at the State House, Augusta, Maine, by first class mail, postage prepaid, each address being within 500 miles of the point of mailing.

.....
DAVID H. SOUTER

Concord, New Hampshire
June 11, 1973

APPENDIX A

AFFIDAVIT OF GOVERNOR MELDRIM THOMSON, JR.

1. My name is Meldrim Thomson,, Jr. I am the Governor of the State of New Hampshire.
2. I have examined the foregoing Motion for Preliminary Injunction, and I have examined a copy of the Motion for Leave to File Complaint and Complaint in this action.
3. Paragraph VI of the foregoing Motion describes the arrest on May 23, 1973 by officers of the State of Maine of a duly licensed New Hampshire fisherman operating within the disputed area, as described in paragraph V of the foregoing Motion.
4. On that date I urged all New Hampshire lobstermen duly licensed to fish in the disputed area to refrain from doing so for the immediate time being. I made this request in an effort to avoid an increase in tension between officials of the State of Maine and New Hampshire fishermen which could lead to physical violence.
5. On that same date, I requested officials of the New Hampshire Fish and Game Department to remain out of the disputed area and to take no action against fishermen of the State of Maine who might be found fishing within the area. I took this action for the same reasons given in the foregoing paragraph.
6. Therefore, New Hampshire fishermen have voluntarily refrained from exercising their rights to take lobsters from

waters claimed by the State of New Hampshire as within its territory and the State of New Hampshire has voluntarily refrained from enforcing its law within the same area.

7. I adopt as my own the undertaking of the State of New Hampshire contained in the conclusion of the foregoing Motion, that until otherwise ordered by this Court, the State of New Hampshire will refrain from enforcing New Hampshire state law within the disputed area against residents of Maine duly licensed by the State of Maine to take lobsters within that area, provided that the State of Maine by voluntary reciprocal undertaking or under order of this Court refrains from enforcing Maine state law within the disputed area against residents of New Hampshire duly licensed by New Hampshire to take lobsters within that area.

MELDRIM THOMSON, JR.
Governor of New Hampshire

The State of New Hampshire
Hillsborough, SS

Then personally appeared before me His Excellency, Meldrim Thomson, Jr., known to me to be the person who subscribed the foregoing Affidavit who acknowledged that he executed the same and that all statements of fact contained therein are true to the best of his knowledge and belief.

MICHAEL P. BENTLEY
Notary Public

My Commission Expires January 10, 1978

June 10, 1973

APPENDIX B

AFFIDAVIT OF WAYNE VETTER

1. My name is Wayne Vetter. I am a Deputy District Chief in the Law Enforcement Division of the New Hampshire Fish and Game Department, charged with enforcing fish and game laws of the State of New Hampshire in the region of the state which includes the Piscataqua River and the Atlantic Ocean in the vicinity of the New Hampshire - Maine lateral marine boundary.
2. On May 23, 1973 I was on duty and was proceeding seaward from the Piscataqua River when I observed a boat, known to me to belong to a New Hampshire resident licensed to take lobsters in New Hampshire waters, proceeding inbound alongside a boat containing officers of the State of Maine. When I approached the two boats, the New Hampshire fisherman told me that he was under arrest by the Maine officers on a charge of fishing in Maine waters and that the Maine officers planned to seize his boat and take it to Kittery, Maine.
3. I immediately caused my superior, District Chief Carl Akerly, to be notified of the arrest and of the intentions of the Maine officers.
4. Later, in my presence, District Chief Akerly came to the spot in the Piscataqua River where the two boats were located and demanded the release of the New Hampshire lobsterman's boat to New Hampshire officers. The boat was so released and I then proceeded seaward to the place where I believed the New Hampshire lobsterman had been fishing.
5. I located a boat containing Maine officers who were pulling from the seabed and putting aboard their boat lobster traps which I identified conclusively as belonging to the arrested New Hampshire fisherman.

6. I have examined the portion of the map attached to the foregoing Motion and labeled Appendix E and have located on that map the position at which I observed the lobster traps and activity described in the foregoing paragraph. That position is southerly and westerly of the line labeled on that map as "Portsmouth Harbor-Gosport Harbor" and that position is known to me to be within the area subject to boundary dispute between the State of New Hampshire and the State of Maine.
7. On June 7, 1973 I traveled to the office of the Clerk of the United States District Court for the District of Maine, Southern Division, in Portland, Maine. In that office I personally inspected a Complaint filed there on June 6, 1973 under the name of *Heaphy v. Apollonio, et al*, No. 1444, charging certain officers of the State of Maine with violations of 18 U.S.C. 1652 (piracy). The Complaint describes the Plaintiff as a resident of New Hampshire. The Complaint alleges that the acts of piracy consist of seizure in January, 1973 and on May 22, 1973 by Maine officers of lobster traps belonging to the Plaintiff and placed in waters traditionally regarded as New Hampshire waters but presently subject to jurisdictional dispute between New Hampshire and Maine.

WAYNE VETTER

The State of New Hampshire
Merrimack, SS

Then personally appeared before me Wayne Vetter, known to me to be the person who subscribed the foregoing Affidavit who acknowledged that he executed the same and that all statements of fact contained therein are true to the best of his knowledge and belief.

MICHAEL P. BENTLEY
Notary Public

My Commission Expires January 10, 1978

June 10, 1973

APPENDIX C

AFFIDAVIT OF CARL AKERLY

1. My name is Carl Akerly. My address in Newington, New Hampshire. I am a District Chief in the Law Enforcement Division of the New Hampshire Fish and Game Department, charged with enforcing fish and game laws of the State of New Hampshire in the region of the state which includes the Piscataqua River and the Atlantic Ocean in the vicinity of the New Hampshire - Maine lateral marine boundary.
2. On May 23, 1973 I received a communication from Deputy District Chief, Wayne Vetter, which stated that a New Hampshire resident licensed to take lobsters in New Hampshire waters had been arrested by officers of the State of Maine for allegedly fishing for lobsters in waters of the State of Maine and that those Maine officers were attempting to seize the boat operated by that New Hampshire licensee.
3. I was taken by the United States Coast Guard out into the Piscataqua River, through which the New Hampshire - Maine boundary passes, to a point approximately in the middle of that river at which I observed Maine officers in a Maine boat alongside the boat of the arrested New Hampshire lobsterman.
4. I approached the boats and was informed by the Maine officers that they intended to seize the vessel of the New Hampshire licensee under arrest.
5. I protested their intended course of action and demanded that the boat of the New Hampshire licensee be released to me.

6. At length, the Maine officers did release that boat to me.
7. It is my opinion without any reservation that if I had not interfered in the attempted seizure that Maine officers would have seized the boat in question.

CARL AKERLY

The State of New Hampshire
Merrimack, SS

Then personally appeared before me Carl Akerly, known to me to be the person who subscribed the foregoing Affidavit who acknowledged that he executed the same and that all statements of fact contained therein are true to the best of his knowledge and belief.

MICHAEL P. BENTLEY
Notary Public

My Commission Expires January 10, 1978

June 10, 1973

APPENDIX D

AFFIDAVIT OF DAVID H. SOUTER DEPUTY ATTORNEY GENERAL

1. My name is David H. Souter. I am the Deputy Attorney General of New Hampshire and counsel for the Plaintiff in this action.
2. I have prepared the paragraph numbered IX in the foregoing Motion for Preliminary Injunction.
3. I was personally present at the conference of counsel for the States of Maine and New Hampshire held on the evening of May 23, 1973 described in that paragraph IX, and the description of that conference is accurate.
4. The Attorney General of New Hampshire has examined the statements contained in that paragraph IX with respect to inquiries made by him, and has told me that those statements are correct.

DAVID H. SOUTER..
Deputy Attorney General

The State of New Hampshire
Merrimack, SS

Then personally appeared before me David H. Souter, known to me to be the person who subscribed the foregoing Affidavit who acknowledged that he executed the same and that all statements of fact contained therein are true to the best of his knowledge and belief.

MICHAEL P. BENTLEY
Notary Public

My Commission Expires January 10, 1978

June 11, 1973

APPENDIX E

Portion of United States Department of the Interior Geological Survey map, Maine-New Hampshire/York Quadrangle, Edition of 1920, No. N4300-W7030/15, with markings to which references are made in the preceding Complaint. This portion of the map is identical to that included as an Appendix to the Complaint in this action.



Lights in Range $143\frac{1}{2}^{\circ} T$
 Portsmouth Harbor - Gosport Harbor $143^{\circ} T$

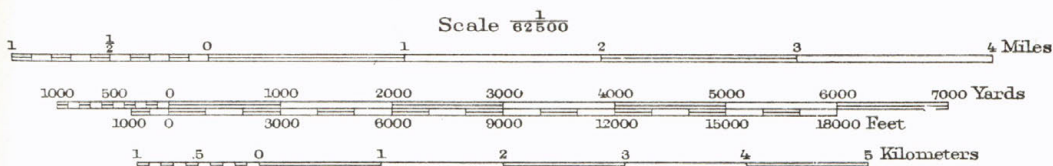
3.26 Naut. Mi.
 $156^{\circ} T$

1.71 Naut. Mi.
 $132^{\circ} T$

1.29 Naut. Mi.
 $123^{\circ} T$

R.B. Marshall, Chief Geographer.
 Frank Sutton, Geographer in charge.
 Topography by J.H. Wheat, W.H. Griffin,
 Robert Muldrow, Geo. H. Guerdum and C.W. Arnold.
 Shore line by
 U.S. Coast and Geodetic Survey.
 Control by U.S. Coast and Geodetic Survey,
 C.W. Arnold, and C.H. Stewart.
 Surveyed in 1916-17.

SURVEYED IN COOPERATION WITH THE WAR DEPARTMENT.



Contour interval 20 feet

Duck Island
 Shag Rock
 Eastern Rock
 Mingo Rock

TOWN OF KITTERY

Appledore Island

Gosport Harbor

Lunging Island
 Square Rock

TOWN OF RYE

White I.
 ISLES OF SHOALS L.H.

SHOALS

ISLES

