IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 36, ORIGINAL

THE STATE OF TEXAS,

Plaintiff

vs.

THE STATE OF LOUISIANA,

Defendant

BRIEF OF THE STATE OF TEXAS IN SUPPORT OF THE SPECIAL MASTER'S REPORT AND IN REPLY TO EXCEPTIONS FILED BY THE STATE OF LOUISIANA

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STATEMENT

This suit was instituted by the State of Texas for the purpose of establishing its rights as against the State of Louisiana to the jurisdiction over and ownership of the western half of the Sabine River[1] from the mouth of the River on the Gulf of Mexico to the 32nd degree of north latitude, and for a decree confirming the boundary of the two States in the middle of said stream.

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[1]The use of the term "Sabine River" or "Sabine" includes Sabine Pass and Sabine Lake. By their pleadings, the parties are in agreement that these streams form a continuous body of navigable water, and that for convenience they are referred to collectively as "Sabine River," unless otherwise noted.

The Honorable Robert Van Pelt, appointed by the Court as Special Master, after hearing the evidence and arguments of the parties, has filed his Report holding with Texas on the basic issues, to-wit:

1. That the western half of the Sabine was never a part of the State of Louisiana but was a part of the territory of the United States when on July 5, 1848, Congress gave consent for the State of Texas to extend its eastern boundary so as to include such area. (Special Master's Report, 12-26).

2. That in addition to its title thus acquired from the United States, as a matter of law, Texas has established its eastern boundary in the geographic middle of the Sabine under the doctrine of prescription and acquiescence. (Special Master's Report, 27-30).

3. That the Sabine boundary between the two States, as a matter of law and by prescription and acquiescence, is the geographic middle of the stream rather than the thalweg center of a main navigable channel. (Special Master's Report, 31-34).

Louisiana has filed exceptions to the above findings of the Special Master together with a brief in support of its exceptions. Texas supports the above basic findings and all recommendations of the Special Master, with only one reservation and exception heretofore filed as to a portion of an incidental and independent conclusion relating to the ownership of three very small "islands" at the mouth of the main thread of the Sabine River (as distinguished from Sabine Lake and Pass) and one alleged four-acre "island" at the mouth of the Neches River. As to these alleged small "islands" west of the geographic middle of the Sabine, the Special Master concludes that they may be owned by Louisiana if it is hereafter shown that they existed as true

islands in 1812 and if Texas has not acquired title to them by prescription and acquiescence. Since the Report recommends that the Special Master be authorized to hear further evidence as to the ownership of these alleged islands, Texas suggests that the entire question of island ownership in the western half of the Sabine be reserved and again referred to the Special Master after the Court has determined whether it approves his findings and recommendations on the above basic and controlling issues as to the boundary line between the two States.

Texas has heretofore filed with the Court and the Special Master a brief entitled "Brief for the State of Texas in Support of Motion for Judgment", dated July 10, 1970, which consists of 54 pages plus a separately numbered 45 page Appendix. It will be hereinafter referred to as "Texas Brief" or "Tex. Br.", with frequent citations to more detailed arguments and documents which have been reproduced in its Appendix (Tex. Br. App.), so as not to repeat or reprint all of such arguments and documents in this Brief. All citations to pages in the Texas Brief and Appendix will refer to the reprinted copies filed in compliance with type sizes required by the Rules of the Supreme Court. The original printing in smaller type should be discarded.

The purpose of this Brief is to summarize and consolidate all arguments heretofore made in support of the Special Master's Report. Actually, the Report is so well annotated, both as to the law and the evidence, that very little is required to be said in its support. Therefore, a principal function of this Brief will be to reply to Louisiana's exceptions and its Brief in support of such exceptions.

ARGUMENT

I

THE SPECIAL MASTER CORRECTLY HELD AS A MATTER OF LAW THAT THE WESTERN HALF OF THE SABINE WAS NEVER A PART OF THE STATE OF LOUISIANA BUT WAS A PART OF THE TERRITORY OF THE UNITED STATES WHEN ON JULY 5, 1848, CONGRESS GAVE CONSENT FOR THE STATE OF TEXAS TO EXTEND ITS EASTERN BOUNDARY SO AS TO INCLUDE SUCH AREA. (In reply to Louisiana's Exception No. 1 and Point "A" of Louisiana's Brief.)

A. The area in controversy was part of the territory acquired by the United States from France under the Louisiana Purchase Treaty in 1803.

It is undisputed in this case that the area in controversey was acquired by the United States from France as part of the Louisiana Purchase in 1803. 8 Stat., 200. (Copied in Tex. Br., App., p. 1).

By this Purchase, the United States obtained from France a vast area of land between the Mississippi River and the Rocky Mountains, from which all or part of fifteen States have been carved.[2] The United States claimed that the western boundary of the Purchase was the Rio Grande and that it thus included the area which comprises the present State of Texas.[3] This

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[2] JAMES K. HOSMER, HISTORY OF THE LOUISIANA PURCHASE (1902) 202.

[3] THOMAS JEFFERSON, THE LIMITS AND BOUNDS OF LOUISIANA (1804) 27-28, 31-32, published in DOCUMENTS RELATING TO THE PURCHASE AND EXPLORATION OF LOUISIANA (Houghton Mifflin Co., 1904); ADAMS, HISTORY OF THE UNITED STATES, II, 5-7, 298; CHANNING, HISTORY OF THE UNITED STATES, IV, 331-333; THOMAS M. MARSHALL, A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA PURCHASE. 1819-1841 (1914) 1-46.

is significant in the present controversy only to the extent that it explains why the United States limited the State of Louisiana to a western boundary in the middle of the Sabine River in 1812. The Nation was then and for seven years thereafter claiming the Province of Texas, and as hereinafter shown, it was the policy of the United States to fix mid-stream boundaries in navigable waters between States and territories. It was not until 1819 that the United States ceded to Spain the area west of the west bank of the Sabine, retaining as part of its territory the western half of the stream.[4]

B. The area in controversy was never included within the boundaries of the State of Louisiana.

The area in controversy was included within the Territory of Orleans by Act of Congress in 1804 (2 Stat. 283) but was not included by Congress and the people of Louisiana within the boundaries of the State of Louisiana. The Territory of Orleans was created by Congress from that portion of the Louisiana Purchase lying west of the Mississippi River and south of the 33rd degree of north latitude. In this case, Louisiana admits that the west boundary of this Territory, from which the State of Louisiana was formed, "had not been established."[5] From 1804 until 1819, the United States claimed that the Territory of Orleans embraced all of the lands between the Mississippi River and the Rio Grande, including all of the Province of Texas.[6] Map 4 from Thomas M. Marshall's exhaustive work on the Louisiana Purchase is reproduced on page 16 of Texas' Brief in Support of Motion for Judgment. It shows Jefferson's final conception of the size of the

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[4] 3 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES (1934) 3.

[5] Defendant's Answer, p. 5.

[6] See footnote 3, *supra;* MARSHALL, *Op. Cit. supra,* 13-16, 21-22, 55-60.

purchase. All lands depicted south of the 33rd degree of north latitude were included in the Territory of Orleans.

(1) The Enabling Act of Congress, February 20, 1811, specifically limited the proposed State of Louisiana to a western boundary "along the middle of said [Sabine] river, including all islands to the thirty-second degree of latitude." (2 Stat. 641)

Congress authorized the inhabitants of a certain portion of the Louisiana Purchase to form a government and seek admission as the State of Louisiana. The relevant portion of the Enabling Act specifically defined the area as to which such authority was granted, with the west boundary being fixed in the middle of the Sabine River, as follows:

> "That the inhabitants of all *that part* of the territory or country ceded under the name of Louisiana . . . *contained within the following limits,* that is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn *along the middle of the said river, including all islands to the thirty-second degree of latitude;* thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi . . . be, and they are hereby authorized to form for themselves a constitution and state government . . ."[7]

Louisiana does not deny the passage or the terms of this Enabling Act.

(2) The Constitution of the State of Louisiana adopted on January 22, 1812, fixed its western boundary in the middle of the Sabine River, using substantially the same language as the Enabling Act.

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[7]Emphasis supplied unless otherwise noted. The Act is printed in full in Tex. Br. App., p. 3.

Pursuant to the authority granted by Congress, the inhabitants of this specifically defined area (which was carved out of the Territory) formed their government and adopted the State Constitution of Louisiana.[8] The Preamble of this Constitution fixed the western boundary of the State in the middle of the Sabine River, using substantially the same language as in the Enabling Act, as follows:

> "We, the Representatives of the People of all *that part* of the Territory or country ceded under the name of Louisiana, by the treaty made at Paris, on the 30th day of April, 1803, between the United States and France, *contained in the following limits,* to wit: *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 of latitude—thence due north to the Northernmost part of the thirty third degree of north latitude*[9]—thence along the said parallel of latitude to the river Mississippi—thence down the said river to the river Iberville, and from thence along the middle of the said river and lakes Maurepas and Pontchartrain to the Gulf of Mexico—thence bounded by the said Gulf of Mexico to the place of beginning, including all Islands within three leagues of the coast—in Convention Assembled . . . do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent State, by the name of the State of Louisiana."

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[8] 3 WEST, LOUISIANA STATUTES ANNOT., CONST. 511; Copied in Tex. Br. App., p. 4, and in Tex. Ex. C, p. 1.

[9] This is the same descriptive language as in the Enabling Act except for adding the word "its" before the word "islands" and a comma after such word. If the difference is of any relevance, obviously the Acts of Congress would control because it had exclusive power to admit a new State and "to dispose of . . . the Territory or other Property belonging to the United States . . ." Article IV, Sec. 3, CONSTITUTION OF THE UNITED STATES. *Alabama vs. Texas,* 347 U.S. 272 (1953).

A controlling point in this case is that the above constitutional boundary provision has never been amended by Louisiana, except for the addition on the east of a small portion of "West Florida." *Louisiana* v. *Mississippi,* 202 U.S. 1 (1906). As far as its western boundary in the middle of Sabine River is concerned, this constitutional provision is the existing law of the State of Louisiana.

Louisiana attempts to ignore this Congressional and Constitutional boundary limit in its Exceptions Brief (pp. 11-19) arguing that its western boundary was uncertain and to be later fixed by treaty with Spain. It copies a long debate in the House by Mr. Poindexter in which he makes this argument when the Enabling Act of 1811 was under consideration. What Louisiana overlooks is that, Section 2 of the bill then under debate and as passed by the House on January 15, 1811, provided for no fixed boundary on the west, merely describing the area of the proposed State to be that "now contained within the limits of the Territory of Orleans, except that part lying east of the river Iberville and a line to be drawn along the middle of the lakes Maurepas and Pontchartrain to the ocean" (La. Ex. A, 62). However, the Senate did not go along with any such uncertain western boundary for the State of Louisiana. It amended the bill to provide the definite and fixed western boundary provision which was finally enacted and that is now before the court in this case. (See copy of proceedings, Texas' Exhibit G, pp. 51-58).

In *Louisiana* v. *Mississippi, supra,* Louisiana cited the Constitution of 1812 boundary provision as the existing boundary of the State, together with the addition of the small area on the east consented to by Act of Congress on April 14, 1812, 2 Stat. 702. The Court quoted the 1812 constitutional boundary provision and

based its decision, in part, on that provision as containing the existing boundary limits of the State of Louisiana. See also *United States v. Louisiana, et al,* 363 U.S. 1, 66, 75-76 (1960).

(3) The Act of Congress, April 8, 1812, admitting Louisiana as a State, repeats the same Sabine boundary (middle of the River) as in the Enabling Act of 1811 and in the Louisiana Constitution of 1812.

The relevant portion of the Act of Admission repeats the same middle of the Sabine River boundary as contained in the Enabling Act and in the Louisiana Constitution of 1812. (2 Stat. 701; Tex. Br. App., p. 5).

This Act not only reiterates that only *"that part of the territory . . .* contained *within the following limits"* was admitted, but adds a section which further confirms that a portion of the Territory of Orleans was omitted from the new State. Section 3 states "that the new State, *together with the residue of that portion of the country which was comprehended within the territory of Orleans . . .* shall be one district . . ." for the jurisdiction of a federal court created by the Act.

(4) The mid-stream boundary of the State of Louisiana as fixed by Congress and the Constitution of Louisiana in 1812 was in accordance with the policy and law of the United States relating to navigable river boundaries between states and territories.

Louisiana's argument indicates that the State might question the reasonableness or intent of Congress in fixing its western boundary in the middle of the Sabine. While reasonableness and intent have little or no bearing in determining what Congress actually did in definite and unambiguous terms, it should be pointed out that the Congress was simply following established policy and law with reference to navigable water boun-

daries between states and territories. The middle of the stream is always followed, either by statute or by operation of law, except where prior treaties or agreements have fixed a different line. The Special Master has correctly held that establishment of "the Louisiana boundary in the middle of the Sabine River was clearly in accordance with the policy and law of the United States relating to river boundaries between States and territories, so that any present or future States would be treated equally with respect to common boundary streams." This policy has been recognized by the Supreme Court:

> "[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926). See also *Shively v. Bowlby,* 152 U.S. 1, 49, 57-58 (1894).

The rule was also recognized and followed in *Louisiana v. Mississippi, supra,* p. 48, when speaking of the Mississippi River boundary established by Congress and the Louisiana Constitution of 1812. Although the Louisiana boundary limits on the east call only for the Mississippi River, and except for the mid-stream policy and law could have been interpreted to stop at the west bank of the River, the Court said, "Now to repeat, the boundary of Louisiana separating her from the State of Mississippi to the east is the thread of the

channel of the Mississippi River . . ." See also *Handly's Lessee v. Anthony,* 5 Wheat. 374, 379 (1820), in which Chief Justice Marshall wrote, "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream."

There is no reason why the rule or the Act of Congress fixing Louisiana's western boundary in the middle of the Sabine should appear unusual to Louisiana, since all of its other water boundaries (Mississippi, Iberville, Amite, and Pearl Rivers, and Lakes Maurepas and Pontchartrain) go to the middle of the streams either by specific calls or by operation of the above stated rule of law. *Louisiana v. Mississippi, supra;* DOUGLAS, *Boundaries, Areas, etc. of the United States and the Several States,* GEOLOGICAL SURVEY BULLETIN 817 pp. 166-169 (1930).

When Louisiana was admitted as a State in 1812, the United States was claiming a vast area to the west, including all of Texas, and under the navigable river boundary policy and law then in effect it would have been more unusual if Congress had not limited Louisiana's western boundary to the middle of the Sabine. In any event, the geographical mid-stream boundary was what Congress specified, and it remains until this day the boundary as agreed to by the people of Louisiana in their Constitution of 1812.

Louisiana makes much of the fact that the United States followed a different policy on the Red River between Oklahoma and Texas. (La. Exceptions Brief, p. 37-38). The main distinction here is that the Red was held to be a non-navigable stream under which the United States retains title. Although it granted much of the north half of the river to Oklahoma tribes, the

United States still retains title to the south half of that stream. *Oklahoma v. Texas,* 258 U.S. 574 (1922).

(5) Relinquishment by the United States of that portion of Texas lying west of the Sabine and retention of its title and jurisdiction over the western half of the Sabine River in the Treaty with Spain in 1819, did not result in an extension of the western boundary of Louisiana.

Louisiana bases its whole argument for a west bank boundary on a novel theory that the United States was "appearing on the part of the State of Louisiana," in negotiating the Treaty with Spain in 1819, or that by reason of such Treaty the western boundary of Louisiana was automatically eased over from the middle of the Sabine to the western bank of the stream.

The United States Was Acting for Itself in 1819 and Not for the State of Louisiana

Ignoring for the moment the constitutional requirement of specific Congressional approval before a state boundary can be changed, it should be pointed out that the territorial boundaries agreed to in the Treaty of 1819 do not touch a single boundary of the State of Louisiana as established by Congress and the Constitution of Louisiana. The Treaty does not mention the State of Louisiana and neither do the extensive negotiations and subsequent commentaries which have been examined by Plaintiff.[10] The same is true of the Treaty of 1828 with Mexico[11] and the Treaty of 1838 with the

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[10]3 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES, 3-64; MARSHALL, A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA PURCHASE, *1818-1841* (1914) 17-244; *State Papers, Foreign Relations IV,* 422-692; COX, *The Louisiana-Texas Frontier,* SOUTHWESTERN HISTORICAL QUARTERLY (1913), Vol. *XVII,* 1-42, 140-187.

[11]3 MILLER, *supra,* 405-420; MARSHALL, *supra,* 71-123.

Republic of Texas,[12] adhering to the same boundary as in the Treaty of 1819. The relevant portions of all these treaties are printed in Tex. Br. App., 7-20.

As stated in the opening sentence of the Treaty of 1819, it was concerned with defining as between the United States and Spain "the limits of their respective bordering *territories* in North America." For the United States, this meant the boundaries of the residue of the territory purchased from France, which the United States claimed to include all of Texas, all or portions of what later became the States of Arkansas, Missouri, Iowa, Minnesota, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Colorado, New Mexico, Idaho, Oregon, and Washington, and part of West Florida.

The sixteen years of negotiations with Spain on this Treaty began in 1803,[13] nine years before the State of Louisiana was created, and continued for seven years after Louisiana was admitted as a State. During all of these sixteen years the United States insisted that it was entitled to all of the Province of Texas, receding at times during the latter years from the Rio Grande to the Colorado River, the Trinity River, and finally to the west bank of the Sabine.[14] By the final terms agreed upon in 1819, the United States relinquished all of Texas west of the west bank of the Sabine in exchange for Florida and the Spanish claim to the Oregon Territory.[15] There was strong public and official reaction led by Henry Clay, against the relinquishment of Texas, and final ratifications were not exchanged until February 19, 1821.[16]

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[12]3 MILLER, *supra,* 133-143; MARSHALL, *supra,* 206-241.
[13]MARSHALL, *supra,* 70.
[14]*Id.,* 17-70.
[15]*Id.,* 46-70.
[16]*Id.,* 66-74. Thomas Jefferson wrote to Henry Dearborn on July 5, 1819: "I cannot say I am anxious about the Spanish

If this Treaty had put an end to the plans of national leaders who wanted Texas as a territory and possibly as a future State, there might have been some reason for Congress to have permitted Louisiana to extend its boundary so as to include the western half of the Sabine. However, this was not the case. Henry Clay and John Quincy Adams immediately renewed efforts to regain Texas by diplomacy or purchase.[17]

In 1821, Mexico declared its independence from Spain, and during the next fourteen years of negotiations with the new Mexican Republic as to the same boundary, the main thrust of the negotiators appointed by both President Adams and President Jackson was to effect a purchase of Texas from Mexico and fix the western boundary at the Rio Grande or as far west as possible. Mexico declined in 1828 and, as the price for a Treaty of Commerce, forced the signing of the Treaty of 1828. In it the United States agreed to the boundaries contained in the Treaty with Spain in 1819, but ratifications were delayed until April 5, 1832. (See footnote 17).

Appointment of commissioners to run the boundary was delayed, and it was never surveyed as agreed to in the Treaty. During this delay, President Jackson kept Anthony Butler in Mexico for six years still attempting to negotiate a purchase of Texas, with the offer finally reaching $5 million.[18] Also, Jackson interposed a claim that the Neches River (which lies west of the

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treaty; in giving up the province of Texas, we gave up a sugar country sufficient for the supply of the United States. I would rather keep that and trust to the inevitable falling of Florida into our mouths." XIX THE WRITINGS OF THOMAS JEFFERSON, 270, 271. (Monticello ed. 1904)

[17]MARSHALL, *supra*, 86-123; MANNING, TEXAS AND THE BOUNDARY ISSUE, 1822-1829 (1913), XVII SOUTHWESTERN HISTORICAL QUARTERLY, 217, 240-260.

[18]MARSHALL, *supra*, 86-99.

Sabine but also runs into Sabine Lake) was the stream called the "Sabine" in the Treaty of 1819 and vowed that in any survey he would contend for that river as the boundary and would defend it by force if necessary.[19]

Although not conclusive, there is evidence that Jackson and his friend, General Sam Houston, who came to Texas in 1832, had agreed upon a plan to wrest Texas from Mexico by revolution.[20] In any event, that is what occurred in 1836. At the first election in the new Republic, Sam Houston was named President and the people voted overwhelmingly to seek annexation to the United States.[21] The Republic was recognized as an independent nation on March 1, 1837,[22] and the Sabine portion of the boundary agreed upon with Spain in 1819 and with Mexico in 1828 was first run on ground in accordance with the Treaty of 1838 between the United States and the Republic of Texas. (8 Stat. 511; Tex. Br. App., p 18). Annexation followed in 1845, or reannextation as many members of Congress called it.[23] Texas was admitted as a State on December 29, 1845. 9 Stat. 108. Within less than three years thereafter,

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[19]STENBERG, *Jackson's Neches Claim,* 1829-1836, XXXIX SOUTHWESTERN HISTORICAL QUARTERLY 255.

[20]*Id.,* also STENBERG, *The Texas Schemes of Jackson and Houston, 1829-1836,* SOUTHWESTERN SOCIAL SCIENCE QUARTERLY, XIII, 264-286; XV, 299-350. As early as 1833, Jackson endorsed a letter from Anthony Butler with these words: "The Convention in Texas meets the 1st of next April to form a constitution for themselves. When this is done, Mexico can never annex her jurisdiction again, or control its legislature. It will be useless after this act to enter into a treaty of boundary with Mexico." MARSHALL, *supra,* 102.

[21]JOHN HENRY BROWN, HISTORY OF TEXAS, 1689-1892, II 99.

[22]CONG. GLOBE, 24th Cong., 2d Sess., 270.

[23]President Polk also used the term "reannexation," and called the action by the United States "the peaceful acquisition of a territory once her own." *Inaugural Address,* 1845, V MESSAGES AND PAPERS OF THE PRESIDENTS, 2223, 2230-31.

Congress consented to the new State extending its eastern boundary from the west bank of the Sabine to the Louisiana line in the middle of the stream. (9 Stat. 245; Tex. Br. App., p. 23).

The foregoing summary of historical facts, which are subject to judicial notice, shows that in the Treaties of 1819, 1828, and 1838, the United States was acting for itself and not for the State of Louisiana, or any other single state, in delimiting the boundaries of the Nation's *"territories"* which bordered the original Province of Texas. They also show that the negotiations and treaties relating to the area west of the middle of the Sabine were chiefly concerned with keeping Texas as a territory or paving the way for it to become a State.

Until 1845, the western half of Sabine Pass, Sabine Lake and Sabine River was all that the Nation salvaged from that part of the territory ceded by France south of the 33rd degree of north latitude and west of the middle of the Sabine. However, the narrow width of this area did not make it any less a territorial possession subject to the Constitution and laws relating to territories of the United States.[24] This was so held in a decision of the General Land Office, opinion by the First Assistant Secretary of the Interior, June 27, 1910, in a hearing involving title to certain islands in the Sabine in which both Louisiana and Texas were parties. The opinion said:

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[24]*Oklahoma v. Texas,* 258 U.S. 574. Actually, Sabine Lake has an average width of 34,000 feet, and the greater area in controversy is in the western half of Sabine Lake, which comprises 30,727 acres, as compared with 4,000 acres in the western half of the River, and 1010 acres in the western half of the Pass. See affidavit of R. C. Wisdom, Director of the Surveying Division, General Land Office of Texas, Texas Exhibit G, Item 1.

"The boundaries thus defined necessarily left the western portion of the westernmost channel (of the Sabine) exclusively in Federal jurisdiction and dominion."[25]

The brief filed by Louisiana in that hearing on September 16, 1909, pages 9-10, conceded this point in the following language:

"The United States enjoyed undisputed and general jurisdiction over the remaining western half, from the middle of the main or sailing channel, of said Sabine Pass, Sabine Lake and Sabine River, to the western shore from the date of the treaty with Spain, February 22, 1819, to July 5, 1848, at which latter date the following Act to extend the Texas boundary (U.S. Stat. Vol. 9, 245) was passed:" (The brief then cites the Act consenting to Texas extending its eastern boundary so as to include the western half of the Sabine Pass, Lake and River.) National Archives, Record Group 49.

Louisiana now seeks to dispute the position taken by its attorneys in 1909, as quoted above. It leans on three weak reeds: (1) an isolated report to Congress from Adams and Clay; (2) a Texas Court of Civil Appeals opinion relating to the Rio Grande; and (3) a theory of automatic boundary change or "coalescence" because of contiguity. We shall reply in that order under appropriate subheads.

The Adams-Clay Report

As heretofore shown, all treaties with Spain, Mexico and the Republic of Texas were made by the United States on its own behalf fixing the west bank of the Sabine as the west boundary of the United States, and not as the west boundary of the State of Louisiana.

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[25]39 DECISIONS RELATING TO PUBLIC LANDS 53, 57 (1910), General Land Office, Department of Interior. Opinion and Louisiana Brief copied in full as Items 1 and 2 of Tex. Ex. B.

This is further evidenced by the cover sheet of President Adams' message to Congress on January 15, 1828 (Louisiana's Exceptions Brief, p. 117), transmitting a report from Secretary of State Henry Clay. Because President Adams makes passing reference to "the boundary between the State of Louisiana and the Province of Texas," Louisiana assumes that this and Clay's report referred to the west bank of the Sabine. This ignores the fact that both Adams and Clay were at the time busily engaged in negotiations with Mexico for a boundary line much farther west than the Sabine.[26] The treaty with Mexico fixing the same line as the 1819 Treaty with Spain, although bearing a signatory date of January 12, 1828, was not known by Clay to have been concluded, according to his report of January 14, 1828, and it was not finally ratified and proclaimed until April 5, 1832. 8 Stat. 372.

The west bank of the Sabine as the western boundary of the United States was never surveyed until Texas became a Republic, and the Boundary Convention between those two Republics and the instructions to the Boundary Commissioners quite clearly relate only to an international boundary with no mention of the State of Louisiana in the instructions or the subsequent report. La. Ex. A-14, pp. 221-255. The Secretary of State's instructions to its Commissioner, J. H. Overton, dated April 8, 1840, stated:

> "The duty assigned to the commission is one of a purely ministerial character to run and mark a line of boundary described with singular clearness and precision in a solemn treaty between two nations."[27]

Louisiana also introduced an opinion dated March

[26]See fn. 17, supra.

[27]See Ex. B attached to Louisiana's Memo No. 1 filed with Special Master as La. Ex. S.

7, 1910, from S. V. Proudfit, Acting Commissioner of the General Land Office to the Secretary of the Interior, in which it was stated:

> "The Joint commission named under a convention between the United States and the Republic of Texas designated 'The Narrows' or western channel as the boundary line between the United States and Texas, but in doing so did not necessarily fix the western boundary of Louisiana. *The commission was not concerned with Louisiana's boundary; it was only required to locate and designate the boundary between the two republics and not the line between Louisiana and Texas.* There is no question but what the line established by this commission was not the western boundary of Louisiana and that there was Federal territory lying between the eastern boundary of Texas and the western boundary of Louisiana which did not form a part of either of these states, because Congress by the Act of 1848, extended the eastern boundary of the State of Texas from The Narrows to the center of the Sabine River which formed the boundary of the State of Louisiana, thus making the lines of the two States coincident for the first time."

These official records introduced by Louisiana preclude the necessity for further argument on this point. Clearly, Louisiana's western boundary was still "a line to be drawn along the middle of the said river," completely unaffected by the Nation's boundary being fixed on the west bank of the river.

Fragoso v. Cisneros, Relating to the Rio Grande

Louisiana cites the case of *Fragoso v. Cisneros,* 154 S.W.2d 991 (Tex. Civ. App. 1941, writ ref. w.o.m.) involving the Rio Grande boundary between the United States and Mexico as authority for its theory of an automatic change in a State's boundary as the result of the Nation changing its boundary by a treaty with

Mexico. This lower court cites no authority for its "common sense, practical construction", and the decision does not conform with Article IV, Section 3 of the United States Constitution; the decisions of this Court with respect to lands acquired by treaty; or the interpretation and action of Congress with respect to the necessity for it to grant Texas authority for these very lands along the Rio Grande to be brought within the boundaries of Texas.

With respect to these banco lands, which became a territory of the United States by reason of the Treaty with Mexico in 1905 and subsequent treaties, Congress enacted Public Law 132 in 1922 (42 Stat. 359) authorizing Texas to bring the new area within its jurisdiction, and Texas enacted a law so extending its boundaries. (GENERAL LAWS OF TEXAS, Ch. 101, 1923). Both laws and the House Judiciary Committee Report covering the necessity of this procedure are reproduced in Texas' Exhibit G, pp. 59-65.

The western half of the Sabine, being a territorial possession of the United States, its disposition or incorporation within the boundaries of an existing State was governed by Article IV, Section 3 of the United States Constitution and required action by the Congress. The relevant portion of the Constitution reads:

> ". . . no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
>
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

There are numerous Supreme Court decisions on this point. In *Van Brocklin v. Tennessee,* 117 U.S. 151, 168 (1886), the Court said:

> "But public and unoccupied lands, to which the United States have acquired title . . . by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right or embarrass its exercise."[28]

Since the Congress of the United States did not authorize Louisiana to extend its western boundary to the west bank of the Sabine, the western half of the Sabine remained a part of the territory of the United States from 1819 until Congress authorized Texas to extend its boundary so as to include the area on July 5, 1848 (9 Stat. 245; Tex. Br. App., 23-24) and Texas complied on November 24, 1849 (3 GAMMELS LAWS OF TEXAS 442; Tex. Br. App., 24).

Louisiana Boundary Did Not Automatically Change or Coalesce

We have already answered much of Louisiana's argument for an automatic change of boundary without approval of Congress and without action of its Legislature. Louisiana's final argument—that being the westernmost State after the Treaty of 1819 was ratified in 1821, it should have automatically inherited the western half of the Sabine—ignores the fact that

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[28]For other cases holding that new territory acquired by treaty does not even become a part of the United States and subject to its domestic law without an Act of Congress, see Tex. Br., 30-33.

there remained strong opposition to the treaty relinquishing Texas up to the date of its ratification,[29] and thereafter every American President and Secretary of State continuously sought to reacquire Texas by purchase or diplomacy until the Texas Annexation Agreement was accomplished in 1845.[30] There was a reason for Congress to retain the western half of the Sabine for a possible future state, and any other policy would have been an unfair precedent for each subsequent western state which was later added to the Union. For instance, in 1846 Texas was the most western state and bordered on the Rio Grande with a Spanish Territory which later became the Territory and State of New Mexico. Its western border was very properly and consistently fixed at the middle of the Rio Grande. *New Mexico v. Texas,* 275 U.S. 279 (1927).

Louisiana's theory of automatic enlargement of its boundary after 1819 because of being then the most western state of the Union is akin to the old rule of "contiguity" or "geographical propinquity" by which nations once acquired additional territory under international law. The doctrine was rejected in the 19th century "because it is wholly lacking in precision," and it was never applied to include areas outside of a fixed statutory boundary or "to the extent of invoking it to supersede a vested legal title" in another sovereign.[31] Obviously, the theory cannot apply on behalf of Louisiana against the United States under a Constitution

[29]Much of the opposition came from Louisiana. Secretary of State Adams wrote that ratification in 1821 was opposed in a resolution introduced in the Louisiana Legislature and that Louisiana Governor T. B. Robertson "made an attack upon the treaty in his speech to the Legislature." V MEMOIRS OF JOHN QUINCY ADAMS, 285-86.

[30]IV SAMUEL FLAGG BEMIS, THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY (1928); *United States v. Louisiana, et al.,* 363 U.S. 1, 39-40, footnote 73.

[31]II U.S. DEPARTMENT OF STATE, DIGEST OF INTERNATIONAL LAW 1046-1059 (1963).

which requires the approval of Congress before a State can change its boundary. In all of the cases cited by Defendant on this point, Congressional approval was held to be required.

The Supreme Court held squarely against Louisiana in *United States v. Louisiana, et al.,* 363 U.S. 1 (1960), when that State advanced the same argument with respect to its southern boundary being automatically extended to include any adjacent "tidelands" belt which was acquired by the United States under international law after Louisiana's admission to the Union. The Court said:

> "It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the Pollard rule." (35)
>
> * * *
>
> "To the extent that Louisiana's reliance on postadmission events is for the purpose of showing that the United States established a three league 'National Boundary' in the Gulf, they cannot help her case, for reasons previously discussed. . . . Under the Submerged Lands Act, Louisiana's boundary must be measured at the time of her admission unless a subsequent change was approved by Congress. If the Act of Admission fixed the boundary at the shore, neither action by Congress fixing greater boundaries for other States nor Executive policy on the extent of territorial waters could constitute Congressional approval of a maritime boundary for Louisiana . . ." (75-76)

Louisiana's argument for enlargement of a fixed water boundary by "coalescence" is analagous to a recognized legal doctrine of "accretion". However in a case where the ordinary rule of accretion would oth-

erwise apply, the Supreme Court held in *New Mexico v. Texas,* 275 U.S. 279, 301-302 (1927), that the rule did not operate to move the river boundary that had been otherwise fixed in the middle of the Rio Grande by the Act of Congress admitting New Mexico as a State and by the Constitution of New Mexico adopted prior to its admission. This case is squarely in point, because it involved a river boundary between two States, and Texas was complaining of the Master's finding that the boundary had been moved eastward by accretion which occurred after the boundary had been fixed in the middle of the Rio Grande as it existed in 1850. In overruling this portion of the Master's Report, the Supreme Court said:

> "Both sides have filed exceptions to the master's report in reference to accretions. Texas, on the one hand, insists that he was in error in reporting as the boundary line the location occupied by the river after it has been moved eastward from its location in 1850 by accretions. New Mexico, on the other hand, insists conditionally—that is, only if its exceptions as to the location in 1850 are not sustained—that in determining the accretions in the Country Club area the master fixed the line of such accretions in an indefinite manner and not far enough to the east. We find that the contention of Texas is well taken and the conditional contention of New Mexico is therefore immaterial.
>
> "This case is not one calling for the application of the general rule established in *Nebraska v. Iowa,* 143 U.S. 359, *Missouri v. Nebraska,* 196 U.S. 23, *Arkansas v. Tennessee,* 246 U.S. 158, and *Oklahoma v. Texas,* 260 U.S. 606, as to changes in State boundary lines caused by gradual accretions on a river boundary.
>
> * * *
>
> "New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its

boundary ran 'along said thirty-second parallel to the Rio Grande . . . as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees, forty-seven minutes north latitude.' This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary; and Texas has also affirmed the same by its pleadings in this cause. *Since the Constitution defined its boundary by the channel of the river as existing in 1850, and Congress admitted it as a State with that boundary, New Mexico, manifestly, cannot now question this limitation of its boundary or assert a claim to any land east of the line thus limited."* (301-302)

Texas submits that the foregoing case completely answers all of Louisiana's contentions that this Sabine boundary could have been changed to include the western half of the river by any method other than legislative action by Congress and by the State of Louisiana. The Defendant shows neither.

C. The eastern boundary of the State of Texas was properly and legally extended to include the western half of the Sabine River by the Act of Congress of July 5, 1848, and the Act of the Texas Legislature on November 24, 1849,

(1) The Consent of Congress.

The consent of Congress in the Act of July 5, 1848 (9 Stat. 245) reads as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Congress consents that the legislature of the State of Texas may extend her eastern boundary so as to include within her limits one half of Sabine Pass, one half of Sabine Lake, also one half of Sabine River, from its mouth as far north as the thirty-second degree of north latitude."

This action had been requested by Resolution of the Texas Legislature approved March 18, 1848. See Tex. Br. App., 22.

(2) The Act of the Texas Legislature

The Act of the Texas Legislature extending its eastern boundary to the middle of the Sabine reads in part as follows:

> "Sec. 1. *Be it enacted by the Legislature of the State of Texas,* That in accordance with the consent of the Congress of the United States, given by an act of said Congress, approved July 5th, 1848, the Eastern Boundary of the State of Texas be, and the same is hereby extended so as to include within the limits of the State of Texas, the western half of Sabine Pass, Sabine Lake and Sabine River from its mouth as far north as the thirty-second degree of north latitude . . ." (See full text in Tex. Br. App., 24.)

(3) State Ownership and Jurisdiction Extend to the Waters of and Lands Beneath Navigable Streams within State Boundaries.

It is conceded by Louisiana that the Sabine River is navigable in fact throughout the length involved in this controversy and that it has been navigable in fact since 1812. (See Answer, p. 4 and Stipulation). Therefore, under a long-established rule of law, Texas has had State jurisdiction over and ownership of the lands beneath the waters of the western half of the Sabine ever since the area was legally embraced within its boundaries. Navigability and location within State boundaries are the two basic requirements of the rule. It was stated as follows in *Martin v. Waddell,* 16 Pet. 367, 410 (1842):

> "For when the Revolution took place, the people of each state became themselves sovereign; and in

that character hold the absolute right to *all their navigable waters and the soils under them,* for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The most often cited case is *Pollard's Lessee v. Hagan,* 3 How. 212, 229 (1845), which said:

> "First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."

In any event, the rule has been confirmed and reinforced by the Submerged Lands Act of 1953, which quitclaimed to the states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters." 67 Stat. 29.

Louisiana's contention that the Congressional Act of July 5, 1848 (9 Stat. 245) only referred to criminal jurisdiction is fully answered in the Special Master's Report, p. 25. There was no limitation in the Act authorizing Texas to extend its boundary so as to include the western half of the Sabine. Since the area was part of the territory of the United States outside of the boundaries of the State of Louisiana, there is no legal basis for Louisiana to question the constitutionality of this disposition of the area by Congress. Article IV, Section 3, U.S. CONSTITUTION; *Alabama v. Texas,* 347 U.S. 272 (1953); *Van Brocklin v. Tennessee,* 117 U.S. 151, 168, (1886).

II

THE SPECIAL MASTER CORRECTLY HELD THAT IN ADDITION TO ITS TITLE ACQUIRED FROM THE UNITED STATES

AS A MATTER OF LAW, TEXAS HAS ESTABLISHED ITS EASTERN BOUNDARY IN THE GEOGRAPHIC MIDDLE OF THE SABINE UNDER THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE. (In Reply to Louisiana's Exception No. 2 and Point "B" of Louisiana's Brief).

The Special Master's Report on prescription and acquiescence (pp. 27-30), and his careful listing and comments on the volumes of evidence showing acts of prescription by Texas and acts of acquiescence by Louisiana to the geographic mid-stream boundary (Appendix A-E, pp. 41-109), clearly demonstrate the correctness of his finding on this point. Further briefing would be simply repetitious. The Master's Report is fully supported by the evidence covering more than a century of recognition and use of the geographic mid-stream boundary by both Texas and Louisiana and by the United States.

Louisiana sums up its reply on this point with the argument that "the undisputed facts do not sustain the findings of the Special Master that Louisiana *lost title* to the bed and subsoil of the west half of the Sabine." In the first place, the Master did not find that Louisiana "lost title". He found that as a matter of law Louisiana *never had title* to the west half of the Sabine, and that prescription and acquiescence merely confirmed the legal title of Texas to the geographic mid-stream boundary which had been fixed as a matter of law. In the second place, the Special Master was not obliged to make this finding on undisputed evidence. That would have been necessary only if he had made the finding on Texas' Motion for Summary Judgment, which the Master did not do. Instead, he conducted a full hearing on the merits, receiving all evidence offered by both States. (Report, p. 6-7). Therefore, the

Special Master was entitled to make his findings on the preponderance of the evidence and not alone on undisputed evidence.

If the Court will briefly examine the 193 acts, maps, shell leases, oil leases, pipeline rights-of-way, tax collection affidavits, exercises of law enforcement jurisdiction, bridge agreements and other items specifically enumerated by the Special Master (Report, 41-109) as showing recognition and use of the geographic mid-stream of the Sabine as the boundary between Texas and Louisiana, it will be evident that any other finding on prescription and acquiescence would have been against the great weight and preponderance of the evidence. Such an examination of the exhibits will not be as tedious as it may sound, because they have been carefully grouped and indexed. For instance, large maps prepared by Federal, Louisiana and Texas agencies are assembled in Texas Exhibits A and F, and other maps, pictures and documents may be readily referred to through the index pages in the front of Texas Exhibits B, C, D, E, G, H and K.

From November 24, 1849, when Texas extended its boundary and the boundaries of all of its counties to include the western half of the Sabine, under consent granted by Congress, the record shows that Louisiana acquiesced in the geographic mid-stream boundary (as previously fixed by Congress and the Louisiana Constitution in 1811 and 1812) for more than 92 years without a single protest or claim to a different boundary. It was not until 1941 that a Louisiana Governor asserted a claim to the west bank, and he recognized that the claim would not stand if "there has been acquiescence." (Tex. Ex. C, 49; Ex. G, 67, 72). The record shows that this was but a temporary and passing fancy, never pursued with any type of possession or suit

which would interrupt Texas' prescription. *Michigan v. Wisconsin,* 270 U.S. 295, 313-319 (1926); *Indiana v. Kentucky,* 136 U.S. 479, 509-10 (1890). Neither did it interrupt Louisiana's acquiescence, because the State continued thereafter to make maps, oil and gas leases, bridge agreements, and right-of-way easements depicting the geographic middle of the Sabine as the boundary between the two States.

Even after the filing of this suit, Louisiana was still distributing copies of the maps made by that State in co-operation with the U.S. Geological Survey in 1957 (Affidavit of James H. Quick, Tex. Ex. B, 40; Ex. A, 27) and its 1970 State Highway Map (Tex. Ex. A, 49), which clearly depict the geographic middle of Sabine Lake as the boundary between the two States. Pictured at page 100 of Texas Exhibit E are both sides of the existing "State Line" sign erected in the center of the bridge across the Sabine on U.S. Hwy. 10, and at page 101 is the contract between the two States for the erection and maintenance thereof dated October 3, 1962. Louisiana has never levied or collected any taxes on railroad bridges, pipelines, utility lines, or oil and gas leases beyond the geographic middle of the Sabine, while Texas and its political subdivisions have collected taxes on such property on the west side of the geographic center of the Sabine continuously since 1905. (Tex. Ex. C, 27-64; Ex. G, 115-161). Clearly, this is a case where for more than 120 years before filing this suit the Louisiana Legislature and Louisiana officials have recognized, mapped and used the geographic center of the Sabine as the western boundary of the State contrary to the position now being taken by its attorneys in this case.

One specific act of recognition by the Louisiana Legislature contrary to its attorneys' present contentions should be noted. It is Resolution 212 passed by the Lou-

isiana Legislature on March 16, 1848, seeking consent of Congress to extend its boundary to the west bank of the Sabine (Full Text in Special Master's Report 16-17). Quoting only a portion of this Resolution 212, Louisiana's present counsel would lead the Court to believe that it was a claim or declaration of a then existing State boundary "on the west side of the Sabine River" (La. Exceptions Br., 33-36; 48), and that the purpose of the Resolution was merely to seek criminal jurisdiction over lands already within its boundaries. A full reading of the entire Resolution 212, rather than excerpts taken out of context, will demonstrate the inaccuracy of this interpretation. In fact, it means just the contrary and is one of the most conclusive documents in this case against the factual and legal contentions now being made by Louisiana against the Special Master's findings. The "Whereas" clause clearly recognizes that on March 16, 1848 "the Constitution and the Laws of the State of Louisiana" *did not* extend over "the waters of the Sabine River, from the middle of the stream to the western bank thereof," and it proposes that the "constitution and jurisdiction of the State of Louisiana shall be extended *over part of the United States",* embraced within such limits, "whenever the consent of the Congress of the United States can be procured thereto . . ." This was a far cry from asserting a then existing boundary covering the western half of the Sabine. In fact, it was a complete recognition (1) that the area in controversy then was under the exclusive jurisdiction of the United States and not within the boundary of Louisiana and (2) that Congressional approval was essential before Louisiana could change its boundary to the west bank. Congress did not give its approval, but instead granted a similar petition of Texas, dated March 18, 1848 (Report, 17) authorizing Texas to extend its eastern boundary so as

to include the western half of the Sabine (Report, 18-19).

Louisiana asks the Court to take judicial knowledge of World War II, followed by the extended tidelands controversy during which it claims a "tacit" understanding that this boundary controversy would not be pushed, as a reason for excusing its acquiescence and failure to file a lawsuit since 1941. While each party perhaps had its own good reason to delay filing a suit against its neighboring State, we disclaim any agreement, tacit or otherwise, which would have prevented either State from filing a suit to resolve this question at an earlier date. The 92 years of prescription and acquiescence which had already run prior to 1941 simply continued until the date of this suit because Texas was in possession and had exercised jurisdiction over the west half of the Sabine continuously since 1849, and Louisiana was never in possession and never exercised any jurisdiction over the west half at any time during a total of more than 120 years. Its claim to the west bank, now asserted for the first time in a Court of law, is without merit and completely contrary to its previous acts of acquiescence and recognition of the geographic mid-stream boundary which was fixed by Acts of Congress for Louisiana in 1811 and for Texas in 1848. The Special Master correctly held, upon the great weight and preponderance of the evidence, that this line as fixed by Congress has been confirmed by prescription and acquiescence.

III

THE SPECIAL MASTER CORRECTLY HELD THAT THE BOUNDARY IS THE GEOGRAPHIC MIDDLE OF THE STREAM RATHER THAN THE THALWEG CENTER OF A MAIN NAVIGABLE CHANNEL. (In

reply to Louisiana's Exception No. 3 and Point "C" of Louisiana Brief).

There are four reasons why the thalweg rule does not apply to this water boundary, and the Special Master has discussed the law and the evidence with respect to three of them. (Report, 31-34). The history of, reasons for, and explicit exceptions to the thalweg rule clearly demonstrate its inapplicability to the Sabine boundary line between Texas and Louisiana, for the following reasons:

A. The only basis for the Thalweg Rule is absent in this case, because free and common use of the entire river for navigation was reserved to the adjacent territories and future states by statutes and treaty.

On navigable rivers, the original and more ancient rule calls for equal division of territory by use of a line equidistant from the river banks, and this is still the rule applicable to non-navigable rivers and to those navigable rivers in which a main channel is unknown or is not involved or alleged.[32] The only reason for a change in the ancient rule was to assure the states bordering on a river equal use of the main channel of navigation. The Supreme Court stated in *Minnesota v. Wisconsin,* 252 U.S. 273, 282 (1920):

> "The doctrine of Thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary."

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[32] II SHALOWITZ, COAST AND GEODETIC SURVEY, U. S. DEPARTMENT OF COMMERCE, *Shore and Sea Boundaries,* 374 (1962); *Georgia v. South Carolina,* 257 U.S. 516, 521 (1922); *Iowa v. Illinois,* 147 U.S. 1, 7-8 (1892).

In *Iowa v. Illinois,* 147 U.S. 1, 7-8 (1892), the Supreme Court held the thalweg doctrine for boundaries between States is based entirely upon this equitable principle: "The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest." However, the opinion includes the following quotation from CREASY, FIRST PLATFORM ON INTERNATIONAL LAW, 222, which indicates that the ancient geographic line is the *prima facie* line until the existence of a different main channel is alleged and proven:

> "Formerly a line drawn along the middle of the water, the *medium filum aquae,* was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum.* When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

In the same case, the Court made it clear that the thalweg rule will not apply if it has been otherwise provided "by statute or usage of so great a length of time as to have acquired the force of law." This exception is also stated by the Court in *Arkansas v. Tennessee,* 246 U.S. 158, 170 (1918).

In *Georgia v. South Carolina,* 257 U.S. 516 (1922), the Supreme Court, then composed of eight of the same members who decided *Arkansas v. Tennessee,* supra, held that since equal rights of both States to navigation had been otherwise preserved, the reason for applying the thalweg doctrine was "out of the case." Therefore, the Court applied the more ancient general rule, deciding that the boundary line in the river was "midway between the banks of the stream."

In 1811, while the Territory of Orleans covered all lands from the Mississippi on the east to the Rio Grande on the west, Congress enacted a statute relating to the public lands in the Territories of Orleans and Louisiana, Section 12 of which provided:

> "Section 12. *And be it further enacted,* That all Navigable rivers and waters in the Territories of Orleans and Louisiana, shall be, and forever remain, public highways."[33]

In 1812, while the United States was still asserting its title to all lands between the Mississippi and the Rio Grande, Congress provided in the Act of Admission of the State of Louisiana[34] the following:

> "Provided, That it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and territories of the United States, . . ."

Article 3 of the Treaty of 1819 between the United States and Spain contained the following provision:

> ". . . the use of the Waters and the navigation of the Sabine to the Sea, and of the said Rivers, Roxo and Arkansas, throughout the extent of the said Boundary, on their respective Banks, shall be common to the respective inhabitants of both Nations."[35]

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[33]Act approved February 15, 1811, Appendix, Public Acts of Congress, 1811, 1296, 1302. A copy is in Plaintiff's Exhibit G, 47-50.

[34]2 Stat. 701, April 8, 1812; Tex. Br. App. 5-7.

[35]8 Stat. 252, Treaty of 1819, proclaimed February 22, 1821. Tex. Br. App., 9. This provision was carried forward in the Treaty with Mexico of 1828, 8 Stat. 372 (Tex. Br. App. 14).

Louisiana admits that under the above statutes and treaty the entire Sabine is free to uninterrupted navigation by the citizens of both States. It makes no allegation or argument that a boundary in the middle of a thalweg or a main channel of navigation is necessary to protect its rights of navigation. It is obvious that navigation is not an interest, much less the "paramount" or "controlling" interest so essential for the application of the thalweg doctrine.

Therefore, Texas submits that the Special Master has correctly held that the Supreme Court's decision in *Georgia v. South Carolina,* supra, is controlling and that the boundary should be determined to be in the geographic middle of the Sabine bodies of water, equidistant from the banks and shores, which is the location that has been recognized and followed by Congress, Federal agencies, and agencies of both States for more than 120 years.

This was also the holding of the Supreme Court of Louisiana in the second case of *State v. Burton,* 31 So. 291 (1902), a copy of which is in Plaintiff's Exhibit C, 21-22. In the first case of *State v. Burton,* 29 So. 970 (1901), the Supreme Court of Louisiana had held that the middle of the Sabine was the boundary between Texas and Louisiana. A copy of this decision is in Plaintiff's Exhibit B, 86. In the second case, referring to the meaning of the "middle" of the Sabine, the syllabus written by the Court said:

> " 'The thread' of a stream is the line midway between the banks at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream."

Louisiana departs from its thalweg claim in advocating that the boundary line should be drawn west of all islands, regardless of the location of the main chan-

nel, citing *Georgia v. South Carolina, supra.* There is a vital point which distinguishes that case from the present case. The boundary description between Georgia and South Carolina did not call for a "middle line" through the rivers involved. Instead, it specifically called for "the most northern branch" of the Savannah and Tugalo Rivers, and specifically reserved to Georgia (the State bounded on the South) "all islands in the rivers Savannah and Tugalo." This was the reason the Supreme Court determined that the geographic middle of the most northern branches of these rivers should be followed north of the islands so as to leave them in the State of Georgia. On the other hand, in 1811 Congress called for the Louisiana boundary to be *"a line to be drawn along the middle of said river,* including all islands to the thirty-second degree of latitude." The primary emphasis in the Act and all subsequent evidence of interpretations by the parties is on the "line to be drawn along the middle" so as to include one-half of the Sabine in Louisiana and one-half in Texas. This recognizes that where an island is encountered "by a line to be drawn along the middle of said river" the boundary runs in the western branch midway between the western bank of the river and the bank of the island.

The U. S. Geological Survey, acting in cooperation with the State of Louisiana, followed this rule in positioning the boundary in the branch of the Sabine west of Shell or Sabine Island where the Sabine River flows into Sabine Lake and in the center of the Narrows (west branch) in Orange County. These two instances are shown on the U.S.G.S. Quadrangles at pages 25 and 41, respectively, of Plaintiff's Exhibit A. We have no quarrel with Louisiana in the application of this rule so long as it does not seek to divert the line entirely away from the geographic middle line so as to encom-

pass islands which are not intercepted by the geographic middle line.

B. The United States, as common source proprietor, provided by statute for a geographic middle line in the Sabine.

In using the words "thence by a line to be drawn along the middle of said river" in the Enabling Act for creation of the State of Louisiana, approved February 20, 1811, there was no reason for Congress to intend anything other than a line along the geographic middle of the Sabine, because five days earlier it had already provided free access for navigation of the entire river in its Territorial Lands Act of February 15, 1811, *supra.*

The only possible basis for interpreting the language to mean the middle of a thalweg or main channel of navigation was absent, and this was confirmed in the Act of Admission, approved April 8, 1812, which contained both the boundary language above quoted and a reiteration that these "navigable rivers and waters . . . shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States . . ."

This was the construction given to the Sabine River boundary language of the aforesaid statutes when Congress passed the Act of July 5, 1848 (9 Stat. 245) consenting for Texas to "extend her eastern boundary so as to include within her limits *one half* of Sabine Pass, *one half* of Sabine Lake, *also one half* of Sabine River . . ." (Emphasis supplied). Obviously, these are mathematical terms indicating geographic halves of the river and have no relation to a thalweg or main channel of navigation. Such was the precise construction given to the Acts by the Senate Judiciary Committee Chairman, who reported:

". . . The boundary of the State of Louisiana extended to the middle of the Sabine; so that the half of the river and lake, to the western shore belonged to the United States, and was not included in the State of Louisiana. . . . The bill before the Senate gives the half of the river beyond the boundary of the State of Louisiana to the State of Texas . . ."[36]

Although enacted at different sessions of Congress, these Acts refer to the same boundary and should be considered in *pari materia* so long as the construction harmonizes and does not produce a conflict. *Red Lion Broadcasting Co. vs. F.C.C.*, 395 U.S. 367, 381; SUTHERLAND, STATUTORY CONSTRUCTION, Ch. 52, pp. 535-539; 50 AM.JR. §§ 349-350, pp. 345-349; 25 R.C.L. §§ 288, p. 1064.

C. The Geographic Middle Has Been Established by Prescription and Acquiescence.

The Special Master has correctly held that the geographic middle of the Sabine has been established under the doctrine of prescription and acquiescence (Report, 32-33). It is to this line that all of the evidence of prescription by Texas and acquiescence by Louisiana discussed in II, supra, applies.

The thalweg doctrine does not apply when it is established that there has been acquiescence in a long-continued assertion of dominion and jurisdiction over a given area and to a line other than the thalweg. *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).

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[36]CONGRESSIONAL GLOBE, 1st. Sess., 30th Cong., New Series No. 56 at p. 882; Tex. Br. App., 23-24.

D. There was No Well-Defined or Habitually Used Main Channel of Navigation in Sabine Pass, Sabine Lake or Sabine River in 1812 or Thereafter until Man-Made channels Were Dredged, and Louisiana Has Failed to Allege Otherwise.

The fact that the evidence shows that there was no main channel of navigation in the Sabine in 1812 or thereafter until man-made channels were dredged is a reason for denying Louisiana's thalweg claim which the Special Master did not mention.

We take it from the quotations in *Iowa v. Illinois,* supra, that the burden is upon a state asserting the applicability of the thalweg doctrine to allege and show that there in fact exists a thalweg in which "vessels which navigate those parts keep their course habitually along some channel different from the *medium filum.*" This also seems evident in the other thalweg cases cited above and in Louisiana's Exceptions Brief.

Louisiana has not alleged that in 1812 or at any subsequent date, there was a known thalweg or habitually used main channel of navigation different from the geographic middle of Sabine Pass, Sabine Lake or Sabine River. Texas alleged in its Reply to the Counterclaims of Louisiana (p. 8) that there was no such channel, and Louisiana failed to make any specific denial thereof. In reply to Texas' Requests for Admissions, Louisiana admits that between 1812 and the dredging of man-made channels neither the State nor any of its departments ever surveyed or mapped a thalweg or deepwater sailing channel in the Sabine; that no such channel has ever been used as the boundary line between Texas and Louisiana; and that the State and its departments do not have in their possession any map purporting to show a thalweg or deepwater channel of navigation in Sabine River, Sabine Lake or Sabine Pass as of 1812 or any date thereafter prior to the

dredging of a man-made channel. (Requests and Answers 1-7, filed with Special Master on or about Dec. 11, 1970).

Although it was not our burden to do so, Texas introduced the affidavit of an 81 year old witness who had navigated Sabine Lake, Sabine Pass and the lower end of Sabine River since 1887. He swore that "there was no main channel of navigation North and South across Sabine Lake," which "was about the same depth all the way across between points approximately one mile from the west shore to one-half mile from the East shore" and that there was no defined or habitually used navigation channel in Sabine Lake or in the River from there to Orange. "Boats simply sought and followed the deepest water at any given time, and the location changed from time to time, being influenced by frequent overflows." (Tex. Ex. G, 44-45). Texas also introduced affidavits and U. S. Corps of Engineer Reports for 1875, 1879, 1880, 1895 and 1897 showing the almost uniform shallow depths of Sabine Lake and Pass, all indicating that only shallow draft vessels could pass the bar at Sabine Pass and that the uniform depths of the Lake and Pass were such as to accommodate these vessels "on practically any course that they chose to follow." (Affidavit of R. C. Wisdom, Tex. Ex. G., 1-3; U.S.C. of E. Reports, Tex. Ex. G., 24-43). See also depths shown on U.S.G.S.-Louisiana maps 23, 25 and 27 in Texas Exhibit A.

In *Minnesota v. Wisconsin,* 252 U.S. 273, 282-83, this Court applied the geographic middle rule to this type of water area in Lower St. Louis Bay, and it is the only rule applicable where no thalweg or main channel of navigation is shown to exist.

Louisiana accuses Texas of an ulterior motive in wanting the geographic middle so that it will have a

better chance to claim both sides of the Sabine jetties when it comes time to determine the boundary between the two states in the Gulf of Mexico. (Louisiana Exceptions Brief, 85, 120). The record shows no evidence whatever of a thalweg channel at the mouth of the Sabine being more favorable or less favorable than the geographic middle for a beginning point from which to measure the common state boundary southward into the Gulf of Mexico. The newspaper article reproduced in Louisiana's brief at page 120 concerning the Texas Parks and Wildlife Department's claims and operations in the Gulf were completely unknown to and without the approval of the Attorney General of Texas. It has been stipulated that none of the proceedings in this suit shall relate to the common boundary in the Gulf of Mexico and that during such proceedings both parties would refrain from any activities which would put this seaward boundary in controversy. After Louisiana Attorney General Guste advised Texas Governor Preston Smith of the aforesaid newspaper article, the Attorney General of Texas advised the Director of the Texas Parks and Wildlife Department of the stipulation with Louisiana and stopped his operations in the area. This is evidenced by a letter from the Attorney General of Texas to the Governor of Texas dated June 30, 1972. A copy together with a transmittal letter was sent to the Attorney General of Louisiana. (Both are reproduced herein as Appendix A.) Perhaps the Louisiana Attorney General received these communications after his brief was sent to the printer.

IV

ALL QUESTIONS RELATING TO JURISDICTION OVER ALLEGED ISLANDS WEST OF THE GEOGRAPHIC MIDDLE OF THE SABINE SHOULD BE REFERRED TO THE SPECIAL MASTER FOR REPORT AFTER

THE COURT HAS DECIDED THE BASIC BOUNDARY ISSUES.

The Special Master recommends that if the Court approves his Report as to the boundary line, he should be authorized to hear additional evidence as to the presently existing islands in the Sabine west of the geographic middle line for the purpose of determining whether they are true islands; whether they existed in 1812; and whether they have been acquired by Texas under the doctrine of prescription and acquiescence. Texas concurs in this part of his Report as to islands but excepts to his finding prior to the taking of such further evidence, that any presently existing islands which existed in 1812 were then owned by or within the jurisdiction of Louisiana.

The description in the Enabling Act of 1811 "beginning at the mouth of the river Sabine; thence by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude" (and thence setting forth the remaining boundaries to the north, east and south) is subject to the interpretation given by the Special Master, to-wit: That it gave all islands of the Sabine, both within and without such specific boundaries, to Louisiana. On the other hand, it is likewise subject to the interpretation that "including all islands" simply referred to all islands within Sabine waters east of the line to be drawn along the middle of the river, which we concede as including those intercepted by such middle line. The latter is the practical interpretation which has been placed on this boundary Act for many years by Federal, Louisiana and Texas agencies and officials, and there is other evidence which Texas would like to offer bearing on the legal effect of this practical interpretation by the parties before the Court makes a final determination as to whether islands west of the geographic middle line and

outside of the boundaries of Louisiana were intended by Congress to be granted to Louisiana in 1812.

We concede that it is possible for a State to own or have jurisdiction over islands outside of and beyond its boundaries. See *United States v. Louisiana, et al,* 363 U.S. 1, 66-80 (1960). Congress had the power to grant Louisiana islands outside of the boundaries which circumscribed the new State, but we do not believe this was the intention of the phrase "including all islands" as used in the Act of 1811. For instance, although the language may appear as surplusage if it only referred to islands east of or intercepted by the geographic middle line, it has been held that such is not the case. In both *Moss v. Ramey,* 239 U.S. 538 (1916) and *Scott v. Lattig,* 227 U.S. 229 (1913), this Court held that islands on the Idaho side of the navigable Snake River at the time of Idaho's admission to the Union were not a part of the bed of the stream or land under water, and therefore their "ownership did not pass to the State, or come within the disposing influence of its laws." In *Scott,* it was further said at 244:

> "On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws . . ."

There are many instances of water boundaries whose limits clearly encompass islands to which there have been added specific references showing that the limits include *all islands* within such water boundaries. An example is found in the 1819 Treaty with Spain wherein the boundary of the United States was fixed at the west bank of the Sabine and the south banks of the Red and Arkansas Rivers, clearly placing all of such waters and their encompassed islands within the United

States, but to this description was added the specific provision that "all of the Islands in the Sabine and the said Red and Arkansas Rivers throughout the Course thus described, to belong to the United States." (Tex. Br. App., 7-9). Also, the boundary agreement between Georgia and South Carolina was specifically fixed as the northern branches of the Savannah and Tugalo Rivers, clearly leaving all islands to the south in Georgia, but a specific provision was added "reserving all the islands in the said rivers Savannah and Tugalo to Georgia."

The phrase in the 1811 Enabling Act "including all islands" is clearly secondary to the middle line and refers only to all islands east of the middle line and within the boundaries described in the Act. This was the precise interpretation placed on the "including all islands" phrase by the Attorney General of Louisiana in a previous brief filed in this Court in *U.S. v. Louisiana et al,* No. 10 Original,[37] in which it was said:

> "Those *limits* include all islands eastward of the middle of the River Sabine to the thirty-second degree latitude and also all islands within three leagues of the coast in the Gulf of Mexico." (22-23)
>
> "However, the reference to the inclusion of islands within the limits of the state, whether in the east half of the River Sabine or within three leagues of the Gulf coast, should not confuse one's thinking with the fact that by boundary description in the Congressional Enabling Act of 1811, the 1812 Louisiana Constitution, and again in the Congressional Act of Admission of April 8, 1812, the purpose was to fix the territorial limits of the

[37]Louisiana's Supplemental Brief in Opposition to Motion for Judgment, pp. 22-24, *U.S. v. Louisiana, et al.,* No. 10, Original, October Term, 1959. See quotations therefrom printed at pages 31-33, Brief for the State of Texas in Support of Motion for Judgment.

State of Louisiana, both landward and seaward and to include all islands within said limits." (24)

Complete reservation of this island question will involve very little of the land in controversy. Perhaps the extent of these small areas and our position concerning them would best be understood by observing the map of Sabine Lake prepared by the U.S. Geological Survey in cooperation with the State of Louisiana in 1957. (Tex. Ex. A, 25). The geographic mid-stream boundary is positioned by the black dashed line drawn through the Lake and into Middle Pass of the Sabine River. To the left and about four miles west of this line will be seen the point where the Neches River empties into Sabine Lake. Here will be observed a small speck designated as Dooms Island (formerly called Johns Island), which is the first mentioned by the Special Master as being claimed by Louisiana (Report, 35-36).[38] To the north is Stewts Island, which was a part of the mainland until it was cut off by the Intracoastal Canal, and between Stewts and the Middle Pass (also called West Pass or West Fork) of the Sabine River is a line of spoil banks or man-made islands (such as Sydney Island) created by dredging of the deep-water Canal.[39] If the Court approves the Special Master's finding as to the geographic mid-stream boundary, Louisiana apparently asserts no title to these artificial man-made "islands" or spoil banks. However, Louisiana does assert title to two small delta "islands", which Texas considers battures, shell banks or appendages of the shore, lying west of the geographic middle line as depicted by the U.S.G.S. and the State

[38]This four-acre "island" or shell bank was once considered by Texas as a part of the mainland and was actually surveyed and patented as part of a mainland grant. (Tex. Ex. K, 1-14). The testimony shows that it no longer exists. New Orleans Hearing Transcript, 243-300; 554-557.

[39]Tex. Ex. K, 10-11.

of Louisiana on the map above referred to. Together, these two areas appear to cover less than 100 acres. These are the only "islands" referred to by the Special Master and the only ones about which Texas is informed of any controversy.

The Special Master recognizes that even if these alleged "islands" existed in 1812 and were then granted to Louisiana, there is a possibility that they have since come under the jurisdiction and ownership of Texas by prescription and acquiescence and that he should be authorized to hear further evidence concerning them if and after the Court approves his basic boundary findings. It just so happens that these two appendages in the delta of the Sabine River border upon a portion of the geographic mid-stream boundary which has not only been marked on the U.S.G.S. and Louisiana maps since 1932, but which has been used by both States in metes and bounds descriptions of oil and gas leases which they have issued on each side of this recognized position of the boundary line. On April 21, 1938, Louisiana executed its mineral lease, signed by the Governor, to Humble Oil & Refining Company, covering the north 10,000 acres of the east half of Sabine Lake with attached field notes calling for the center of Middle Pass(West Fork) as its western boundary and as the eastern boundary of the State of Texas. (Tex. Ex. D, 15-19). The attached field note calls begin at the southeast corner of the lease on the east shore of Sabine Lake and thence run west to "the center of Sabine Lake, same being the Texas-Louisiana boundary as set out in an Act, approved July 5, 1848 . . . giving the consent of the Government of the United States to the State of Texas to extend her eastern boundary . . . Thence in a northeasterly direction with the center of said Lake to the mouth of the West Fork [same as Middle Pass] of Sabine River . . ." There was attached

a U.S.G.S.-Louisiana map showing this precise boundary line as shown on the map hereinabove referred to. (Tex. Ex. D, 17-19).

On the west side of this line, Texas executed a mineral lease on its Tract No. 3 to the Texas Company in 1958, which extended to the middle of Middle Pass (also known as West Pass or Fork) and including the two alleged islands in question west of Middle Pass. (See Map, Tex. Ex. F, 32; New Orleans Hearing Transcript, R. C. Wisdom's testimony, pp. 552-555).

Louisiana's alternative claim to title or jurisdiction over these small alleged islands came late in the development of this case. It was first made known to Texas at the oral arguments on Motion for Judgment in Houston on December 16, 1970. Texas included a partial reply in a letter to the Special Master, with attached exhibits, dated December 31, 1971 (Tex. Ex. J and K), and with some evidence of prescription and acquiescence in the subsequent New Orleans hearing (New Orleans Hearing Transcript, pp. 524-576). However, the issues as to these small alleged islands have not been thoroughly developed or briefed, it being Texas' contention from the beginning that if any such controversy should arise, the matter should be reserved for a future hearing after a decision on the basic boundary issues. (Plf. Reply Brief of December 10, 1970, pp. 30-31).

The answer to the question of what Congress intended in 1811 with respect to islands west of and outside the specific boundaries set forth for the State of Louisiana may depend to a great extent upon the subsequent practical interpretation of the boundary language by Federal agencies and the two States. Since this is proposed to be developed in subsequent hearings by the Special Master with reference to prescription

and acquiescence, there is good reason to reserve the entire question of initial and present ownership and jurisdiction over these small areas until additional evidence and briefs can be submitted at the proposed subsequent hearings.

RECOMMENDATION AS TO SURVEYING THE BOUNDARY

If the Special Master's basic boundary findings are approved by the Court and if the parties are unable to agree upon the location of the "geographic middle" of the Sabine within 30 days after the Court's order of approval, the Master recommends that he be authorized to make a survey thereof with the assistance of the U.S. Geological Survey, with the costs to be equally divided between the two States. Texas has no objection to this procedure, but we offer an alternative which would conform to the practical line which has been used by the States for many years and which would provide for a future survey only as to those portions of the boundary on which the parties cannot agree.

The alternative comes from the solution used by this Court in *Louisiana v. Mississippi,* 202 U.S. 1, 59 (1906), a water boundary case won by Louisiana largely upon proof of an existing boundary line depicted on the charts of the U.S. Coast and Geodetic Survey. The Court decreed the water boundary to be "as delineated on the following map, made up of the parts of charts Nos. 190 and 191 of the United States Coast and Geodetic Survey, embracing the particular locality." In the present case, we have in evidence official maps of the U.S. Geological Survey made in cooperation with the State of Louisiana beginning in 1932, which depict the geographic middle line of the entire Sabine from its mouth on the Gulf to the thirty-second degree of north latitude (Tex. Ex. A, 3-15, 26-

39, 40-45). These maps were found by the Special Master to "have been used extensively by both Texas and Louisiana as a basis for their maps." (Report, 33). In order that both States may continue the use of these maps with respect to the area in controversy until there is some need for additional surveying on a portion of the boundary, our alternative suggestion would be for a judgment and decree along the following lines:

> "That the geographic middle of Sabine Pass, Sabine Lake and Sabine River from the mouth of Sabine Pass north to the thirty-second degree of north latitude, as depicted on the 1957 series of Sabine River Quadrangles prepared and published by the U.S. Geological Survey in cooperation with the State of Louisiana shall be the location of the boundary line between the two States unless and until either State petitions this Court, within one year of the date of this order, for a more definite survey of the location of any portion of said boundary. The Court retains jurisdiction of the case for such further orders as may be necessary in accordance herewith."

PRAYER

WHEREFORE, the State of Texas prays that the Report of the Special Master be in all things adopted and approved as the judgment of the Court, with the above alternative as to future surveys, and except for determination of the following matters in a subsequent report:

(1) Whether any presently existing islands in the western half of the Sabine were in existence in 1812, and if so, whether they were initially incorporated by Congress into and as a part of the State of Louisiana.

(2) Whether Texas has title to or jurisdiction over any such islands by reason of the Act of July 5, 1848

(9 Stat. 245) or by reason of prescription and acquiescence.

Respectfully submitted,
CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

HOUGHTON BROWNLEE, JR.

J. ARTHUR SANDLIN

JAMES H. QUICK
Assistant Attorneys General

August, 1972

CERTIFICATE

I, Crawford C. Martin, Attorney General of Texas, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the —— day of August, 1972, I served copies of the foregoing Brief of the State of Texas in Support of the Report of Special Master by first class mail, postage prepaid, to the offices of the Governor and Attorney General, respectively, of the State of Louisiana.

CRAWFORD C. MARTIN
Attorney General of Texas

APPENDIX A

THE ATTORNEY GENERAL
OF TEXAS
Austin, Texas 78711
June 30, 1972

Honorable Preston Smith
Governor of Texas
Capitol Building
Austin, Texas 78711

Re: Texas v. Louisiana, Boundary dispute, offshore area

Dear Governor Smith:

We have received the letter directed to you by Attorney General Guste of Louisiana under date of June 21, 1972, protesting the statements of the Director of our Parks and Wildlife Department that the Department intended to exercise regulatory jurisdiction over the east jetty at the gulfward mouth of Sabine Pass. We have looked into this matter and have discussed it with Mr. James U. Cross, the Executive Director of the Parks and Wildlife Department and make to you the following report:

(1) The assertions contained in the June 21st letter from Louisiana Attorney General Guste are substantially correct insofar as they relate to the present posture of the litigation between Louisiana and Texas and insofar as they relate to the fact that Texas and Louisiana mutually agreed that the disputed area gulfward from Sabine Pass was not to be decided in the present controversy and was to be settled later after the inshore boundary had been fixed by final judgment. By this agreement, neither state waived any claim in the disputed area. Neither Texas nor Louisiana should be doing anything in the disputed area different from what has been done in the past, whatever that may have been.

(2) In discussions yesterday between Mr. Robert Flowers of our office and Mr. James U. Cross, the situation was explained, and Mr. Cross assured us that until the gulfward claims are resolved the Texas Parks and Wildlife Department will not attempt to conduct any further operations in the disputed area.

We believe that Mr. Cross's statements reported in the Beaumont paper were due to a perfectly understandable misunderstanding of the nature of the present litigation, and his cooperation as assured to us in yesterday's conversation with him should be sufficient to allow a reassurance to the Attorney General of Louisiana that Texas will abide by its agreement as to operations in or upon any of the disputed area in the Gulf south of the mouth of Sabine River.

We presume that this will be sufficient to conclude this matter, but if further action is necessary, we are at your service to effect whatever is necessary to protect the rights of Texas and forestall any change in the status of the present litigation between Texas and Louisiana.

Sincerely yours,

CRAWFORD C. MARTIN

CCM:vg

cc: James U. Cross
Executive Director
Texas Parks and Wildlife Department
John H. Reagan Building
Austin, Texas 78711

July 3, 1972

Honorable William J. Guste, Jr.
Attorney General of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear General Guste:

Attached is a letter which we believe is self-explanatory, from the Attorney General of Texas to Governor Preston Smith in response to our inquiry relative to your letter of June 21, 1972.

If we can be of further assistance in this regard please let us know.

Sincerely,

HAWTHORNE PHILLIPS
Legal Counsel to the Governor

HP/rg
Attach.
bcc: Carlton Carl