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

No. 36 ORIGINAL

In the
Supreme Court of the United States

OCTOBER TERM, 1969

THE STATE OF TEXAS,

Plaintiff,

v.

THE STATE OF LOUISIANA,

Defendant.

MOTION FOR REHEARING AND ALTERNATIVE MOTION
TO ENLARGE THE REFERENCE TO THE SPECIAL MASTER
TO FIX THE EXTENSION OF LOUISIANA'S INLAND BOUNDARY
INTO THE GULF OF MEXICO BETWEEN LOUISIANA, TEXAS,
AND THE UNITED STATES TO THE EXTENT OF LOUISIANA'S
TITLE UNDER THE SUBMERGED LANDS ACT OR, IN THE
FURTHER ALTERNATIVE, AS A MOTION FOR LEAVE OF
LOUISIANA, WITHIN A TIME TO BE FIXED BY THIS COURT,
TO FILE AN AMENDED CROSS-CLAIM AGAINST TEXAS AND
THE UNITED STATES TO ESTABLISH THE EXTENSION OF
LOUISIANA'S INLAND BOUNDARY INTO THE GULF OF MEXICO
BETWEEN LOUISIANA, TEXAS, AND THE UNITED STATES TO
THE GULFWARD EXTENT OF LOUISIANA'S TITLE AS ACQUIRED
UNDER THE SUBMERGED LANDS ACT, AND TO ASK THAT
THIS CLAIM BE REFERRED TO THE SPECIAL MASTER TO THE
SAME EXTENT AS THE ORIGINAL CLAIM WAS REFERRED
TO HIM IN THIS CASE.

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TO HIM IN THIS CASE.

Now comes the State of Louisiana (Louisiana),
through its Attorney General, and respectfully prays
for (1) a rehearing of this case for the reasons here-
inafter set forth and (2) in the alternative, a motion
to enlarge the reference to the Special Master to fix
the extension of Louisiana's inland boundary into the
Gulf of Mexico between Louisiana, Texas, and the
United States to the extent of Louisiana's title under
the Submerged Lands Act or, in the further alterna-
tive, as a motion for leave of Louisiana, within a time

to be fixed by this Court, to file an amended cross-claim against Texas and the United States to establish the extension of Louisiana's inland boundary into the Gulf of Mexico between Louisiana, Texas, and the United States to the Gulfward extent of Louisiana's title as acquired under the Submerged Lands Act, and to ask that this claim be referred to the Special Master to the same extent as the original claim was referred to him in this case.

I.

A. This Honorable Court determined the intent of Congress as to Louisiana's western boundary in 1812 by relying on statements, acts of the legislatures of State of Texas (Texas) and Louisiana and Acts of Congress in the year 1848, after Texas was admitted into the Union, instead of statements of government leaders, Acts of Congress and the Louisiana Legislature prior to the admission of Texas in the Union in 1845 which recognized Louisiana's boundary as coinciding with that of the United States as settled by the Treaty of Amity, Settlement and Limits between the United States and Spain, dated 1819¹ which was later reaffirmed in 1828 with Mexico² and in 1838 with the Republic of Texas.³ As a result of these treaties, the boundary between the Republic of Texas and the United States was surveyed and staked in 1839-41 by a Joint Commission appointed by the two countries, before Texas was admitted to the Union.

¹ 8 Stat. 252.

² 8 Stat. 373.

³ 8 Stat. 511.

(1) The intent of the United States, in negotiating the Treaty of 1819, and, thereby, finally fixing the boundary of its western state, Louisiana, was evidenced on many occasions and affirmative proof of that intent was offered in evidence by Louisiana, as for instance:

a) The official correspondence of President John Quincy Adams, who negotiated the Treaty of 1819, and Secretary of State Henry Clay, who was in Congress when Louisiana was admitted to the Union, reflect that the Treaty of 1819 established the western boundary of Louisiana.⁴

b) This was also true of statements of Presidents Van Buren and Tyler to the United States Congress about 1840.⁵

c) Another indication that the United States was establishing the western boundary of Louisiana is evidenced by the survey plats of the Joint Commission which clearly reflect the "Republic of Texas" on one side of the Sabine and the "State of Louisiana" on the

⁴ Louisiana Exhibit A, Items 8, p. 92 and Item 9, p. 93; also, pp. 18-22 Brief of the State of Louisiana in Support of the Exceptions to the Report of the Special Master, which will be referred to hereinafter in footnotes as "Brief."

⁵ Louisiana Exhibit A, Items 8, 9, 12, 14 and 15; also pp. 26-27 of Brief; the interpretation of a treaty by the executive branch is entitled to great weight in evaluating the impact of such a treaty and this Court, in examining treaties such as involved in this matter may look to negotiations, diplomatic correspondence, which is of weight. *Factor v. Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933); *Kolovrat v. Oregon*, 366 U. S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961); and *Shaffer v. United States*, 273 F. Supp. 152 (S.D.N.Y., 1967), *aff'd* 400 F. 2d 584 (2d Cir., 1968).

other; there is no reference shown or made to a federal strip or territory in the Sabine.⁶

d) Additionally, prior to 1848, the creation of the Parishes of Caddo,⁷ Sabine,⁸ and DeSoto,⁹ all reflect a western boundary on the west bank of the Sabine and/or “the line between the United States and the Republic of Texas.”

e) There were many other acts of the Louisiana Legislature asserting ownership of the Sabine to its west bank, including granting of the privilege of keeping a ferry, etc.¹⁰

Therefore, both the United States and Louisiana recognized the boundary of Louisiana on the west bank of the Sabine *before* 1848.

(2) As this Court pointed out in its opinion, the Enabling Act,¹¹ Louisiana’s Constitution of 1812, and the Act of Admission of Louisiana of April 8, 1812,¹² all stated that all islands in the Sabine would be in Louisiana. The opinion pointed out that, in the Treaty of 1819, it was provided that all islands in the Sabine belonged to the United States and, as the Court stated in footnote No. 2, neither the Treaty of 1819 or the Treaty of 1828 mentioned Louisiana or its western boundary. There was no need to make such a statement for Congress had already included all islands in

⁶ Louisiana Exhibit F, Items 2 and 3.

⁷ Louisiana Exhibit A, Item 16; also pp. 27-28 of Brief.

⁸ Louisiana Exhibit A, Item 18.

⁹ Louisiana Exhibit A, Item 17.

¹⁰ Louisiana Exhibit H, Item 2 and Item 9, pp. 28-31; also pp. 28-29 of Brief.

¹¹ 2 Stat. 641.

¹² 2 Stat. 701.

the Sabine in Louisiana, and the United States was negotiating with a foreign country, as only it could do under the U. S. Constitution¹³ to settle the boundary between Spain and the United States which, thereby, became the boundary of its westernmost state, Louisiana. It would not have been proper for the United States to state it was negotiating a boundary for one of its states with a foreign power. The establishment of a state's boundary is an internal matter between the United States and the state affected, in this case, Louisiana.

As pointed out in Louisiana's Brief In Support of Its Exceptions to the Report of the Special Master, suppose, in the Treaty of 1819, the boundary had been established on the east side of the Sabine, as one time suggested by Mr. Adams or established at the Mermentau River (many miles to the east of the Sabine) as urged by Mr. de Onis on behalf of Spain. Clearly, when the boundary was finally settled, Louisiana, being the westernmost state, had its boundary firmly and finally established by that Treaty whether Louisiana lost or gained territory. It was not a question of Louisiana acquiring title to additional land, as found by the Special Master in his report.

(3) The evidence presented by Louisiana in connection with the survey of the boundary of 1838-41, namely, that evidence with reference to the resurvey of certain townships on the landed portion of the boundary where the boundary of Louisiana was re-

¹³ Art. I, Sec. 10.

surveyed to coincide with the treaty boundary located by the survey undertaken by the Joint Commission in 1838-41, conclusively show that the boundary on the landed portion of the boundary *between Louisiana and the Republic of Texas* was considered the treaty boundary and there was no evidence or recognition of a federal strip of ownership between Louisiana and the Republic of Texas.¹⁴

(4) Was it the intention of Congress in 1848 to change Louisiana's boundary as established by the Treaty of 1819 even if it could legally do so? We argue no such intent was expressed.

The resolutions of 1848 by Texas and Louisiana both make clear reference to the extension of *jurisdiction*^{14a} over the west half of the Sabine. The Court failed to give adequate consideration to the provisions of the Treaty of 1819, and those following with Mexico and the Republic of Texas, that "the use of waters, and the navigation of the Sabine to the sea . . . throughout the extent of said boundary, on their respective banks, shall be *common to the respective inhabitants of both nations*." (Emphasis ours) The inhabitants of both sides of the Sabine had common use of the water.

The opinion of this Court, in referring to the intent behind the resolutions of the Louisiana and Texas Legislatures of 1848, placed great reliance on a state-

¹⁴ Louisiana Exhibit G; also pp. 24-25 of Brief.

^{14a} See: *Nielsen v. State of Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1909) and *State of Washington v. State of Oregon*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909).

ment from the floor of the Senate by Mr. Butler speaking for the judiciary committee. However, Resolution No. 212 of the Louisiana Legislature of 1848,¹⁵ in referring to the description of the Sabine covered by that resolution, made clear reference to the *western* bank and to "it being the boundary line between the *State of Louisiana, and the State of Texas.*" The Resolution of the Texas Legislature, dated November 24, 1849, accepting the extension of its jurisdiction made clear reference to the fact that its "jurisdiction" was being extended, not ownership.

The single statement of Mr. Butler, relied on by the Court cannot have more significance as to the intent of the different legislative bodies in connection with these resolutions of 1848 than the report of the U.S. Senate action on the Texas Resolution, wherein the chairman of the Judiciary Committee urged the passage of an Act of Congress extending the eastern boundary of Texas to the middle of the Sabine "For the purpose of enabling the latter [Texas] to extend her *criminal jurisdiction* to the Louisiana boundary."

B. Even if the Court refuses to reconsider Louisiana's western boundary contention, it was in error in fixing the boundary in the geographic middle for these reasons, among others, namely:

1) This Honorable Court gave special emphasis to the resolutions of 1848 in construing the intent of Congress in 1812 insofar as whether the boundary of

¹⁵ Louisiana Exhibit A, Item 19.

Louisiana was the middle or the middle of the navigable channel. The Court stated:

“* * * we think the Act of 1848 and the events connected with its passage had special significance as a construction by the United States and Louisiana of the earlier act admitting Louisiana to the Union.”

However, Resolution No. 212 of the Louisiana Legislature of 1848,¹⁶ to which the opinion specifically refers, in resolving that the Constitution and *jurisdiction* of Louisiana should be extended to the west bank, specifically described the area as follows:

“* * * between the middle of the Sabine river and the western banks thereof, to begin at the mouth of the said river, where it empties into the Gulf of Mexico, and thence to continue along the *said western bank to the place where it intersects the 32° of North latitude, it being the boundary line between the said State of Louisiana and the State of Texas.*” (Emphasis ours)

This resolution specifically referred to Louisiana's western boundary as the west bank of the Sabine rather than the middle of the Sabine.

2) The Louisiana Constitution of 1812, involved in this case, was also involved in this Court's ruling concerning the water boundary between Louisiana and the State of Mississippi. This Honorable Court, in that case, and based on the same Constitution, applied the Thalweg Rule and said: “By the language, ‘a line drawn along the middle of the River Mississippi from

¹⁶ Louisiana Exhibit A, Item 19; also, pp. 33-35 of Brief.

its source to the River Iberville,' as there used, is meant along the middle of the channel of the River Mississippi." ¹⁷

The effect of the ruling of this Court in the instant litigation will create doubt in long established river boundaries between states and particularly those states long the Mississippi River where the court had ruled the identical or similar language meant the middle of the navigable channel or the thalweg.

Is it the intention of this Court to now place the Louisiana eastern water boundary in doubt? We believe not. This matter alone is sufficient for this Court to grant a rehearing.

3) Additionally, Louisiana urges that this Court has not decided the time at which the "middle" of the Sabine is to be determined, whether that phrase is finally decided to be the "thalweg" or the "geographic middle." Louisiana filed and introduced into evidence certain maps prepared in conjunction with the Joint Commission's survey of 1839-41, which show various channels where Sabine River enters Sabine Lake.¹⁸

There is a very serious and important question as to the position the boundary line should take where Sabine River enters Sabine Lake, since there were four passes at this point originally.¹⁹ Even if this Court

¹⁷ *State of Louisiana v. State of Mississippi*, 202 U.S. No. 1, 26 S.Ct. 405, 50 L.Ed. 913 (1906); also pp. 44-45 of Brief.

¹⁸ Louisiana Exhibit K, Item 1 and Appendix, Item 5 of Brief; also pp. 77-79 of Brief.

¹⁹ Louisiana Exhibit K, Items 1, 7, 12, and 13; also, Louisiana Exhibit N(a), particularly Sheets 18 of 21 sheets attached thereto.

recognizes Texas' claim to the "geographic middle" of the Sabine, the boundary should still be drawn in the westernmost pass because of the decision of the Interior Department in the 1910 case involving the "Narrows", which held that Louisiana was and is entitled to the "west bank of the west branch."

4) However, the primary question is the time at which to determine the "middle" of the Sabine. Louisiana urges this Court grant a rehearing so that this question can be determined before the case is again referred to the Special Master, or that this matter be left open for the Special Master to determine.

Louisiana contends that the "middle" of the Sabine should, whichever construction of that term is ultimately given by this Court, be determined as of the date of Louisiana's entry to the Union, 1812, or at least with reference to the earliest surveys of the Sabine. It is necessary to locate the middle of the Sabine in 1812 to determine what islands were located in the west half and what islands were located in the east half.

C. Although the question of ownership of the islands in the west half of the Sabine has again been referred to the Special Master, Louisiana urges that this Court grant a rehearing and decide the question of the ownership of the islands in the west half of the Sabine, particularly in light of the fact that the Special Master rejected Louisiana's claims to islands formed after 1812 in the western half of the Sabine and held that such islands belonged to Texas.²⁰

²⁰ See: pp. 86-92 of Brief.

The Court stated: "but unless the 1848 Act conveyed to Texas the islands located in the western half of the river at that time, title to those islands remained in the United States, if the United States had not previously conveyed all or part of them to Louisiana." The islands in the west half of the Sabine were definitely conveyed to Louisiana, under any interpretation of the Enabling Act, Constitution of Louisiana of 1812, and/or the Act of Admission of Louisiana and, therefore, under Article IV, Section 3 of the United States Constitution, the United States could not have given the islands in the west half of the Sabine to Texas, without the consent of Louisiana, which was not granted. Texas, therefore, has no interest in these islands.

II.

The reference to the Special Master should be enlarged to include the establishment of Louisiana's lateral boundary in the Gulf of Mexico between Louisiana, Texas and the United States or, in the alternative, this should be treated as a motion for authority of Louisiana to file a cross-claim asking for the establishment of such boundary and reference to the Special Master to hear evidence on that issue.

The Court has suggested the United States be made a party to this suit to determine the ownership of islands in the west half of the Sabine. Now that the United States is to be made a party to this suit it is important to settle this lateral boundary. The location of Louisiana's coastline has been referred to the Hon-

orable Walter P. Armstrong, Jr.,²¹ Special Master, but the reference did not include the establishment of the lateral boundary in the Gulf of Mexico between Louisiana, Texas, and the United States.

Louisiana urges the reference to the Special Master in this case should be enlarged giving and granting to the Special Master authority to receive appropriate pleadings by Louisiana, Texas and the United States to establish the boundary in the Gulf of Mexico between Louisiana, Texas and the United States and to hear evidence and to report his findings to this Court along with the other issues to be considered by him.

As recently as June 17, 1972, officials of Texas have made statements and claims east of the east jetty at the Sabine Pass of territory which has always been under the control and possession of Louisiana.²² These claims will precipitate another lawsuit between Louisiana and Texas and the United States unless settled in this litigation.

The Special Master in this case has considered evidence in connection with Louisiana's inland water boundary between Louisiana and Texas and is in a better position to hear and consider evidence to establish an extension of this boundary into the Gulf of Mexico to the extent of Louisiana's title under the Submerged Lands Act of 1953.²³ This would eliminate multiplicity of litigation and provide for an early settlement of this dispute. Texas has already settled

²¹ *United States v. State of Louisiana*, 394 U.S. 11.

²² Item No. 4, Appendix A, of Brief.

²³ 67 Stat. 29; 43 U.S.C. 1301-1315.

its offshore claim with the United States. Louisiana is in the process of doing so and this reference would provide a determination of the remaining open offshore dispute involving Louisiana, Texas and the United States.

In the event this Court determines additional pleadings are required to enlarge the reference to the Special Master to settle this lateral boundary between Louisiana, Texas and the United States in the Gulf of Mexico, Louisiana asks this Court to consider this as a motion for leave to file, within a time to be fixed by the Court, an amended crossclaim against Texas and the United States to establish the extension of the boundary between Louisiana, Texas and the United States into the Gulf of Mexico to the extent of Louisiana's title as acquired under the Submerged Lands Act and to request this claim be referred to the Honorable Robert Van Pelt, as Special Master, to receive additional pleadings, to hear evidence and report to this Court on such boundary along with the report on other matters referred to the Special Master by the Court.

WHEREFORE, the State of Louisiana prays that a rehearing be granted in this case.

PRAYS FURTHER, in the alternative, that the reference to the Special Master be enlarged to authorize him to receive pleadings by Louisiana, Texas and the United States to fix the lateral boundary between Louisiana, Texas and the United States as it extends from Louisiana's inland western boundary into the

Gulf of Mexico to the extent of the rights acquired by the State of Louisiana under the Submerged Lands Act, and to hear evidence and to report his findings to this Court as to such boundary in the Gulf of Mexico between Louisiana, Texas and the United States.

PRAYS FURTHER, in the alternative, that if the Court should refuse to enlarge the reference as above prayed for, that this pleading be treated as a motion for leave of Louisiana, within a time to be fixed by this Court, to file an amended crossclaim against Texas and the United States to establish the extension of Louisiana's inland boundary into the Gulf of Mexico between Louisiana, Texas and the United States to the Gulfward extent of Louisiana's title as acquired under the Submerged Lands Act, and to ask that this claim be referred to the Special Master to the same extent as the original claim was referred to him in this case.

PRAYS FURTHER for all orders and decrees necessary in the premises; for all, general and equitable relief.

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

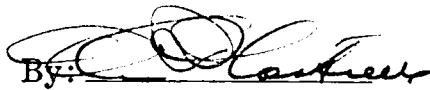
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CERTIFICATE

I, WILLIAM J. GUSTE, JR., Attorney General of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1973, I served copies of the foregoing motion for rehearing and alternative motion to enlarge the reference to the Special Master to fix the extension of Louisiana's inland boundary into the Gulf of Mexico between Louisiana, Texas and the United States to the extent of Louisiana's title under the Submerged Lands Act or, in the future alternative, as a motion for leave of Louisiana, within a time to be fixed by this Court, to file an amended cross-claim against Texas and the United States to establish the extension of Louisiana's inland boundary into the Gulf of Mexico between Louisiana, Texas, and the United States to the Gulfward extent of Louisiana's title as acquired under the Submerged Lands Act, and to ask that this claim be referred to the Special Master to the same extent as the original claim was referred to him in this case, by transmitting conformed copies of the same, by first class mail, postage prepaid, to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Texas, and upon the Solicitor General of the United States, in compliance with Rule 33.2(b) of the Rules of the Supreme Court of the United States, since the Report of Special Master has raised the question of the con-

stitutionality of an Act of Congress of July 5, 1848
(9 U. S. Stat. 245).

A handwritten signature in cursive script, appearing to read "W. J. Guste, Jr.", written in dark ink.

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

