



**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*

**PLAINTIFF'S REPLY BRIEF
TO DEFENDANT'S BRIEF
OPPOSING LEAVE TO FILE COMPLAINT**

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New Hampshire as plaintiff respectfully submits this reply brief in answer to arguments made by the State of Maine in its brief urging the Court to deny plaintiff's motion for leave to file a complaint herein.

JURISDICTION

The proposed complaint alleges that jurisdiction is founded on Article III, section 2, Constitution of the United States, which provides that the original jurisdiction of the Court shall extend to "controversies between two or more States". Furthermore, 28 USC s. 1251 provides that:

"* * * (a) The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States; * * *"

QUESTION PRESENTED

Whether the proposed complaint states a cause of action sufficient to invoke the original jurisdiction of this Court.

STATEMENT

On June 6, 1973, New Hampshire filed with the Clerk of this Court a motion for leave to file a complaint against Maine, to which was appended the proposed complaint. Subsequently a motion for preliminary injunction was filed by New Hampshire, opposed by Maine, and denied by the Court. Then on July 31, 1973, Maine filed its brief in opposition to New Hampshire's motion for leave to file complaint.

The "controversy" between New Hampshire and Maine, upon which the complaint is based, concerns the true location of the lateral marine boundary between New Hampshire and Maine in that area of the Atlantic Ocean lying between the mouth of Portsmouth Harbor (which is also the mouth of the Piscataqua River) and the entrance to Gosport Harbor in the Isles of Shoals.

The Isles of Shoals are a group of small islands, lying about six miles offshore. The northerly part of this group of islands lies in Maine and the southerly part lies in New Hampshire. Thus the state boundary parts the islands running between Cedar Island in Maine and Star Island in New Hampshire. Cedar Island and Star Island are connected by a breakwater and form a small harbor, known as Gosport Harbor, which derives its name from the former village of Gosport on Star Island.

The legal basis for the common boundary between Maine and New Hampshire is the English Order in Council of April 9, 1740 (when Maine was part of the Province of Massachusetts Bay), the pertinent section thereof reading as follows:

"[t]hat the Dividing Line shall pass up thro 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 thro the Middle of the Harbour between the Islands to the Sea on the Southerly Side." Complaint, Section II, at page 3.

This Order in Council is silent as to the course of the boundary between the mouth of Piscataqua or Portsmouth Harbor and the entrance to Gosport Harbor of the Isles of Shoals. However, the two terminal points being known, it is a well known presumption of the common law that a straight line

connecting them was probably intended by the parties to be the boundary in the absence of some controlling indication to the contrary.

Supporting New Hampshire's claim of a straight line as the connecting link in the disputed area is the allegation that for over 100 years New Hampshire fishermen, fishing pursuant to New Hampshire law, have used the so-called "lights on range" as an approximate measure of the location of the lateral marine boundary and have during this period customarily and continuously fished up to the limits of such boundary. See complaint, par. VI. Since 1921, New Hampshire lobster fishermen have fished this area pursuant to New Hampshire licenses (chapter 90, Session Laws of 1921). The "lights on range" method of location pre-supposes a straight line as the boundary.

Maine claims that the lateral marine boundary is as drawn on the Kittery-Isles of Shoals quadrangle of the U. S. Geological Survey map of the area, which is a curved line curving southerly and then easterly between the two admitted terminal points. Between the straight line claimed by New Hampshire and the curved line claimed by Maine lie approximately 2,400 acres of territorial waters, which is the area in dispute.

Since the Isles of Shoals as offshore islands are entitled to their own separate three-mile marginal zone of territorial waters in addition to the traditional three-mile marginal zone of territorial waters which is appurtenant to the mainland, the entire area in dispute lies within the territorial waters of one state or the other. This fact serves to simplify the issues.

The arrest by Maine wardens of a New Hampshire fisherman, in the disputed area in January 1973, followed by a like arrest of another New Hampshire fisherman on May 23, 1973, in the disputed area, have had serious repercussions. The territory close to the boundary is quite good lobster fishing territory. Fishermen of both states have been competing and fishing heavily to the limits of their claimed boundaries. There have been seizures of New Hampshire fishing equipment and threats of further arrests. There have also been threats of retaliation and claims of sabotage of fishing equipment in or near the disputed area.

Following the second arrest on May 23, 1973, which occurred during the sessions of a Judicial Conference of the

First Circuit at nearby New Castle, New Hampshire, joint hearings were held at New Castle by the district judges of Maine and New Hampshire (who were then attending the Conference), on Maine's motion for an injunction against interference by New Hampshire authorities in the disputed area. These motions were denied for lack of jurisdiction, but representations were then made to the district judges in open court that one or both states would shortly bring the "controversy" before this Court. A patrol of the disputed area by a U. S. Coastguard vessel was undertaken voluntarily during this tense period. See the motion for preliminary injunction filed herein June 11, 1973, and the affidavits attached to it.

It should be noted that this "controversy" between Maine and New Hampshire over the location of their common lateral marine boundary is not an isolated problem. All along the Atlantic seaboard (with but one or two exceptions) the lateral marine boundaries between the coastal states are "substantially undelimited". See the publication "Delimitation of Ocean Space Boundaries between Adjacent Coastal States of the United States" by William L. Griffin, legal consultant to the U. S. Coast and Geodetic Survey (Department of Commerce, 1968). Therefore there exists considerable public interest in establishing the principles of law applicable to the determination of the true location of such lateral marine boundaries within the limits of the territorial waters of the respective coastal states.

Efforts of commissioners of Maine and New Hampshire to negotiate a compact settling the dispute have failed.

ARGUMENT

I.

NEW HAMPSHIRE HAS ASSERTED A POSITIVE AND DEFINITE BOUNDARY CLAIM, ADVERSE TO THAT OF MAINE.

A. New Hampshire Statutes

Subsequent to the filing of the motion for leave to file complaint herein, the legislature of New Hampshire passed and the governor approved, effective July 5, 1973, chapter 580, Session Laws of 1973 ("An Act to define the offshore jurisdiction of the state", originally House Bill No. 714 introduced April 3, 1973.) Section 1 of this act (RSA 1:15-I) provides in part as follows:

"1:15 Lateral Boundaries. Until otherwise established by law, interstate compact or judgment of the supreme court of the United States, the lateral marine boundaries of this state shall be and are hereby fixed as follows:

"1. Adjoining the State of Maine: Beginning at the midpoint of the mouth of the Piscataqua River; thence southeasterly in a straight line to the midpoint of the mouth of Gosport Harbor of the Isles of Shoals; thence following the center of said harbor easterly and southeasterly and crossing the middle of the breakwater between Cedar Island and Star Island on a course perpendicular thereto, and extending on the last-mentioned course to the line of mean low water; thence 102° East (true) to the outward limits of state jurisdiction as defined in RSA 1:14. As to that section of the lateral marine boundary lying between the mouth of the Piscataqua River and the mouth of Gosport Harbor in the Isles of Shoals, the so-called line of 'lights on range', namely, a straight line projection southeasterly to the Isles of Shoals of a straight line connecting Fort Point Light and Whaleback Light shall be *prima facie* the lateral marine boundary for the guidance of fisher-

men in the waters lying between Whaleback Light and the Isles of Shoals.”

Shortly before this action was commenced, the legislature of New Hampshire had enacted and the governor approved, effective March 28, 1973 (chapter 58, Session Laws of 1973), the following joint resolution “relative to the marine boundary between Maine and New Hampshire”:

“It is hereby declared that the State of New Hampshire does not and never has agreed to or acquiesced in the lateral marine boundary between the States of Maine and New Hampshire as most recently delineated on maps of the Kittery and Isles of Shoals quadrangles published by the U. S. Geological Survey in 1956 or on any prior editions of such maps showing substantially the same delineation.”

B. Maine Statutes and Other Data

A careful search through the Maine statutes down to date has disclosed no similar legislation relating to the lateral marine boundary between the two states.

Maine was originally a district of the Province of Massachusetts Bay, prior to the American Revolution. It continued as part of the Commonwealth of Massachusetts after Independence and until 1820.

The Act of Congress providing for the admission of Maine to the Union (Act of March 3, 1820; Vol. 5, U. S. Stat. at Large, p. 544) contains no reference to the boundaries of the new state. The act of the Massachusetts legislature (Act of June 13, 1819, contained in Laws of Maine with First Constitution, 1832 edition) consenting to the separation of Maine from Massachusetts and providing for a popular referendum on the issue, likewise contains no boundary description. Neither does Maine’s first constitution, published in the same volume.

In the notorious Wagner murder case arising from a homicide committed on one of the Isles of Shoals (reported in *State vs. Louis Wagner*, 61 Maine 178 at 190), the boundary question is alluded to, but no claims or rulings are set forth concerning the

lateral marine boundary between the two states. See also the message of Governor Enoch Lincoln of Maine to the legislature dated June 13, 1829, containing the first perambulation of the common boundary by commissioners representing the two states (immediately following chapter 29, Maine Session Laws, 1829), which likewise contains no reference to the lateral marine boundary between the two states.

C. Colonial Documents

While the colonial documentation of the boundary, derived from the British Order in Council of April 9, 1740 (referred to in par. II of the complaint), is silent as to the lateral marine boundary, there is one document in the New Hampshire public papers relating to this controversy which shows that the New Hampshire commissioners were thinking in terms of a straight line as the obvious lateral marine boundary between the two provinces. It was argued by the New Hampshire commissioners in their answer to the Massachusetts Bay claim with reference to the direction of the straight-line boundary extending north-westerly to Canada that consideration should be given to the opposite effect such direction might have on the straight-line boundary extending offshore to the Isles of Shoals, as follows (Vol. XIX, *N. H. State Papers*, pp. 293 ff):

“As to the Northern boundary of New Hamp^r or the Line that should be run between that part of the Province of the Mass^a Bay which was the late Province of Main & New Hampshire, We think that the Mass^a can Claim no further than the bounds Set forth in their Charter, & the Settling that point ends the Dispute, for we say what is not within their Province is within ours; Now the words of the Charter must be the guide here as well as on the other Side, & So far as the River Runs there can be no Dispute, & by the word Directing the Course afterwards viz North-Westward, can with propriety be meant nothing but a few Degrees West of the North, and is an Equivalent expression or the Same with, North Westerly, which is always understood to mean a few Degrees less than a Quarter of a point West of the North. And this Course it

ought to Run from the head of the River Now Called Salmon falls which is at a Pond—We are Confirm'd in this Opinion, because the half of the Isles of Shoals lays in the Province of the Mass^a viz the Easterly half between which & the other half ly's the Harbour or Road, which is near South from Piscataqua River, now if the Line from the head of the River should be Northwest this from the mouth of the River should be South-East, & then all the Isles of Shoals will fall in the Province of New Hamp^r Contrary to the Express words of the Charter —”

D. Common Law Interpretation

Then too, at common law, when two end-points in a boundary are known, there is a presumption that the connecting link is a straight line running from one terminus to the other. As stated in *Boundaries*, 12 Am Jur (2) pp. 595-596, s. 56 “Presumptions”:

“Consequently, in the absence of some controlling indication to the contrary, when a description of the boundaries of land calls for a line from one monument to another, the law presumes a straight line is intended;
* * * *

By way of analogy, see also *Doddridge v. Thompson*, 9 Wheaton (U. S.) 469; 6 L.Ed. 137. Also annotation 54 ALR 781, entitled “Distance as determined by a straight line or other method”.

II.

THE MAP RELIED UPON BY THE STATE OF MAINE IS INCONCLUSIVE EVIDENCE AT THIS STATE OF THE PROCEEDINGS.

A. Background Relating to U.S. G.S. Map

The map relied upon by the State of Maine in its brief in opposition to the motion of New Hampshire for leave to file

complaint herein, is the Kittery-Isles of Shoals quadrangle (1956 edition) as published by the U. S. Geological Survey, a bureau of the Department of Interior. The same or a slightly different lateral marine boundary appears in several prior editions of the map going back to 1916-1917.

Maine correctly states in its brief at page 7 that this federal bureau does not have "authority to establish legally binding boundaries between States".

Reference is also made to statements of the Director, U. S. Geological Survey, in his letter to Congressman James Cleveland of New Hampshire dated June 10, 1966, (which is already before the court as Appendix A to New Hampshire's rebuttal brief in support of its motion for a preliminary injunction), reading as follows:

"In reviewing topographic quadrangle maps of the area in question, we found no evidence to prove that the Maine-New Hampshire boundary from the mouth of Piscataqua River to the Isles of Shoals is a straight line. Neither have we found any proof that it is a curving line although it is shown on the now out-of-print special Portsmouth 1:62,500-scale topographic map prepared by the Geological Survey in 1916-17. It was hoped that the original field survey sheets for this map, stored in the National Archives, would provide some documentation as to why the curving boundary was shown. Unfortunately, none was found. Accordingly, we can only conclude that personal interpretations on the part of the field engineer, possibly supported by local opinion, was the reason for the line being shown in that manner.

"On the 1:24,000 scale topographic quadrangle maps of the area, prepared in 1944 by the U. S. Coast and Geodetic Survey for the Army Map Service, the boundary is shown in this same general location although it is more curving in some parts on the 1916-17 map. We believe these minor differences indicate that definite information regarding the boundary location was not available during either survey."

Two other facts confirm the uncertainty of the validity of the marine boundary as shown on this map. First, the authoritative publication of the U. S. Geological Survey entitled "Boundaries of the United States and the Several States" Bulletin No. 1212 (1966) by Franklin K. Van Zandt does not mention, directly or indirectly, the marine boundary shown on the map, although it otherwise describes all state boundaries in great detail. Second, in a publication of the U. S. Coast and Geodetic Survey, a bureau or the Department of Commerce, entitled "Delimitation of Ocean Space Boundaries between Adjacent Coastal States of the United States" by William L. Griffin, legal consultant (1968), the author points out that the problem of determining the proper location of the lateral marine boundaries between the coastal states of the United States is a common one, and, in his discussion of the lateral marine boundary between Maine and New Hampshire, he refers to it as being one of those which is "substantially undelimited", saying:

"Of the 18 lateral boundaries between the States only one is unambiguously and completely delimited, three others are substantially delimited but are incomplete in the sense that the States concerned are not claiming as much ocean space territory as Congress has authorized them to claim and fourteen are substantially undelimited. In some cases inexact language makes ambiguous the authors' intent. In most cases, however, there is an almost complete lack of delimiting language. Such omissions are, of course, understandable. Until recent years there was no felt need for delimiting State boundaries in ocean space.

"The thirteen substantially undelimited lateral State boundaries are as follows:

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"In 1731 commissioners from the two States, who had been appointed to fix the boundary, met but were unable to agree. New Hampshire appealed to the King who ordered the dispute to be settled by commissioners from the neighboring Provinces. Their Report, confirmed by the

King by Order in Council of August 5, 1740, provided that 'the dividing line shall pass up through the mouth of Piscataqua Harbor' and that seaward 'the dividing line shall part the Isle of *Sholes*, and run through the middle of the Harbor, between the Islands to the sea on the southerly side'."

The author makes no reference to the U. S. G. S. map relied on by Maine. Presumably he would have done so if the map furnished any legal basis for settling the lateral marine boundary, as his treatise is a scholarly and exhaustive one.

B. Legal Basis for State Boundaries in New England

The usual methods of resolving boundary disputes between the thirteen original states of the Union are:

(1) By reference to the Crown grant of each state, made before the Revolution, and interpretation of it. See for example *Vermont vs. New Hampshire*, 289 U. S. 593.

(2) By written agreement between the two states, ratified by the U. S. Congress under the "compact clause". (Here both states have been unsuccessful in attempts to achieve agreement under such procedure (see their separate acts creating boundary commissions, namely, chapter 429, N. H. Session Laws of 1971, approved June 30, 1971 and chapter 131, Maine Session Laws of 1971, approved June 25, 1971)).

(3) By long continued acquiescence by one state in the boundary claimed by another. See for example *Ohio vs. Kentucky*, _____ U. S. _____, 35 L.Ed. (2d) 560, decided March 5, 1973.

(4) By judgment of this Court in an original action. (See prior unsuccessful efforts to litigate this issue in the U. S. district courts of Maine and New Hampshire, referred to in paragraphs IX and X of New Hampshire's motion for preliminary injunction herein).

Thus it appears that, on the basis of the foregoing analysis, the U. S. Geological Survey map relied upon by Maine, in its brief in opposition, should not be given any substantial weight at this stage of the proceedings and before any evidence is heard.

The map standing by itself does not furnish any legal basis for resolving the boundary dispute.

C. New Hampshire Has Not Acquiesced in the Lateral Marine Boundary Shown on the Map

The allegations of paragraph VI of the complaint are sufficient to deny acquiescence. See also the New Hampshire joint legislative resolution (chapter 58, Session Laws of 1973) quoted in section I-A of this brief, *supra*.

Furthermore, the publication in 1916-1917 of the first edition of the U. S. G. S. map showing the marine boundary *now claimed* by Maine was not an act of the State of Maine. The date when Maine *first* began to claim such line to be the true lateral marine boundary does not appear in the record and cannot be known unless Maine answers the complaint. Acquiescence by New Hampshire in Maine's claim could not begin until Maine first asserted its claim.

D. The Thalweg Doctrine and Equality in Navigation

The so-called "thalweg doctrine" also relied on by Maine in its brief has no application to the determination of a boundary in the open ocean, outside the mouth of a navigable river such as the Piscataqua. As was said concerning the "thalweg doctrine" in *Texas vs. Louisiana*, _____ U. S. _____; 35 L.Ed. (2) 646 (decided March 20, 1973):

"The doctrine was borrowed from international law and has often been adhered to in this Court, although it is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg."

E. The Equidistant Principle

Maine's brief in opposition also refers to the median line or equidistant principle for mathematically drawing lateral marine boundaries. This principle was adopted in the International Convention on the Territorial Sea and the Contiguous

Zone, signed at Geneva in 1958. See section 1, Article 12 thereof. But it is subject to the limitation that it does not apply where "historic title or other special circumstances" indicate a contrary solution. It is unlikely that the U. S. Geological Survey mapmakers of 1916-1917 when the line claimed by Maine was first drawn or mapped, were acting on the basis of a principle of international law which did not become well accepted until the 1958 convention, or some 40 years later.

Furthermore, New Hampshire represents to this Court that it is prepared to prove, at the trial, that the lateral marine boundary shown on the U. S. G. S. map relied upon by Maine is *not* drawn according to the median line or equidistant principle and that a hypothetical lateral marine boundary drawn between the mouth of Portsmouth Harbor and the Isles of Shoals, in accordance with this principle of international law, would contain 5 or 6 sharp changes in course all within this six mile stretch of open sea, making it an entirely impractical and indeed impossible boundary from an administrative or law-enforcement viewpoint. The location of the Isles of Shoals and the heavy fishing in the area compound the problem in this respect.

In *Shore and Sea Boundaries* by A. L. Shalowitz (U. S. Dept. of Commerce, Coast and Geodetic Survey, 1962) at vol. I, p. 232 n.55, the author remarks that there may be occasions not to use such a mathematical line, saying:

"Exceptional configurations of a coast, the presence of islands, the existence of special mineral or fishing rights in one of the States, or the presence of a navigable channel are among the special circumstances which might justify a deviation from the median line."

III.

IN SUCH AN ORIGINAL ACTION AS THIS ONE, THE SUPREME COURT HAS JURISDICTION TO DETERMINE THE APPROPRIATE LATERAL MARINE BOUNDARY AND MAY ACCEPT THE CLAIMS OF EITHER STATE OR REJECT THOSE OF BOTH, IN SO DOING.

In *Vermont vs. New Hampshire*, 289 U. S. 593, Vermont claimed to the center line of the Connecticut River, and New Hampshire claimed to the top of the west bank of the same River. This Court did not accept either claim. Instead, having taken jurisdiction, it proceeded to determine the true boundary and fixed it at low water mark on the west side of the River.

Here New Hampshire has claimed in its proposed complaint that the true lateral marine boundary is a straight line connecting Portsmouth Harbor and Gosport Harbor in the Isles of Shoals, but the proposed complaint also prays "for such other and further relief as may be proper".

In this action, New Hampshire is entitled to a judgment determining the lateral marine boundary between itself and Maine, whether it be the straight line claimed by New Hampshire, the curved line claimed by Maine, or some other line determined by this Court. In a boundary action, a court of equity traditionally gives complete relief by rendering judgment fixing the true boundary, thus seeking to end the dispute and all further litigation. See *Mississippi v. Louisiana*, 350 U. S. 5; *Rhode Island v. Massachusetts*, 12 Peters (U. S.) 657.

Rule 9 of the rules of this Court states that the Federal Rules of Civil Procedure are to be followed in this action where appropriate. It is the policy of the Federal Rules of Civil Procedure to give complete relief in one action. See *Cyclopedia of Federal Procedure* (3d ed, 1967) s. 9.09 (vol. 3) and s. 14.235 (vol. 4). See also Rule 54(c) of the Federal Rules of Civil Procedure. Compare *Sullivan vs. Dumaine*, 106 N. H. 102, 205 Atl(2) 848 and *Barber vs. Somers*, 102 N. H. 38, 150 Atl(2) 408.

In *Alabama vs. Arizona*, 291 U. S. 286, cited by Maine, this Court refused to entertain the complaint because:

"If filed, the bill would have to be dismissed for want of equity."

That case did not involve a boundary dispute between states.

In the present case, New Hampshire has filed a proposed complaint which on its face entitles it to the judgment of this Court, either a decree sustaining the boundary claimed by it or a decree determining the appropriate boundary in the disputed marine area.

The controversy is one involving 2,400 acres of marine territory, closely fished by competing lobster fishermen of both states. This controversy is a serious dispute, which has threatened to erupt into an open conflict between law enforcement officers and fishermen of the two states. There have already been two arrests coupled with seizures of fishing equipment, and threats of more to come. There have been claims of sabotage of fishing equipment in the disputed area. Attempts at settlement by negotiations between commissioners of the two states have failed. There has been abortive litigation in the lower federal courts of the two states. See affidavits attached to New Hampshire's motion for preliminary injunction herein.

If this Court should refuse leave to file the complaint, there is grave danger, based on immediate past history, that, in such a frustrating situation, further border incidents, violence, retaliation or property damage of a serious nature will occur. The Supreme Court of the United States is the only tribunal to which either state may go for a peaceful and binding settlement of an exceedingly troublesome border dispute, which shows no signs of abating short of a final settlement by a tribunal which has the jurisdiction to impose it.

CONCLUSION

We respectfully submit that the complaint, when viewed in the light of the applicable case and statute law, states a cause of action clearly sufficient to entitle New Hampshire to a decree establishing the true lateral marine boundary between itself and the State of Maine and that its motion for leave to file its complaint ought to be granted.

Respectfully submitted

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