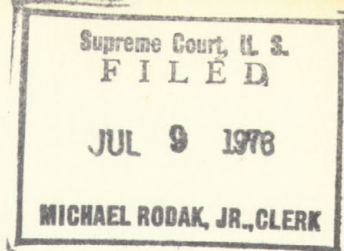


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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

* * *

NO. 36, ORIGINAL

* * *

THE STATE OF TEXAS,

Petitioner

V.

THE STATE OF LOUISIANA,

Respondent

* * *

PETITION FOR REHEARING OF
THE STATE OF TEXAS

* * *

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July, 1976

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PETITION FOR REHEARING OF
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* * *

Pursuant to Section 1, Rule 58, Supreme Court Rules, Petitioner, State of Texas, respectfully prays for a rehearing of the decision and judgment of this Court insofar as it establishes the offshore lateral boundary between Texas and Louisiana and Texas and the United States.

In light of the fact that litigation has spanned five years and this Court has heretofore sustained the contentions of Texas that:

- (1) the middle of the River Sabine is the true boundary against the contention of Louisiana that it was located on the west bank;
- (2) title to Pleasure Island rested in the State of Texas and subsequently in the City of Port Arthur against contentions that ownership was elsewhere;
- (3) the boundary between the States at the northern

end of Sabine Lake runs through "middle pass" rather than "west pass" as asserted by Louisiana; and

(4) the offshore lateral boundary between the states is a line eastward of a line contended for by Louisiana, some question may exist as to why the State of Texas persists in urging this Court to reconsider a portion of its June 14, 1976 decision. However, the State of Texas believes that this final position must be urged on the Court not only because it is the legally correct position but also because of the impact of the court's holding on subsequent boundary litigation. Petitioner urges the following points for reconsideration:

I.

THE COURT ERRED IN FAILING TO ESTABLISH THE LOCATION OF THE HISTORIC INCHOATE BOUNDARY BETWEEN TEXAS AND LOUISIANA

The State of Texas has urged this Court to find that there existed an inchoate boundary between Texas and Louisiana and further urged that appropriate legal standards be applied to such boundary.

This Court has apparently recognized the existence of the historic inchoate boundary between Texas and Louisiana, (*Texas v. Louisiana*, No. 36, Original, June 14, 1976, p. 4), but dismissed its responsibility to assist in the determination of what that boundary was and is by saying:

"The Court should not be called upon to speculate as to what Congress might have done." *Texas v. Louisiana*, No. 36 Original, June 14, 1976, p. 5.

The Court erred in this approach and should have made

the determination on the legal basis compelled by the law as previously established and used by this Court. As early as 1920 this Court adopted the principle of ascertaining the intent of Congress to judicially establish boundaries between states. *Minnesota v. Wisconsin*, 252 U.S. 273 (1920). In *Wisconsin v. Michigan*, 295 U.S. 455, 461 (1935), the principle was succinctly stated and set out by this Court:

“As it is impossible to identify any channel in the bay as that indicated by the acts referred to, *the intention of Congress must be otherwise ascertained.*” (Emphasis added.)

And, as later put by Mr. Justice Black,

“There are, of course, no markers out in the Gulf of Mexico to show where the boundaries were when the states were admitted. Since some were admitted anywhere from 140 to 150 years ago, there are no living witnesses to testify where their boundaries were at the time. But despite these difficulties, it is our duty to give effect to the congressional act as best we can.” *United States v. Louisiana*, 363 U.S. 1, 90 (1960).

See also New Mexico v. Texas, 257 U.S. 279 (1927).

Prior holdings of this Court have also clearly established that whatever line adopted by this Court based on historic title, documents and events could not have been varied by the subsequent building of jetties. The jetties are clearly an avulsive action. The establishment or altereation of a state's boundary by this method has never been sanctioned by this Court in the past; in fact, it has been repeatedly rejected. *Nebraska v. Iowa*, 143 U.S. 359 (1892); *Washington v.*

Oregon, 211 U.S. 217 (1908); *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Minnesota v. Wisconsin, supra, Durfee v. Duke*, 375 U.S. 106 (1963); *James v. State*, 72 S.E. 600 (C.A. Georgia, 1911); *Whiteside v. Norton*, 205 F. 5 (8th Cir. 1913), cert. denied 232 U.S. 726 (1913); *Stowe v. United States*, 71 F.2d 826 (8th Cir. 1923). This Court's refusal to determine this boundary dispute on the basis of historic title and document is in direct contradiction to a legal principle outstanding for more than fifty years. Contrary to this Court's comment in footnote 4 of its opinion herein, Texas submits that the decision of this Court is inconsistent with its opinion in *United States v. Louisiana*, 389 U.S. 155 (1967). In that case, it is true that the court found no reason to "resort to international law; Texas has simply been given that amount of submerged land it owned when it entered the Union." 389 U.S. at 160. In the instant case, Texas is again seeking simply the amount of submerged land it had when it entered the Union; yet, the Court today finds a need to resort to international law to make this determination. In its improper application of international law, *infra*, the Court has clearly granted Texas less submerged land than it had on entry to the Union and has allowed the diminution in ownership to be based solely on the avulsive construction of jetties by the Corps of Engineers.

II.

THE COURT ERRED IN ESTABLISHING THE LATERAL BOUNDARY BY REFERENCE TO MANMADE AVULSIVE JETTIES BECAUSE OF AN IMPROPER APPLICATION OF THE 1958 GENEVA CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE.

The decision of this Court to adopt the Report of the Special Master applying the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (hereinafter referred to as the Geneva Convention) to the present shorelines of Texas and Louisiana including the jetties exposes future litigants to the danger of disposition of controversies of this sort, not by the rule of law, but by the haphazard construction of navigational aids. The actual offshore lateral boundary between Texas and Louisiana and Texas and the United States has been determined, not by the Acts of Congress in admitting the respective states into the Union, not even by the proper application of the Geneva Convention, but by the action of the United States Corps of Engineers in constructing jetties for navigational purposes.

The State of Texas respectfully urges that the Special Master and this Court have allowed this result through the improper application of the Geneva Convention to the instant case. Article 12 of the Convention provides:

"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured."

A proper application of this Article, designed to resolve disputes between two separate nations, would be as follows:

"Where the coasts of two States [TEXAS AND LOUISIANA], are opposite or adjacent to each other, neither of the two States [TEXAS OR LOUISIANA] is entitled, failing agreement between them [TEXAS AND LOUISIANA] to

the contrary, to extend its [TEXAS OR LOUISIANA] territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States [TEXAS AND LOUISIANA] is measured."

It is well established that by virtue of this Court's decision in the *United States v. Louisiana*, 389 U.S. 155 (1967), Texas may not utilize the west jetty in determining the breadth of her territorial sea as Louisiana does. To avoid the clear and admitted inequitable situation of constructing a median line using only the east jetty, the Special Master, and this Court, have determined that Article 12 can be *literally* applied without reaching an inequitable result. This is accomplished by the Master's statement that:

"Only the United States has a territorial sea, and it is measured from the Convention coastline, including the jetties." (Report of the Special Master, p.44.)

The Master's *literal* application of Article 12, then, reads as follows:

"Where the coasts of two States [TEXAS AND LOUISIANA] are opposite or adjacent to each other, neither of the two States [TEXAS OR LOUISIANA] is entitled, failing agreement between them [TEXAS AND LOUISIANA] to the contrary, to extend its [TEXAS AND LOUISIANA] territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States [THE UNITED STATES] is measured."

Or, alternatively, in line with the Master's Report stating that Texas and Louisiana have no territorial sea, the prohibition phrase in Article 12 would read:

" . . . neither of the two States [TEXAS OR LOUISIANA] is entitled . . . to extend its [THE UNITED STATES] territorial sea beyond the medial line "

While, " 'the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome.' " (*Texas v. Louisiana*, No. 36 Original, June 14, 1976, p. 5), the State of Texas submits that the above discussion illustrates that, because of the circumstances of this case, the literal application of the Geneva Convention does not provide the answer because it requires the use of only the east jetty, an admittedly unacceptable boundary line. The *literal* application used by the Master and this Court requires the inconsistent substitution of features belonging to different governmental units. Such an application of the Geneva Convention does not follow any principles of international or domestic law. The State of Texas further submits that the resolution of this boundary dispute between two sovereign states is not a lesser problem related to coastlines, but a most important issue relating to boundary determination for all coastal states.

By its own terms the second sentence of Article 12 of the Geneva Convention recognizes that circumstances may exist which will require a departure from its formula for establishing adjacent offshore boundaries.

"The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances

to delimit the territorial seas of the two States in a way which is at variance with this provision."

As recognized by this Court, all parties agree that the equidistant principle set out in Article 12 should be applied. The use of the Geneva Convention to determine precisely which coastline should be utilized in constructing the equidistant line results in the anomolous situation set out above. But the Special Master, and subsequently this Court, attempting to ignore the true result of the application of Article 12, have decided that under the second sentence of Article 12:

"To the extent the jetties are special circumstances in this case, they are to be included rather than ignored." (Special Master's Report, p.45.)

This determination is made in complete disregard of the overwhelming testimony at trial from expert witnesses of the United States (Dr. Hodgson, Tr., p. 647-657), and of Texas (Young, Tr., p. 955, 974; Dr. Alexander, Tx. Exh. "LLL", "LLL-1", and the writings of the former Special Assistant to the Director of the United States Coast and Geodetic Survey) (Shalowitz, Tx. Exh. "YYY", p. 16-17, Shalowitz Memorandum). The conclusion of this Court is not supported by the law, the evidence, or the testimony.

CONCLUSION

The State of Texas urges that this Court follow its own precedents and apply appropriate legal standards for the precise determination of the offshore lateral boundary between Texas and Louisiana. The State of Texas further urges that, if the Geneva Convention is to be utilized, this Court acknowledge that its true

application results in the inequitable boundary line constructed with reference to the east jetty only and therefore the jetties at the mouth of the Sabine River are to be considered special circumstances, the jetties are to be excluded in constructing a median line or equidistant boundary based on the weight of testimony and evidence at trial, and the well-established principles of boundary law relating to avulsive alterations to a coastline or boundary.

WHEREFORE, PREMISES CONSIDERED, the State of Texas, Petitioner, herein moves the Court to grant the rehearing herein prayed for.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that the within Petition for Rehearing is presented in good faith and not for delay.


ELIZABETH LEVATINO

CERTIFICATE OF SERVICE

I, Elizabeth Levatino, Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of July, 1976, I served copies of the foregoing Petition for Rehearing of the State of Texas, by transmitting conformed copies of the same First Class Mail, postage prepaid, to the Special Master, the Office of the Governor and the Office of the Attorney General, respectively, of the State of Louisiana, and upon the Solicitor General of the United States, and also upon the City of Port Arthur, Texas, through its City Attorney.


ELIZABETH LEVATINO

