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No. 36 ORIGINAL

Supreme Court, U. S.
FILED

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MICHAEL ROBAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1969

THE STATE OF TEXAS,

Plaintiff,

v.

THE STATE OF LOUISIANA,

Defendant.

EXCEPTIONS OF THE STATE OF LOUISIANA
TO THE REPORT OF THE SPECIAL MASTER
AND MOTION OF THE STATE OF LOUISIANA
FOR ORAL ARGUMENT ON THE
EXCEPTIONS

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I.

EXCEPTIONS TO THE SPECIAL MASTER'S
REPORT

Comes now the State of Louisiana, (Louisiana) through its Attorney General, pursuant to the Order of this Court of May 22, 1972, and excepts to the Special Master's report in the following respects:

LOUISIANA'S EXCEPTION No. 1

Louisiana excepts to the finding by the Special Master in which he held the State of Texas (Texas) legally extended its boundary from the West bank of the Sabine River, Lake, and Pass (Sabine) to the geographical middle of the Sabine, from the Gulf of

Mexico to the 32° of North Latitude by Act of the Texas Legislature of November 24, 1849, (3 Gam-mel's Laws of Texas, 442) so as to acquire title to the bed and subsoil of that portion of the River which belonged to Louisiana. The purported extension was based on an Act of Congress of July 5, 1848. (9 Stat. 245, Ch. 94, 30th Congress, 1st Session)¹

This Exception is based on, among other grounds, the following:

(a) Louisiana's Western boundary was recognized as being on the West bank of the Sabine from the Gulf of Mexico to the 32° of North Latitude, and thence North to the 33° of North Latitude by the Treaty of Amity of 1819 between Spain and the United States² affirmed by the Treaty of Limits of 1828 between Mexico and the United States³ and again affirmed in the Treaty between the United States and the Republic of Texas;⁴ the said boundary was surveyed and staked in 1839-1841 by a Joint Commission appointed by the Republic of Texas and the United States,⁵ before Texas was admitted into the Union.

(b) The Treaties referred to under (a) hereof provided that "the use of the waters, and the navigation of the Sabine to the sea . . . throughout

¹ See: Page 17, Report of Special Master.

² The Treaty of Amity, Settlement, and Limits Between the United States and Spain, 1819 (8 Stat. 252).

³ The Treaty of Limits Between the United States and the United Mexican States, 1828 (8 Stat. 372).

⁴ Boundary Convention Between the United States and the Republic of Texas, 1838 (8 Stat. 511).

⁵ See: Louisiana Exhibit A, Item 13; Exhibit F, Items 2 and 3; *Fragoso v. Cisneros*, 154 S.W.2d 991 (Court of Civil Appeals of Texas, 1941).

the extent of said boundary, on their respective banks, shall be common to the respective inhabitants of both nations." This meant the inhabitants of the Province of Texas and Louisiana had common use of the water of the Sabine. The Special Master erroneously construed the Act of Congress of 1848 as transferring title to Texas to the bed and subsoil of the West half of the Sabine from the Gulf of Mexico to the 32° of North Latitude, which belonged to Louisiana, instead of granting jurisdiction to Texas to enforce criminal laws over the waters of the Sabine as urged by Louisiana.⁶ This construction makes the Act of Congress of 1848 unconstitutional as an attempt to transfer land belonging to Louisiana to Texas, without the consent of the Legislature of Louisiana.⁷

(c) The Special Master erroneously found "thus it would appear that the United States was holding the western half of the Sabine as a territory of its own, to be given to Texas should it become a part of the United States."⁸ The Treaty of Amity of 1819 settled not only the boundary between the Province of Texas and Louisiana, but established the boundary between other territory of the United States and Spain, including that portion of the boundary separating the Province of Texas along the Red River from the territory of the United States. When Texas was admitted into the Union as a State, its boundary was fixed on

⁶ *State of Washington v. State of Oregon*, 29 S.Ct. 631, 214 U.S. 205, 53 L.Ed. 969 (1909).

⁷ United States Constitution, Article IV, Sec. 3; *Louisiana v. Mississippi*, 202 U.S. 1, 26 S.Ct. 408, 50 L.Ed. 913 (1906).

⁸ Page 22, Report of Special Master.

the *south* bank of the Red River and the west bank of Sabine. Texas did not acquire title to the geographic middle of the Red River, although it made that claim in several cases before this Court, involving its boundary with Oklahoma.⁹ Texas' boundary was established and recognized on the South bank of the Red River as its boundary was established and recognized on the West bank of the Sabine, thus the United States was not holding the half of either river for Texas.

(d) The Special Master failed to give proper weight to the fact that when Louisiana was admitted into the Union as a State in 1812, there was in existence an agreement made in 1806 between the United States, represented by General Wilkinson, and Spain, represented by Lieutenant Colonel Herrera, creating a neutral zone from the Sabine on the West to the Mermentau River on the East, in which it was agreed that neither party would exercise any jurisdiction and authority in the neutral zone until the boundary was settled between Spain and the United States.¹⁰ Even though the Constitution of the State of Louisiana, adopted in 1812, provided: "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty second degree

⁹ *Oklahoma v. Texas*, 253 U.S. 465, 40 S.Ct. 580 (1919); *Oklahoma v. Texas*, 256 U.S. 602, 41 S.Ct. 539 (1920); *Oklahoma v. Texas*, 258 U.S. 574, 42 S.Ct. 406 (1921); *Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221 (1922); *Oklahoma v. Texas*, 261 U.S. 340, 43 S.Ct. 376 (1922); *Oklahoma v. Texas*, 272 U.S. 21, 47 S.Ct. 9 (1926).

¹⁰ See: Louisiana Exhibit C, Item 2; also see, Appendix to Brief of the State of Louisiana in Support of the Exceptions to the Report of Special Master and in Support of the Motion for Oral Argument.

of latitude-thence due north to the Northernmost part of the thirty third degree of north latitude. . . .", Louisiana, nevertheless, had no jurisdiction or authority over the area included in the neutral zone. Louisiana did not know where its western boundary was located, whether on the Mermen-tau River, or the Sabine or at some point in between. The issue of the neutral zone was not settled until the Treaty of Amity in 1819, when the boundary was established on the West bank of the Sabine, which boundary was the western boundary of Louisiana.¹¹

(e) The Special Master failed to give proper weight to the fact that President John Quincy Adams, who negotiated the Treaty for the United States in 1819, and Secretary of State, Henry Clay, who was in Congress when Louisiana was admitted into the Union, stated in official correspondence to the Congress of the United States that the settlement of the western boundary of the United States from the Gulf of Mexico to the 33° of North Latitude established the western boundary of the State of Louisiana. This was true of statements of Presidents Van Buren and Tyler to the United States Congress about 1840.¹²

(f) The Special Master failed to give proper consideration to the fact that Texas recognized by stipulation its eastern boundary from the 32° of North Latitude to 33° of North Latitude was settled by the Treaty of Amity of 1819. After such boundary was surveyed and staked in 1839-1841, the Western boundary lines of certain

¹¹ See: *Fragoso v. Cisneros*, supra.

¹² See: Louisiana Exhibit A, Items 8, 9, 12, 14 and 15.

Louisiana Parishes were made to conform to the treaty boundary, and the Surveyor General of the United States adjusted townships along the treaty boundary in Louisiana to coincide with the boundary as surveyed.¹³ Texas makes no claim east of the treaty boundary North of the 32° of North Latitude.¹⁴

LOUISIANA'S EXCEPTION No. 2

Louisiana excepts to the finding of the Special Master that Louisiana lost the bed and subsoil of the West half of the Sabine from the Gulf of Mexico to the 32° of North Latitude by acquiescence and prescription.

This Exception is based on, among other grounds, the following:

(a) There was no boundary line run out, located and marked in the geographic middle of the Sabine from the Gulf of Mexico to the 32° of North Latitude, which has been recognized and acquiesced in by Louisiana.¹⁵ The only boundary line actually surveyed and staked was that in 1839-1841, which has been possessed by Louisiana on the landed portion from the 32° of North Latitude to the 33° of North Latitude and on the water portion from the Gulf of Mexico to the 32° of North Latitude to the extent permitted under the Treaty of 1819.

¹³ See: Louisiana Exhibit A, Items 20, 21 and 22, and Exhibit G.

¹⁴ See: Pre-Trial Order and Stipulation dated September, 1970, particularly stipulation 3(b).

¹⁵ *State of Virginia v. State of Tennessee*, 13 S.Ct. 728, 148 U.S. 503, 37 L.Ed. 537 (1893).

(b) Both Texas and Louisiana, under the various Treaties, commencing with the Treaty of 1819, had the “use”¹⁶ and “navigation” of the waters of the Sabine. These rights were co-equal and extended through the width and breadth of the Sabine. Neither State could deprive the inhabitants of the other State from the exercise of these rights, which included, among other rights, the right to fish, hunt, and have access to the waters of the Sabine. Neither State could construct facilities in the Sabine that would affect the use of the water and the navigation thereon, if objected to by the other. The Special Master failed to give proper consideration to this unusual Treaty provision in considering acts of possession, which provision distinguishes the facts of this case from the cases relied on by the Special Master in maintaining Texas’ plea of acquiescence and prescription.

(c) The Special Master held “the taxing of disputed *land* is to be given considerable weight in determining whether a State has acquiesced in the other State’s ownership of the land . . .”¹⁷ (Emphasis ours) Neither Texas or Louisiana

¹⁶ “Use” is defined by Webster Dictionary as “the act of using or the state of being used; usage; the power or ability to use: as, he has regained the *use* of his hand; the right or permission to use: as, he granted them the *use* of his name; the need, opportunity, or occasion to use: as, we will have no further use for his services; way of using; the quality that makes a thing useful or suitable for a given purpose; advantage; usefulness; worth; utility.”

Black’s Law Dictionary, page 1710 states “The ‘use’ of a thing means that one is to enjoy, hold, occupy or have some manner of benefit thereof.”

See also Vol. 43A Words and Phrases, commencing at page 248.

¹⁷ Page 28, Report of Special Master.

taxed the bed and subsoil of the West half of the Sabine. The Special Master erred by applying the above holding, pertaining to the taxing of *land*, to the taxing of structures by Texas in the West half of the Sabine. Texas had the right to authorize the construction of structures, subject to the approval of the United States Corps of Engineers in the Sabine under its right of "use" so long as Louisiana did not object.

(d) The Special Master was in error in holding that Resolution No. 212 of the Legislature of Louisiana, approved March 16, 1848, constituted an act of acquiescence by Louisiana to a mid-Sabine boundary, when, in fact, the resolution affirmatively stated Louisiana's boundary was on the West bank of the Sabine.¹⁸ The purpose of the resolution was to extend the *jurisdiction* of Louisiana to the West bank so "that crimes and offences committed thereupon should be punished, and wrongs and damages inflicted should be redressed in a speedy and convenient manner." The approval of the Congress of the United States was asked because the inhabitants of both States had the "use" of the water.

(e) The Special Master was in error in holding the statements of U. S. Senators Johnson and Downs, in which they expressed their acquiescence to the bill before Congress to extend the boundary of Texas to the middle of the Sabine to "enable the latter to extend her criminal jurisdiction to the Louisiana boundary," was acquiescence by Louisiana to a mid-Sabine boundary by Texas,¹⁹

¹⁸ See: Page 29, Report of Special Master; Louisiana Exhibit A, Item 19 (pp. 288-288A).

¹⁹ See: Page 28-29, Report of Special Master.

first because the United States Senators were only talking about criminal jurisdiction, and second, the United States Senators had no right to give away Louisiana territory. The Legislature of Louisiana was the only body that could transfer Louisiana territory,²⁰ and the Louisiana Legislature had just spoken, by Resolution No. 212, that Louisiana's boundary was on the West bank of the Sabine.

(f) The Special Master was in error in giving weight to documents and assertions of ownership by Texas to the West Half of bed and subsoil of the Sabine after 1941, when the Governor of Louisiana gave official notice to the Governor of Texas of Louisiana's West bank boundary claim along the Sabine.²¹

(g) The Special Master failed to recognize the undisputed understanding between representatives of Texas and Louisiana that the boundary question between the two States would not be advanced during the Tidelands litigation with the United States, which commenced in 1947, and ended for Texas on May 5, 1969.²² This suit was filed by Texas on the 10th day of December, 1969 and this Court granted Texas' motion on February 27, 1970.²³

LOUISIANA'S EXCEPTION No. 3

Louisiana excepts to the finding of the Special Master that the "Thalweg Doctrine" does not apply

²⁰ U. S. Constitution, Article IV, Sec. 3.

²¹ See: Louisiana Exhibit B, Item 1.

²² 394 U.S. 836, 89 S.Ct. 1614 (1969).

²³ 397 U.S. 931.

in this case, if Louisiana's West bank claim is rejected.

This Exception is based on, among other grounds, the following:

(a) In the absence of a treaty boundary, where a navigable river forms the boundary between two States, the boundary follows the "Thalweg." The only treaty boundary here is on the West bank of the Sabine and it is admitted that the Sabine is navigable.

(b) There has been no surveyed and agreed to mid-Sabine boundary. The Special Master recognizes this fact by asking for authority to appoint a surveyor to locate such a boundary.²⁴ The cases of *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940); *Arkansas v. Tennessee*, 246 U.S. 158, 170 (1918); *Iowa v. Illinois*, 147 U.S. 1, 10 (1893), relied on by the Special Master do not sustain his holding that a mid-Sabine boundary was established by acquiescence and prescription.²⁵

(c) Louisiana's boundary extended to the channel between the westernmost island in the West half of the Sabine and the West bank of the Sabine. In failing to recognize this principle, the Special Master failed to follow the holding of this Court in *State of Georgia v. State of South Carolina*, 42 S.Ct. 173, 57 U.S. 516, 66 L. Ed. 347 (1922).

(d) The recommendation by the Special Master

²⁴ See: Page 34, Report of Special Master.

²⁵ See: Pages 32-33, Report of Special Master.

that the boundary be established in the geographical middle of the Sabine does not state at what point in time the geographic middle is to be determined, that is, in 1812, 1849, or some later date. The record established that, even on the maps introduced in evidence which purport to have a center line, there are variations on the center line from time to time, depending on what channel is used and as to what bank is used at a particular time.²⁶ If a mid-Sabine boundary is recognized by this Court it must be as it was in 1812 when Louisiana was admitted as a State.

LOUISIANA'S EXCEPTION No. 4

Louisiana excepts to the findings by the Special Master that the islands formed in the West half of the Sabine after 1812 belonged to Texas, and that Louisiana could lose title to the islands in the West half of the Sabine that existed in 1812 by acquiescence, prescription, or erosion.²⁷

This Exception is based on, among other grounds, the following:

(a) The Master was correct in determining that all islands in the Sabine in 1812 whether in the East half or the West half belonged to Louisiana. This means, according to the opinion of the Assistant Secretary of the Interior to the Commissioner General of the Land Office in 1910, that the boundary of Louisiana extended to the channel

²⁶ See: Transcript pp. 518-522 (Testimony of Hatley N. Harrison, Jr., Chief, Lands & Surveys Division, Department of Public Works, State of Louisiana).

²⁷ See: Pages 36-37, Report of Special Master.

west of the islands.²⁸ The boundary of Louisiana did not change, even if an island eroded.

(b) Louisiana is entitled to all islands in the Sabine. There was nothing in the Act of Admission of Louisiana limiting the islands to those existing in 1812. No islands in the Sabine were conveyed to Texas in 1848.

(c) The Special Master held that oyster reefs or shell banks were not islands.²⁹ The definition of an "island" found in the Convention on the Law of the Sea adopted by the United Nations Conference at Geneva in 1958 and ratified by the U. S. Senate, provides:

"Art. 10"

"10. An island is a naturally formed area of land, surrounded by water, which is above water at high tide."

which provision should govern in this case. Therefore, the Special Master was in error in stating, categorically, that oyster reefs and shell banks are not islands, without considering whether they met the definition of islands provided above.

II.

Comes now the State of Louisiana, through its Attorney General, and moves this Court, in view of the importance of this litigation as to the State of Louisiana in settling its Western boundary with Texas, that this case be set down for oral argument after the briefs have been filed.

²⁸ See: Louisiana Exhibit N, p. 4; Texas Exhibit B, Items 1 and 6.

²⁹ See: Page 37, Report of Special Master.

In further response to said Order, Louisiana files its brief concurrent with the foregoing Exceptions and Motion, and in support thereof.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General.

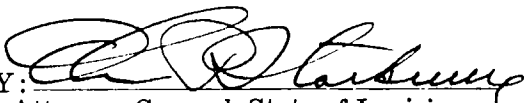
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PROOF OF SERVICE

The undersigned, Attorney General of the State of Louisiana, Defendant herein, hereby certifies that on the 1st day of July, 1972 I served copies of the foregoing Exceptions of the State of Louisiana to the Special Master's Report in this original action by depositing same in a United States Post Office, with sufficient first class postage prepaid, addressed to:


HONORABLE ROBERT VAN PELT,
Senior U. S. District Judge,
Special Master,
Lincoln, Nebraska.

HONORABLE CRAWFORD C. MARTIN,
Attorney General of Texas,
Austin, Texas.

HONORABLE HOUGHTON BROWNLEE,
JR.,
Assistant Attorney General of Texas,
Austin, Texas.


such being their mailing addresses.

BATON ROUGE, LOUISIANA, July 1st,
1972.


FOR: WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana

CERTIFICATE

I, WILLIAM J. GUSTE, JR., Attorney General of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of July, 1972, I served copies of the foregoing exceptions by transmitting conformed copies of the same, by first class mail, postage prepaid to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Texas, and upon the Solicitor General of the United States, in compliance with Rule 33.2(b) of the Rules of the Supreme Court of the United States, since the Report of Special Master has raised the question of constitutionality of an Act of Congress of July 5, 1848 (9 U.S. Stat. 245).


For: WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana.

