No. 130, ORIGINAL

In The

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

v.

STATE OF MAINE,

Defendant.

DEFENDANT'S REPLY BRIEF TO NEW HAMPSHIRE'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES

STATE OF MAINE

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REPLY BRIEF

Maine filed a motion to dismiss on *res judicata* grounds, supported by two volumes of undisputed material. New Hampshire filed a brief in opposition, generally choosing to submit little, if any, countervailing material. Maine duly replied. Thereafter, at the Court's invitation, the United States, through the Solicitor General, filed an *amicus curiae* brief recommending that Maine's motion be granted. Subsequently, on January 5, 2001, New Hampshire submitted its "Brief in Response to Brief for the United States as Amicus Curiae." Because New Hampshire used this filing as an opportunity to proffer new theories and a volume of material, much of it in the way of a surreply to Maine's Reply Brief, Maine respectfully files this brief in reply.

ARGUMENT

The focus of New Hampshire's response to the United States' conclusion that the state's claim is barred by *res judicata* is that New Hampshire should be allowed "to present historical and legal evidence pertaining" to the meaning of the 1740 King's Decree and this Court's 1976 Decision and 1977 Decree. Plaintiff's Reply Brief at 1, 7, 9. In considering a *res judicata* defense, the Court first looks to the pleadings, briefs, judgments, and decrees. *See, e.g., Nevada v. United States*, 463 U.S. 110, 131-34 (1983); *Oklahoma v. Texas*, 256 U.S. 70, 86, 88 (1921). The United States concluded that these key documents alone

resolve the issue here.[1] United States Brief at 14. Although other relevant evidence may be considered (18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4406 (1981)), to avoid dismissal it is incumbent upon New Hampshire at the very least to present at this stage *relevant* evidence raising a material issue that rebuts the clear language of the pleadings and decrees. Because New Hampshire has failed to do so, Maine's motion to dismiss should be granted.

I. THE 1740 KING'S DECREE BARS NEW HAMPSHIRE'S CLAIM TO A BOUNDARY ALONG MAINE'S SHORE.

In its review as *Amicus Curiae*, the United States determined that King George II's 1740 Order conclusively established the boundary as the middle of the river. United States Brief at 10-14. In response, New Hampshire's evolving positions have coalesced into contradictory theories. New Hampshire now appears to agree that the 1740 Decree does indeed set the boundary but argues that alleged "contemporaneous" or "post-1740" acts show that the "middle of the river" line fixed therein has somehow migrated to Maine's shoreline. New Hampshire Response Brief at 2-3. New Hampshire wishes to present historical and legal evidence that "middle" means shoreline. *Id.* at 4-5. Elsewhere, however, New Hampshire persists in claiming that the King's Commissioners in the

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[1] Maine agrees but suggests that other material buttresses this conclusion as well. Maine Reply Brief at 5.

1730's did not have before them this boundary line or the authority to recommend a decision thereon. *Id.* at 5-6.

New Hampshire has failed to identify anything that reasonably disputes New Hampshire's 1733 petition, which clearly sought to have the King in Council establish and determine its boundary with the Province of Maine, or the New Hampshire and Massachusetts pleadings arguing that claim. Maine App. at 1a-19a. Likewise, New Hampshire has yet to provide legal or historical support to counter the well-established precedent that the King's decree fixed the boundaries. *See, e.g.*, J. Smith, *Appeals to the Privy Council from the American Plantations*, 442-58 (1950); II J. Story, *Commentaries on the Constitution*, § 1681 (5th ed. 1891).

The only "contemporaneous" acts identified in New Hampshire's Response Brief are an unreproduced 1782 letter from a New Hampshire official to the President of New Hampshire and a 1763 survey of the Salmon Falls River area. New Hampshire Response Brief at nn.1, 6 & 9. The 1782 letter did not purport to deal with boundaries but rather focused on collection of duties which has been discussed previously (*see* discussion in Maine's Reply Brief at 3-4). New Hampshire persists in pressing the 1763 survey of the Salmon Falls River ponds and branches north of the Piscataqua River as somehow establishing a shoreline boundary in the Piscataqua. As pointed out by the 1828 New Hampshire Boundary Commissioners, the 1760's dispute involved only the Salmon Falls River. Maine App. at 117a-123a; Maine Supp. App. at 1a-6a. The survey on its face does not purport to be a final boundary survey, and there is no hint the survey was adopted or recognized as setting a boundary in the Piscataqua (for

example, the drawing of the Piscataqua and islands therein is at best rough and approximate). Indeed, thereafter, in 1767, a New Hampshire legislative committee reiterated that the boundary "shall pass up thro' the mouth of the Piscataqua Harbour & up the middle of the River into the River of Newichewanock." Maine App. at 83a. Particularly in the face of the pleadings and the 1740 Decree, as well as the Crown's 1741 and 1761 Instructions to the New Hampshire Governor reiterating the "middle of the river" boundary (Maine App. at 26a-29a, 32a-33a), New Hampshire's proffer falls far short of presenting an issue drawing into question the clear language of the pleadings and decree.

New Hampshire next criticizes the United States' statement that Special Master Clark and Maine shared the same view of history because, according to New Hampshire, Special Master Clark recommended geographic middle rather than thalweg as the boundary. New Hampshire Response Brief at 3. New Hampshire misses the point. The views of the Special Master and Maine (and for that matter this Court and New Hampshire as well in 1976) were in agreement that the 1740 Decree established the boundary as the "middle of the river."

New Hampshire argues that a main navigational channel boundary was implausible as the "middle" due to the alleged lack of navigational aids in the 18th century. New Hampshire Response Brief at 8-9. The thalweg doctrine, however, has its roots in a period earlier than the Treaty of Munster in 1648, and is the generally applicable rule regarding river boundaries. *Louisiana v. Mississippi*, 516 U.S. 22, 25 (1995); *New Jersey v. Delaware*, 201 U.S. 361, 379 (1934); *Iowa v. Illinois*, 147 U.S. 1, 10 (1893);

see also "New Hampshire-Massachusetts" Map (1733), reproduced in Plaintiff's Lodging at 40-42 (depicting "Ship Channell Entrance of Piscataqua" through inner harbor).

The Solicitor General did not find it necessary to reach the issue of whether modern *res judicata* rules applied to a King's Decree in view in particular of the clear import and effect of the Supreme Court's 1976 decision in *New Hampshire v. Maine*. United States Brief at n.11. From this, New Hampshire argues that the United States agrees with New Hampshire that *res judicata* rules do not apply to the 1740 Decree. New Hampshire Response Brief at n.5. The United States brief does not so agree and, in any case, New Hampshire's argument is wrong. New Hampshire presents no law contrary to the undisputed precedent that a king in council decision is binding on the parties. *See Ridsdale v. Clifton*, Law Reports, 2 P.D. 276, 306-07 (P.C. 1877); *see also Rhode Island v. Massachusetts*, 45 U.S. 591, 634 (1846) (King's 1740 Decree bound the parties although it did not create a rule of law for other litigants). New Hampshire ignores the basic underpinnings of *res judicata*: where the parties pursue a resolution in a neutral tribunal, with the intent to abide by the result, the parties are bound thereby. *See British Transport Commission v. United States*, 354 U.S. 129, 137-138, 140 (1957) (claimant who chose to resort to a nation's forum is bound by a decision thereof). Simply put, New Hampshire sought a shoreline boundary in the 1730's and lost, and it has now failed to present any material legal or evidentiary issue to overcome the clear language of the 1740 Decree setting the boundary at the "middle."

II. THIS COURT'S 1976 DECISION AND 1977 DECREE BAR RELITIGATION OF THE BOUNDARY.

New Hampshire attacks the United States' reliance upon issue preclusion rather than judicial estoppel[2] or claim preclusion.[3] Any or all of those theories support *res judicata* under these circumstances.[4]

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[2] The United States did not appear to reject judicial estoppel out of hand but found it unnecessary to press this theory upon the Court. United States Brief at n.13. As noted in *Illinois v. Campbell*, 329 U.S. 362 (1976), ordinarily a state's prior positions in court do not bind it. But this is not an *ordinary* case. *See* Maine Reply Brief at 9.

[3] The definition of what constitutes the same cause of action has not remained static. *Nevada v. United States*, 463 U.S. 110, 130 (1983). Under the first Restatement of Judgments, § 61 (1942), causes of action were deemed to be the same "if the evidence needed to sustain the second action would have sustained the first action." *Nevada*, 463 U.S. at 131 n.12. In the Restatement (Second) of Judgments, § 24 (1982), a more pragmatic approach was adopted, looking to a determination whether the claims are products of the same "transaction" to be determined by giving weight to such considerations as whether the facts are related in time, space or origin, whether they form a convenient trial unit, and whether treatment as a unit conforms to expectations, understandings or usage. *Id.* Under either the "same evidence" or the "transaction" analysis, claim preclusion applies here. It simply is impossible to ascertain the lateral marine boundary without determining the effect and meaning of the 1740 Decree. Any claim that the 1740 Decree fixed the boundary at the shoreline, under whatever theory, therefore, was required to be raised and is therefore now lost. *See* Maine's Motion to Dismiss at 29.

[4] New Hampshire again misstates Maine's position on this issue by suggesting that Maine declined to argue that the parties "had any actual understanding that the agreement would bind

New Hampshire argues against issue preclusion alleging that a "consent decree" does not support preclusion of an issue unless the intent of final resolution is evinced on that issue, and no such intent is present here. New Hampshire Response Brief at 10. New Hampshire is wrong for a number of reasons.

First, the "consent decree" exception does not even apply. New Hampshire continues to ignore that the Court independently determined, as it was required to do in view of the Compact Clause, that "the 1740 Decree, not the proposed consent decree, permanently fixed the boundary between the states . . . . " *New Hampshire v. Maine*, 426 U.S. 363, 368 (1976). The 1976 decision certainly was not a *pro forma* acceptance by a court of an agreement between parties to settle for reasons undisclosed, ambiguous or opaque. *United States v. International Building Co.*, 345 U.S. 502, 505-06 (1953); *see also Arizona v. California*, 120 S.Ct. 2304, 2320-21 (2000). Both Maine and New Hampshire clearly understood that the Court could not simply rubber stamp the states' proposed resolution. *See, e.g.*, New Hampshire Reply Brief in Original No. 64, at 2, 12-18 (Maine App. at 458a, 469a-74a) ("The exercise of judicial power requires that the Court independently

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them with respect to parts of the boundary not then at issue." New Hampshire Response Brief at n.14. Maine has repeatedly contended that New Hampshire is bound by the pleadings and decree which evince the intent and understanding that the "middle of the river" is the boundary in the Piscataqua. *See, e.g.*, Maine's Motion to Dismiss at 15-18, 29. While Maine believes judicial estoppel and claim preclusion provide stronger bases to dispose of New Hampshire's claim, Maine certainly has never conceded that the boundary was not in issue in the 1970's.

examine the proposed consent decree and grant or withhold approval in accordance with the applicable law, and the evidence in the record."); Transcript of Oral Argument at 32 (N.H. Supp. App. at 131a). In the 1970's case, the Court most clearly exercised its judicial power by independently concluding that the "middle" boundary was established by the 1740 Decree.

Second, New Hampshire's intent is discerned from its briefs to this Court:

> The "middle of the river" . . . constituted the boundary between the states from and after the 1740 Decree, and . . . constitutes the boundary to this day . . . [T]he present river boundary is the one established by the 1740 Decree . . .

New Hampshire Exceptions and Brief in Original No. 64, at 5 (Maine App. at 419a). In that case, New Hampshire actively pled, understood and intended that the 1740 Decree established the boundary in the "middle" of the Piscataqua River – without limitation. Nowhere in any document in the 1970's litigation referred to by New Hampshire did that state suggest that its boundary with Maine was along Maine's shoreline anywhere on the Piscataqua. New Hampshire consistently stated, without equivocation, that it was the boundary of the river – not just the harbor mouth – that was being resolved. *See, e.g.*, Maine App. at 444a.

Third, New Hampshire suggests that because the dispute focused on the lateral marine boundary, it has no preclusive effect upon the "inner harbor." As correctly noted by the United States, and undisputed by New Hampshire, the determination of the lateral marine boundary cannot be made without ascertaining the "middle of the river." New Hampshire's present notion

that the "middle of the river" boundary between Maine and New Hampshire was intended at one point in the Piscataqua to be the "middle," but at another point at the shoreline finds no support in any pleading in the 1970's case, the 1976 decision, the 1977 Decree, or any legal theory. Although New Hampshire suggests that there is not a "scintilla" of evidence that the "middle of the river" resolution was intended by the states to resolve the boundary of the inner harbor (New Hampshire Response Brief at n.16 & n.17), New Hampshire repeatedly pled in that litigation that the boundary in the "Piscataqua River" was the middle as fixed by the 1740 Decree (*e.g.*, Maine App. at 314a-15a, 419a, 444a, 458a, 462a) and the Court's decree unambiguously established the "middle" to be the main navigational channel of the "Piscataqua River" – not just at its mouth. Simply put, there is nothing in the pleadings or decree indicating any reservation to argue later that "middle of the river" means a shoreline boundary. The construction placed on a treaty, charter or decree in establishing a boundary settles the construction for its entire course. *See Oklahoma v. Texas*, 256 U.S. 70, 93 (1921). Indeed, the 1977 Decree describes the exact location of the "middle" boundary at least one mile inside the mouth of the harbor. *New Hampshire v. Maine*, 434 U.S. 1 (1977).

Next, New Hampshire suggests that contemporaneous statements defeat any finding of intent that the 1976 Decision resolved the boundary in the river. New Hampshire Response Brief at 13-14. New Hampshire points to a variety of correspondence,[5] press releases, and briefs.

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[5] The very documents New Hampshire now presents underscore why *res judicata* applies here. New Hampshire would require inquiry of the attorneys and officials involved at

N.H. Supp. App. at 47a-99a. A review of those documents reveals nothing changing New Hampshire's pleadings that the 1740 Decree set the river boundary at the middle.[6] Indeed, the only "contemporaneous" statements directly on the issue are those of the New Hampshire Attorney General that the shipyard is in Maine. Maine App. at 303a-308a, 488a-409a.

New Hampshire's last argument is that its Attorney General in the 1970's had no authority to settle the location of the boundary in the river. New Hampshire Response Brief at 18-19. New Hampshire's Attorney General certainly had authority to litigate and settle all claims and issues arising out of its suit, including whether the 1740 Decree fixed the boundary between the states as the "middle" and what that meant. Indeed, at the time, the New Hampshire Attorney General understood that be it geographic middle or thalweg, the islands nearest each state were part thereof. Maine App. at 462a-63a; N.H. Supp. App. at 134a. The only clear intent evinced by the New Hampshire Attorney General was that the location in the "middle" places the shipyard in Maine. The Attorney General of New Hampshire flatly so stated in his 1969 Opinion before the 1970's litigation and his 1986 report thereafter. Maine App. at 303a-08a, 488a-91a.

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the time – an awkward and uncertain endeavor at best because of the adversarial nature of that litigation at both its inception and conclusion.

[6] New Hampshire also quotes a portion of the oral argument. As explained previously, New Hampshire's careful cropping of its quote is both misleading and inaccurate. Maine Reply Brief at n.10.

Respectfully submitted,

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