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No. 130, Original

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IN THE,

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

v.

STATE OF MAINE,

Defendant.

**NEW HAMPSHIRE'S PETITION
FOR REHEARING**

STATE OF NEW HAMPSHIRE

PHILIP T. McLAUGHLIN
Attorney General

LESLIE J. LUDTKE*
Associate Attorney General
N.H. Department of Justice
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3658

JOHN R. HARRINGTON, ESQUIRE
Special Counsel
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256
(603) 224-2341

Counsel for Plaintiffs

** Counsel of Record*

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Now Comes the state of New Hampshire, by and through the Attorney General, and respectfully requests, under Rule 44, rehearing of this Court's Order granting the state of Maine's Motion to Dismiss. In support of its Petition for Rehearing, New Hampshire states as follows:

INTRODUCTION

The Court's application of judicial estoppel to New Hampshire's claim is legally unprecedented. The cases cited by this Court establish that to sustain the application of judicial estoppel at least three elements must be present: the party to be estopped must have asserted an inconsistent position in prior litigation; the estopped party must have succeeded in maintaining that position; and the estopped party must have taken the inconsistent position in bad faith or with knowledge of its falsity, or have used that position to gain an advantage over the opposing party. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982); *Scarano v. Central R. Co.*, 203 F.2d 570 (3rd Cir. 1958); *United States v. Hook*, 195 F.3d 299 (7th Cir. 1999). The Court's conclusion that New Hampshire's claim satisfies these three elements of judicial estoppel is wrong because it relies on an erroneous characterization of the 1976 proceedings and, in the end, justifies dismissal of New Hampshire's claim on "equitable" grounds.

When New Hampshire entered the Union in 1789, it surrendered a measure of sovereignty, including the right to resolve disputes concerning its boundaries by diplomacy or war. The constitutional grant of original jurisdiction to this Court was intended to provide a forum for sovereign states to resolve legitimate disputes concerning their boundaries. By its decision, this Court has failed to discharge the constitutional responsibilities that it owes to New Hampshire as a sovereign state.

A case of this magnitude, affecting New Hampshire's most basic and fundamental sovereign interest in its boundaries, should not be disposed of on the basis of a novel application of an equitable doctrine, particularly when the doctrine

has never before been applied to a state asserting claims in a sovereign capacity.¹ By determining the territorial limits of New Hampshire's political and judicial jurisdiction, the Court's dismissal of New Hampshire's claims affects the sovereign rights of New Hampshire to enforce its laws within its territorial bounds and the fundamental rights of thousands of its citizens.² There is not the slightest suggestion in either the lateral marine boundary case or in this case that New Hampshire has not exercised good faith in invoking this Court's jurisdiction to settle a legitimate dispute concerning the location of its boundary.³ The Court's resort to equitable principles, never previously held sufficient, cannot sustain its dismissal of New Hampshire's claim.

I. The Elements Of Judicial Estoppel Have Not Been Met. In dismissing New Hampshire's claim, this Court treats the 1976 decision approving the Consent Decree as a judicial endorsement of New Hampshire's position. This premise finds no support in the record of the proceedings. In 1976, the Court approved the Consent Decree over New

¹ The application of this doctrine is particularly egregious where New Hampshire has not been given a reasonable opportunity to brief this issue. Maine's briefing failed to develop this argument, and the Solicitor General's brief stated that judicial estoppel did not apply. *See* Brief for the United States as Amicus Curiae at 18, n. 13.

² In 1994, the New Hampshire House of Representatives passed an act by a vote of 329 to 3 confirming the location of New Hampshire's boundary at the Maine shore. *See* An Act Directing the Attorney General to Pursue Settlement of the Portsmouth, New Hampshire Naval Shipyard and Inner Portsmouth Harbor Border Dispute Between New Hampshire and Maine, Ch. 264, 1994 N.H. Laws 297 (App. at 35a). The Court's decision will require New Hampshire to dismiss at least one criminal prosecution now pending in Portsmouth District Court involving boating while intoxicated, and may cause New Hampshire citizens to lose their homes due to Maine's collection of back taxes that the Navy never withheld because it considered their employment to be in New Hampshire.

³ In this case, New Hampshire invoked this Court's jurisdiction only after engaging a number of historians to locate, review and calendar over 50,000 pages of historical and legal documents and over three hundred maps. *See* Partial List of Documents Reviewed by New Hampshire (App. at 219a), and List of Maps Reviewed by New Hampshire (App. at 465a).

Hampshire's objection. The record is unequivocal and shows that New Hampshire told the Court in 1976 that the stipulation did not represent its position, and the Consent Decree was legally and factually indefensible.⁴ New Hampshire tried and failed to convince the Court in 1976 *not* to enter the Consent Decree, and to independently examine the facts and the law. The Court did neither.⁵ This Court's extension

⁴ In determining whether judicial estoppel should be applied against a party, the party's pleadings and argument are the best evidence of what that party said. New Hampshire's pleadings, filed in the 1976 case, specifically its Exceptions and Brief of the Plaintiff and its Reply Brief of the Plaintiff, and the transcript of oral argument, summarize its position. These pleadings unambiguously show that New Hampshire said the following: (1) the location of the boundary set forth in the Consent Decree at the main navigational channel was indefensible because it was *not* supported by legal principles; (2) the Court's exercise of judicial power required that the Court independently examine the proposed Consent Decree and withhold its approval if the Court found that the boundary was not in accordance with applicable law and the evidence in the record; (3) the agreements reached in the proposed Consent Decree were based upon incorrect principles of law and an insufficient stipulation of facts and should be rejected; (4) the main navigational channel identified in the Decree as the thalweg was not in fact the thalweg, but designated as such for administrative convenience; (5) the location of the dog-leg portion boundary established in the Consent Decree was arbitrary, and based solely upon considerations of administrative convenience; (6) the straight line portion of the lateral marine boundary was based on principles of international law, not the 1740 Order; and (7) the Special Master correctly identified the geographic midpoint of a harbor closing line as the starting point of the boundary and correctly ran a straight line from that point to a similarly derived point in Gosport Harbor. See Exceptions and Brief of the Plaintiff and Reply Brief of the Plaintiff, App. at 95a and 141a.

⁵ While this Court's decision credits the 1976 Court with independently examining the Consent Decree, that "*independent determination*" was done without the benefit of a developed factual record. To the extent the Special Master had established a factual record through his own historical research, the 1976 Court's decision is contrary to that record. At argument in 1976, Maine's counsel told the Court that the case was at a "preliminary trial stage, because of the way [it] developed below you," and advised the Court that, "You don't have a full development of any of the facts or issue in this case." (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, at 143a)

of the doctrine of judicial estoppel to stipulations in a Consent Decree, particularly where the estopped party attempted to retract the stipulations and withdraw from the Consent Decree, represents a wholly unprecedented extension of judicial estoppel.⁶

As this Court acknowledges, in 1976, three dissenting justices agreed with New Hampshire and held that the Court should not approve the Consent Decree, but the majority of the Court “*concluded otherwise.*” This Court’s attribution of the stipulations in the Consent Decree to New Hampshire under the rubric of “judicial endorsement” fails entirely to account for New Hampshire’s retraction of the Consent Decree, and the Court’s rejection of New Hampshire’s position.

With regard to New Hampshire’s argument that the Court could not approve the boundary in the Consent Decree because it was based on an incorrect principle of law, the 1976 Court’s approval of a modern navigational channel to define a colonial boundary shows that New Hampshire also *failed* to persuade the Court of this.⁷ Based on

⁶ In prior cases dealing with the preclusive effect of consent judgments, the issue has been analyzed under the rubric of collateral estoppel, and the black-letter law in federal court has been recognized to be that no estoppel arises because no issue is actually adjudicated. *E.g.*, *Arizona v. California*, ___ U.S. ___, (2000) (“settlements ordinarily occasion no *issue preclusion* ..., unless it is clear ... that the parties intend their agreement to have such an effect”; (emphasis in original); Restatement (Second) of Judgments §27 cmt. 3 (1982) (“In the case of a judgment entered by confession, consent or default, none of the issues is actually litigated. Therefore, [issue preclusion] does not apply with respect to any issue in a subsequent action.”)

⁷ This Court’s decision recognizes that for judicial estoppel to apply a party must have succeeded in persuading a court of its position. Citing *United States v. C.I.T. Constr. Inc.*, 944 F.2d 253 (CA5 1991) this Court states, “Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations.” As described in the Consent Decree, the dog-leg portion of the boundary is located by reference to a range light line first established in 1956 when navigational aids were installed on the Maine shore. *See* Letter from Commander, First Coast Guard District to Commandant, First Naval District (May 18, 1956) (App. at 2a).

the record of the 1976 proceedings, the approval of the Consent Decree cannot be construed as a judicial endorsement of New Hampshire's position that the 1740 Order was relevant to determining the starting point of the offshore boundary⁸ because the location of the dog-leg portion of the boundary (the 1956 range light line), could *not* have been the boundary intended by the 1740 Order.⁹

With respect to the elements of "bad faith" or "knowing falsity," the Court's analysis subsumes them within a general "unfairness" factor. This Court's opinion suggests that despite New Hampshire's efforts to convince the Court *not* to enter the Consent Decree, New Hampshire's claim is nonetheless barred because (1) New Hampshire obtained a benefit by entering into a settlement that recited that was its "best interests;" (2) New Hampshire "succeeded" in obtaining the Court's approval of the Consent Decree; and (3) New Hampshire told the Court that it generally agreed with the Special Master's Report. This Court speculates that the 1976 Court would not have approved the Consent Decree *but for* New Hampshire's statement in the Proposed Consent Decree that it was in its "best interests," even though the record shows that New Hampshire retracted this statement and told the Court that the Consent Decree was *not* in its best interests.

The Court's analysis of the element of "bad faith" or "unfairness" fails for the following reasons: (1) in 1976, New Hampshire asked the Court not to approve the Consent Decree. Any putative "benefit" that New Hampshire ob-

⁸ New Hampshire never took the position that the 1740 order had *any* relevance to either the location or course of the offshore boundary itself.

⁹ Not a single case supports the use of a modern navigational channel to designate the location of an historic boundary. The Court's boundary decisions hold that the location of the boundary is fixed as of statehood or as of the date of the underlying boundary instrument. There is no legal precedent for using a navigational channel established in 1956 to define a boundary that was fixed by a colonial decree. See *Missouri v. Nebraska*, 196 U.S. 23 (1904); *Arkansas v. Tennessee*, 246 U.S. 158 (1917) (boundary determined as of 1783); *Illinois v. Kentucky*, 111 S. Ct 1877 (1991).

tained from the approval of the Consent Decree was realized over the objection, not only of New Hampshire's counsel, but the New Hampshire legislature as well;¹⁰ (2) the Court in 1976 could not have relied on or been influenced by New Hampshire's statement in the *unamended* original Consent Decree that the 1740 Order was the source of the lateral marine boundary because in 1974 New Hampshire and Maine removed that language from the proposed Consent Decree at the request of the Solicitor General. As explained in a letter from Solicitor General Robert Bork to Justice Tom Clark,

While the United States was considering the possibility of intervention in these proceedings to protect its interests, we were informed by New Hampshire and Maine that they intended to file a joint motion for entry of consent judgment. ... After reviewing the proposed decree and [supporting] memorandum, we suggested several changes which were intended to remove from these proceedings questions of colonial law and practice relating to offshore boundaries.... Upon being informed that the parties accepted our suggestions ... the United States determined that no further participation in these proceedings was necessary. ... We have ... indicated to the States that it is, in our view, unnecessary to the purpose of this litigation for the Special Master or the Court in these proceedings to suggest that the boundary agreed upon by the parties existed during colonial times.

Letter from Solicitor General Robert Bork to Honorable Tom C. Clark (Sept. 3, 1975). The original Consent Decree, was never presented to the Court, and New Hampshire never argued that the 1740 Order gave the Court jurisdiction to approve the Consent Decree;¹¹ (3) the 1976 Court could not

¹⁰ On February 27, 1975, the New Hampshire General Court enacted House Concurrent Resolution No. 4 (App. at 23a).

¹¹ In 1974, New Hampshire and Maine moved to amend the Consent Decree as originally drafted. The amended decree deleted the provisions of Paragraph 2 that identified the 1740 Order as the source of the lat-

have relied on the stipulation in the Consent Decree pertaining to the dog-leg portion of the offshore boundary because New Hampshire told the Court that it had learned, after it signed the proposed Consent Decree, that this stipulation was factually and legally incorrect; (4) the 1976 Court's approval of a location for the starting point of the lateral marine boundary based on modern navigational aids shows that the Court did not accord jurisdictional significance to the 1740 Order; and (5) New Hampshire's representation that it agreed with the Special Master cannot be used as a basis for judicial estoppel because New Hampshire did not succeed in convincing the Court to approve the recommendations of the Special Master.

II. The Court Erred in Presuming Intentional Self-Contradiction. This Court's decision further errs by (1) summarily rejecting the possibility that New Hampshire acted *in good faith* when it changed its views about the meaning of the 1740 Order, and (2) implicitly rejecting, without the benefit of a factual record, the historical and legal plausibility of New Hampshire's claim.¹² It is simply

¹¹ *Cont.*

eral marine boundary, and added a new paragraph 8 that identified the "special circumstances" exception to Article 12 of the Convention on the Territorial Sea as the source of the offshore lateral marine boundary. See Motion for Entry of Judgment by Consent of Plaintiff and Defendant (Sept. 23, 1974), Motion to Amend Motion for Entry of Judgment by Consent of Plaintiff and Defendant (Oct. 21, 1974); [Proposed Draft of] Judgment and Decree (Nov. 1, 1974); Joint Motion for Entry of Final Order (July 22, 1977), App. at 9a, 14a, 18a, and 31a. New Hampshire and Maine made these changes at the request of the Solicitor General Robert Bork. See Letter from Robert Bork to Tom C. Clark (Sept. 3, 1975), App. at 25a; also see Letter from Robert Bork to Tom C. Clark (Sept. 23, 1975), App. at 29a. In the *United States v. Maine* case, the United States took the position that colonial charters did not establish boundaries in the marginal sea. See Report of Albert B. Maris, Special Master, *United States v. Maine, et al.*, No. 35, Original (Aug. 27, 1974) pp. 47-81, App. at 39a. Thereafter, both in pleadings and at oral argument, New Hampshire scrupulously avoided arguing that the 1740 Order fixed the location of the lateral marine boundary.

¹² As shown by the record, the question of whether the King in Council intended the phrase "up the middle of the river" to divide the Port of

wrong to equate New Hampshire's failure in 1976 to discover historical documents dating back three centuries and spanning two centuries with bad faith or falsity as those concepts are applied in judicial estoppel, particularly when the matter at issue, the question of the *application* of the phrase "up the middle of the river" to the starting point of the boundary, was not the subject of dispute in 1976. Moreover, as noted in the Special Master's Report, much of the historical evidence upon which New Hampshire now relies to prove its inland boundary claim was not deemed relevant or material to its offshore boundary because the maritime jurisdiction exercised by the colonies over the marginal sea was protective, not proprietary, in nature.¹³

III. Judicial Estoppel Does Not Apply To New Hampshire's Claim As Successor To The Crown. In 1976, all counsel and the Special Master assumed that the

¹² *Cont.*

Piscataqua between New Hampshire and Massachusetts was not researched in the 1976 litigation because both New Hampshire and Maine simply assumed it was relevant to determining the starting point for the lateral marine boundary. Significantly, the supporting authorities listed in New Hampshire's Pretrial Statement filed in the 1976 litigation do not include any colonial documents other than the 1740 Order itself. Pretrial Submissions of Plaintiff, App. at 4a. The historical research that New Hampshire and Maine conducted in 1976 focused on the meaning of the term "middle" as a divisional principle in 1740, not on the correctness of applying that phrase to the boundary through the Port of Piscataqua in 1740.

¹³ By contrast with the inland water claim now asserted by New Hampshire, the exercise of regulatory jurisdiction in the marginal sea was found in both *United States v. Maine*, et al., 420 U.S. 515 (1975) and by the Special Master Clark not to be probative of an offshore boundary. In dismissing the possibility that the historical research conducted in 1976 failed to uncover the evidence upon which New Hampshire now relies, this Court fails to address the distinction between the legal principles relevant to the determination of an inland water boundary from those applicable to an offshore boundary. See Pretrial Submissions of Plaintiff (App. at 4a), Report of Albert B. Maris, Special Master, *United States v. Maine*, et al., No. 35, Original (Aug. 27, 1974) pp. 47-81 (App. at 39a), and Report of Tom C. Clark, Special Master, *New Hampshire v. Maine*, No. 64, Original (Oct. 8, 1975) pp. 44-59 (App. at 77a).

1740 Order divided Portsmouth Harbor. While subsequent historical research has shown this assumption to be incorrect, the location of the starting point of the lateral marine boundary at the midpoint of the modern navigational channel is not inconsistent with New Hampshire's claim to an inland water boundary running along the Maine shore, and does not result in a "discontinuous" boundary.¹⁴ The 1791 map prepared by Jeremy Belknap depicts just such a boundary.¹⁵ Thus, while Belknap describes the boundary as passing up through the middle of the mouth of Piscataqua Harbor, the inland boundary is shown as running along the Maine shore.¹⁶

As described in New Hampshire's Motion for Leave, New Hampshire bases its inland boundary claim on the annexation of the Port of Piscataqua to New Hampshire.¹⁷ The authority for this claim is an historical record that shows that the Province of New Hampshire exercised exclusive and plenary jurisdiction over the Port of Piscataqua (later the Port of New Hampshire) and the tidal portion of the Piscataqua River.¹⁸ Regardless of how the 1740 Order is construed, that construction alone is not dispositive of New Hampshire's claim as successor in right to Great Britain.

¹⁴ See Letter from Assistant Attorney General E. Tupper Kinder to Captain Roger F. Lanier, NOAA, (Dec. 8, 1980) (The starting point of the lateral marine boundary is not determinative of the endpoint of the inland boundary), Appendix at 33a.

¹⁵ Belknap's designation of these waters as county waters is consistent with New Hampshire's characterization of these as inland waters, App. at 38a. Report of the Special Master, Walter E. Hoffman, *United States v. Maine, et al.* (Massachusetts Boundary Case), No. 35, Original (October Term 1984), pp. 27-61, App. at 179a.

¹⁶ The difference in the location of the inland boundary from that in the marginal sea reflects the difference in principles that underlie inland and offshore boundaries. Unlike a sovereign's actions in the marginal sea, the right to regulate inland territorial waters derives from proprietary ownership and is probative of territorial rights.

¹⁷ See New Hampshire's Motion for Leave to File Complaint, pp. 12-20.

¹⁸ The evidence that New Hampshire seeks to introduce to support its claim is summarized at App. at 217a. See also, *Corfield v. Coryell*, 6 Fed. Cas. 546 (E.D. Penn. 1823)

Just as a 1764 Order in Council fixing the boundary on the west bank of the Connecticut River was held not to bar Vermont from pursuing a boundary claim to the thread of the Connecticut River based on its rights as successor to the New Hampshire Townships, so too a construction of the 1740 Order dividing the harbor cannot be held to bar New Hampshire's claim as successor in interest to the Crown. As described by the Court in *Vermont v. New Hampshire*,

Vermont's claim of a boundary at the thread of the channel was based upon the following propositions: Township grants made by the Governor of the Province of New Hampshire, by royal authority, between 1741 and 1764, on the west side of the Connecticut River in the territory now Vermont, were bounded by the river, which was non-tidal, and carried title to its thread by virtue of the common law of England; an order of the King-in-Council of July 20, 1764, fixing the boundary between the Provinces of New York and New Hampshire at the 'western banks of the River Connecticut,' thus including the territory now Vermont in the Province of New York, was nullified by the successful revolution of the inhabitants of the New Hampshire Grants; hence the eastern boundary of the revolutionary state of Vermont was the same as the eastern limits of the township grants, namely the thread of the river; Vermont was admitted to the Union as a sovereign independent state with her boundaries those established by her revolution. Her eastern boundary was therefore the thread of the Connecticut River.

Vermont v. New Hampshire, 289 U.S. 593 at 596 (1932).

The Court's application of judicial estoppel to bar New Hampshire from presenting evidence to prove its claim as successor to the Crown, is without precedent in the history of this Court's boundary litigation. In *United States v. Texas*, 339 U.S. 707, 715 (1950), the Court noted that "in original actions, passing as it does on controversies between sovereigns which involve issue of high public importance, [it] has

always been liberal in allowing full development of the facts.” In this case, based on fewer than three pages of undeveloped argument, this Court now invokes judicial estoppel to forever bar New Hampshire from proving its claim to the historic boundaries of the Province of New Hampshire.

Instead of allowing New Hampshire’s claim to be judged on its merits, the Court concludes that “given Maine’s countervailing interest in the location of the boundary” that it is unable to “discern any broad interest of public policy” in New Hampshire’s effort to “*adjust* the boundary.” This Court’s use of the word *adjust* is simply wrong. This case has never been about *adjusting* a boundary. A harbor boundary has never been established.¹⁹ New Hampshire claims that the entire harbor is, and has historically been, within its territorial limits. Maine’s “countervailing” interest is what gives rise to this Court’s original and exclusive jurisdiction; it is not a reason for dismissing New Hampshire’s claim. The Court’s reliance on Maine’s interests to justify dismissal is an affront to New Hampshire’s sovereign interests and a violation of New Hampshire’s constitutional rights as a sovereign state, to a resolution of its claim, by this Court, on its merits.

CONCLUSION

The state of New Hampshire respectfully requests that this Court grant rehearing on the question of whether judicial estoppel should be applied to bar New Hampshire’s claim and that New Hampshire be given the opportunity to argue and brief this issue.

¹⁹ *New Hampshire v. Maine*, ___ U.S. ___, (May 29, 2001) (“The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary.”)

Respectfully submitted,

STATE OF NEW HAMPSHIRE

PHILIP T. McLAUGHLIN
Attorney General


LESLIE J. LUDTKE
Special Counsel
New Hampshire Department of Justice
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3658

JOHN R. HARRINGTON, ESQUIRE
Suloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256
(603) 224-2341

CERTIFICATION

I, Leslie J. Ludtke, Special Counsel for the State of New Hampshire, do hereby certify that this Petition for Rehearing is well-founded and submitted in good faith and not for delay.

Dated: June 25th, 2001



Leslie J. Ludtke
Special Counsel
State of New Hampshire

No. 130, Original

IN THE
Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

v.

STATE OF MAINE,

Defendant.

APPENDICES

2a

copy

Commander, 1st CG Dist.
1400 Custom House
Boston 9, Mass.

18 May 1956
H2

From: Commander, First CG District
To: Commandant, First Naval District

Subj: Portsmouth, N.H. Harbor; Entrance Channel Range
Lights

Ref: (a) COMDT IND ltr dtd 8 Nov 1954 file NY2
Ser 1119ND44
(b) CCGDONE (o) ltr 24 Jan 1955 file H2/GO6-3/2
(c) CCGDONE (o) ltr 11 May 1956 H2/GO6-3/2

1. In a telephone conversation with the Coast Guard Civil Engineering Section, Captain W. H. Randig, Civil Engineer Officer of the First Naval District, made inquiry as to the possibility of establishing subject range in a different location from the one originally requested on Fort McClary, since that area was not acceptable to the State of Maine. Captain Randig was informed that a range, slightly to the east of the Fort, would probably be feasible and, although it would be somewhat less sensitive at the harbor entrance, it would be a good to excellent range from the 31 foot shoal to the point of intersection with the existing Pierces Island range.

2. The alternate location of the range is shown on attached chart No. 329 in red, while the original location proposed by the Navy is shown in blue. Of course, the alternate range could be rotated slightly, either way, depending upon which point is desired to hold as a control. The State of Maine has agreed to a rear range tower in the location shown as "B", and there is every reason to believe that the State would

3a

also approve the "A" location for the front tower. However, the front structure would necessarily be North of the road to avoid condemnation of private property.

3. If the red location would be operationally satisfactory to the Navy, this office will make a further survey of the location and take steps to secure formal permits from the State of Maine. Construction of the range itself would be contingent upon approval by Coast Guard Headquarters.

/sgd/ R. L. Raney
R. L. RANEY

Encl: (1) Marked copy of Chart 329

In The Supreme Court
of the United States

October Term 1973

No. 64, Original

The State of New Hampshire

vs.

The State of Maine

Pretrial Submissions of Plaintiff

I. Claims of New Hampshire

A. Location of Westerly Terminus

New Hampshire claims that the westerly terminus of the disputed boundary is the midpoint of the mouth of the Piscataqua River.

B. Location of Easterly Terminus

New Hampshire claims that the easterly terminus of the disputed boundary is the midpoint of the mouth of Gosport harbor in the Isles of Shoals.

C. Course of Boundary Between Easterly and Westerly Termini.

New Hampshire claims that the true boundary is a straight line connecting the above-described easterly and westerly termini.

D. Subsidiary Issues

(1) The location of the westerly terminus of the disputed boundary depends on where the mouth of the Piscataqua River (or Harbor) is located and on whether the midpoint of the mouth is the geographic middle or the middle of the channel (i.e. thalweg). New Hampshire claims that the baseline for the mouth of Piscataqua River (or Harbor) is a straight line connecting Jaffrey Point in New Hampshire with Pocahontas Point in Maine. New Hampshire's first alternative claim is that the baseline of

the mouth of the River is a straight line drawn due east-west through Whaleback Lighthouse. New Hampshire's second alternative claim is that the baseline of the mouth of the River is a straight line connecting Odiornes Point in New Hampshire with Robin's Rock in Maine. New Hampshire's third alternative claim is that the baseline of the mouth of the River is a straight line connecting Odiornes Point in New Hampshire with White Island Reef in Maine. As to the location of the midpoint, there are only two choices, namely, the geographic middle, or the thalweg. New Hampshire claims that the geographic middle of the mouth of the River is the appropriate westerly terminus.

(2) The location of the easterly terminus of the disputed boundary depends on where the mouth of Gosport Harbor is located. New Hampshire claims that the baseline of the mouth of this harbor is a straight line drawn from the northeasterly tip of Lunging Island to the southwesterly point of Appledore Island, and that the midpoint is the geographic middle of this baseline.

II. Supporting Authorities

Cases

- Ohio vs. Kentucky, ____ U.S. ____, decided Mar. 5, 1973
Texas vs. Louisiana, ____ U.S. ____, decided Mar. 20, 1973
State vs. Wagner, 61 Maine 178
United States vs. California, 332 U.S. 19
 (including report of special master)
United States vs. Louisiana, 363 U.S. 1
United States vs. Florida, 363 U.S. 121
United States vs. Louisiana, 339 U.S. 699
United States vs. Texas, 339 U.S. 707
United Kingdom vs. Norway
 (Anglo-Norwegian Fisheries Case, 1951)
 I.C.J.Rep (1951) p. 116

Statutes

- Act of Congress March 3, 1820, Vol. 5 U.S. Stat. at Large 544
 Order in Council of April 9, 1740
 (Laws of N.H. vol. 2, pp. 790, 793)

Chapter 90, N.H. Session Laws of 1921
 Chapter 429, N.H. Session Laws of 1971
 Chapter 131, Maine Session Laws of 1971
 Chapter 580, N.H. Session Laws of 1973
 Chapter 58, N.H. Session Laws of 1973
 Massachusetts Act of June 13, 1819, relating to district of
 Maine
 Chapter 2220, N.H. Session Laws of 1859
 Chapter 1848, N.H. Session Laws of 1856

Miscellaneous

"Boundaries" in 12 AmJur (2d) pp. 595-596
 "Boundaries of the United States and the Several States",
 Geological Survey Bulletin #1212, U.S. Dept. of Interior
 Convention on the Territorial Sea and Contiguous Zone,
 Geneva 1958 (in Appendix I, Shalowitz op cit, infra)
 "Delimitation of Ocean Space Boundaries between Adjacent
 Coastal States of the United States" by William L. Grif-
 fin (U.S. Coast and Geodetic Survey, U.S. Dept. of Com-
 merce 1968)
 "Distance as determined by a straight line or other method"
 Annotation, 54 ALR 781
 Governor's Message, Maine legislature, June 13, 1829 in
 Maine Session Laws of 1829
 N.H. State Papers, Vol. XIX, documents relating to bound-
 ary dispute with Massachusetts Bay
 Shore and Sea Boundaries, A.L. Shalowitz, Publication 10-1
 U.S. Dept. of Commerce, Vol. 1, p. 231 ff
 Proceedings of Hague Convention, 1930
 Belknap, Jeremy, History of New Hampshire (3 vols.) 1791

III. Documents

"Report of the Commissioners for the Survey of the Bound-
 ary between New Hampshire and Maine, 1874"
 Letter of Arthur A. Baker, Acting Director, U.S. Geological
 Survey, to Congressman James Cleveland (N.H.) dated
 June 10, 1966
 Wall map of Rockingham County, N.H. (Smith & Coffin,
 Philadelphia, 1860)

"Town and County Atlas of New Hampshire 1892" (O.H. Hurd, Boston, 1892)

Map of the State of Maine, compiled, drawn and published from official plans and actual surveys (G.N. Colby Co., Houlton, 1883)

Map of New England with adjacent portions of New York and Canada (Sampson, Davenport & Co., Boston 1875)

Map of States of New Hampshire and Vermont (U.S. Geological Survey, edition of 1914)

IV. List of Witnesses and Outline of Testimony

1. Professor William Sprague Barnes, Fletcher School of Diplomacy, Tufts, expert in the field of international law with particular reference to law of the sea and marine boundaries. (Prof. Barnes will retain a geodest to complement his testimony by use of standard base maps). His testimony will be that the straight line as claimed by New Hampshire is in accord with established principles of international law and recognized precedents, in the light of the special circumstances here existing.
2. John F. Page, Director, N.H. Historical Society. As an historical expert, he will testify as to the historical background of the disputed boundary. His testimony may become unnecessary if the parties can agree on use of recognized historical works without calling witnesses to authenticate and explain same.
3. The following-name fishermen and harbor pilots who will testify as to the long-time usage of the straight line "lights on range" as a guide to the marine boundary and the impracticability of anything but a straight line boundary between the mainland and the Isles of Shoals:

John Downs
 Thomas Downs
 Gino Marconi
 Columbo Marconi

Ray Burge
Tom Sheperd
Wylie Brewster
Robert Carlson
Arnold Carlson
Maurice Carlson
Thornton Tobey
Herbert Drake
Harrison Workman
William Rose Jr.
Gerard Amazeen
Shirley and Dick Holt

(Note: We will make every effort to compress this list, depending on course of trial)

V. Other Evidence

Our investigation is still continuing. If other substantial evidence or new witnesses are found, we will amend these submissions promptly with due notice to opposing counsel.

Respectfully submitted,
The State of New Hampshire
Warren B. Rudman, Attorney General
David H. Souter, Dep. Attorney General
By _____
Special Counsel

**In the
Supreme Court of the United States**

October Term, 1973

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

**MOTION FOR ENTRY OF JUDGMENT
BY CONSENT OF PLAINTIFF AND DEFENDANT**

Come now the State of New Hampshire and the State of Maine by and through their respective counsel and move the Court to enter judgment in this action by consent of the Plaintiff and Defendant as specified hereunder.

Counsel for Plaintiff, namely, the Attorney General of New Hampshire, Warren B. Rudman, the Deputy Attorney General of New Hampshire, David H. Souter, and Special Counsel for New Hampshire, Richard F. Upton, and Counsel for Defendant, the Attorney General of Maine, Jon A. Lund, and Assistant Attorney General Charles R. Larouche, represent to the Court that after long and careful study, they have come to agreement as to the pertinent facts and the applicable legal principles determinative of this action. The aforementioned Counsel have concluded that it is in the best interest of each State and of the Court to dispose of this action by a judgment as specified hereunder.

The aforementioned Counsel assure the Court that the requested disposition of this action has been fully explained to the Governor and Executive Council of each State by its Counsel and that the Governor and Executive Council of each State approve the requested disposition of this action.

WHEREFORE, the Plaintiff and Defendant, by and through their respective Counsel, move the Court to enter the following judgment, each party hereby consenting thereto:

(1) This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor, upon the Complaint, Answer, Pretrial Memoranda and agreement of Counsel for New Hampshire and for Maine.

(2) The source of the lateral marine boundary line between New Hampshire and Maine lies in the Order of the King in Council of April 9, 1740, which Order provided:

“And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pas up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest head thereof and from thence North two Degrees West-erly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments And That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwest-erly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same”

(3) The terms “Middle of the River” and “Middle of the Harbour,” as used in the above-quoted Order mean the

middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

(4) The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point, New Hampshire and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cover, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

(5) The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43°02'42.5" North and longitude 70°42'06" West. Said point has a computed bearing of 194°44'47.47" true and a computed distance of 1,554.45 metres (1,700 yards) from the Whaleback Lighthouse. No. 19, USCG-158, whose position is latitude 43°03'31.213" North and longitude 70°41'48.515" West (reference National Geodetic Survey).

(6) The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th edition, Dec. 1, 1973. The position of this point is latitude 42°58'51.6" North and longitude 70°37'17.5" West as scaled from the above-described chart.

(7) The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42°58'55" North and longitude 70°37'39.5" West. Said point has a computed bearing of 349°08'52.81" true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG-158, whose position is latitude 42°58'01.710" North and longitude 70°37'25.590" West (reference National Geodetic Survey).

(8) The lateral marine boundary line between New Hampshire and Maine connecting the channel termina-

tion points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

(9) The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139°20'27.22" true.

(10) The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination point proceeds toward Piscataqua River channel termination point on a computed bearing of 319°17'25.43" true.

(11) All positions in the preceding paragraphs are referred to the North American Datum of 1927.

(12) The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, Eighth Edition, Dec. 1, 1973, filed herewith.

(13) Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. If the parties hereto are unable to agree upon such a stipulation, then upon the expiration of such 180 day period, application shall be made by them, or either of them, to this Court for the appointment of a Commissioner with full power to hear evidence and locate and

mark the boundary as settled and make a return of his actions to this Court, the costs of which proceedings shall be shared equally by the two States.

(14) The State of Maine, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the territory adjudged to her by this decree; and the State of New Hampshire, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the territory adjudged to her by this decree.

(15) The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

(16) This motion is made by each State without prejudice to its claims concerning its lateral marine boundary with the other, easterly of the Isles of Shoals.

Dated: September , 1974

WARREN B. RUDMAN
Attorney General of New Hampshire

DAVID H. SOUTER
Deputy Attorney General of New Hampshire

RICHARD F. UPTON
Special Counsel
Counsel for Plaintiff
The State of New Hampshire

JON A. LUND
Attorney General of Maine

CHARLES R. LAROCHE
Assistant Attorney General of Maine
Counsel for Defendant
The State of Maine

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 64, Original

THE STATE OF NEW HAMPSHIRE, *Plaintiff*

v.

THE STATE OF MAINE, *Defendant*

MOTION TO AMEND MOTION FOR ENTRY OF
JUDGMENT BY CONSENT OF PLAINTIFF
AND DEFENDANT

Now come The State of New Hampshire and The State of Maine by and through their respective Counsel and move that the Motion for Entry of Judgment by Consent of Plaintiff and Defendant, heretofore filed in the above-entitled action, be amended as follows:

1. Amend the second unnumbered paragraph of the introduction to the body of the Motion appearing on page 1 of the Motion, so that the same will read as follows:

“Counsel for Plaintiff, namely, the Attorney General of New Hampshire, Warren B. Rudman, the Deputy Attorney General of New Hampshire, David H. Souther, and Special Counsel for New Hampshire, Richard F. Upton, and Counsel for Defendant, the Attorney General of Maine, Jon A. Lund, and Assistant Attorney General Charles R. Larouche, represent to the Court that after long and careful study of the issues in dispute and the Complaint, the Answer, the Pretrial Memoranda and applicable principles of constitutional and international law, they have come to

agreement as to the pertinent facts and the applicable legal principals determinative of this action. The aforementioned Counsel have concluded that it is in the best interest of each State and the Court to dispose of this action by a judgment as specified hereunder."

2. Amend paragraph (1) of the Motion by striking out all after the words "Gosport Harbor" so that said paragraph (1) as amended shall read as follows:

"(1) This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor."

3. Amend paragraph (2) of the Motion by striking out the same and inserting in place thereof the following new paragraph:

"(2) The Order of the King in Council of April 9, 1740, in pertinent part, provided:

"And as to Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments and That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the South-erly Side; and that the South-westerly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in and be accounted part of the

Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same ...”

4. Amend said Motion by renumbering the present paragraphs (8), (9), (10), (11), (12), (13), (14), (15) and (16) as (9), (10), (11), (12), (13), (14), (15), (16) and (17) and by inserting the following new paragraph (8):

“(8) The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (5) and (7) above has been determined on the basis of the ‘special circumstances’ exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U.S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two states in their colonial grants and charters.”

5. Amend paragraph (14) of the Motion (now paragraph (15) as renumbered) by striking out said paragraph and inserting in place thereof the following new paragraph:

“(15) The State of Maine, its officers, agents, representatives, and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives, and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree.”

Dated this 21st day of October, 1974

WARREN B. RUDMAN

Attorney General of New Hampshire

DAVID H. SOUTER

Deputy Attorney General of New Hampshire

RICHARD F. UPTON
Special Counsel
Counsel for Plaintiff
The State of New Hampshire

JON A. LUND
Attorney General of Maine

CHARLES R. LAROCHE
Assistant Attorney General of Maine
Counsel for Defendant
The State of Maine

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1973

NO. 64, ORIGINAL

THE STATE OF NEW HAMPSHIRE, PLAINTIFF

vs.

THE STATE OF MAINE, DEFENDANT

**[PROPOSED DRAFT OF]
JUDGMENT AND DECREE**

This cause, having been submitted upon the pleadings, pretrial memoranda, motion for entry of judgment by consent of Plaintiff and Defendant, and upon the Report of the Special Master thereon;

It is now ordered, adjudged and decreed as follows:

1. The Report of the Special Master is hereby approved, and the motion for entry of judgment by consent of Plaintiff and Defendant is granted.

2. This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor in the Isles of Shoals.

3. The Order of the King in Council of April 9, 1740, in pertinent part, provided:

“And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River

into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments And That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the South-erly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same”

4. The terms “Middle of the River” and “Middle of the Harbour,” as used in the above-quoted Order, mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

5. The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point, New Hampshire and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cover, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

6. The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43°02'42.5" North and longitude 70°42'06" West. Said point has a computed bearing of 194°44'47.47" true and a computed distance of 1,554.45 metres (1,700 yards) from the Whaleback Lighthouse. No. 19, USCG-158, whose position is latitude 43°03'31.213" North and longitude 70°41'48.515" West (reference National Geodetic Survey).

7. The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th edition, Dec. 1, 1973. The position of this point is latitude 42°58'51.6" North and longitude 70°37'17.5" West as scaled from the above-described chart.

8. The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42°58'55" North and longitude 70°37'39.5" West. Said point has a computed bearing of 349°08'52.81" true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG-158, whose position is latitude 42°58'01.710" North and longitude 70°37'25.590" West (reference National Geodetic Survey).

9. The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (6) and (8) above has been determined on the basis of the "special circumstances" exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U.S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two states in their colonial grants and charters.

10. The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

11. The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139°20'27.22" true.

12. The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel

termination point proceeds toward Piscataqua River channel termination point on a computed bearing of 319°17'25.43" true.

13. All positions in the preceding paragraphs are referred to the North American Datum of 1927.

14. The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, Eighth Edition, Dec. 1, 1973, filed with the Motion for Entry of Judgment by Consent.

15. Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. If the parties hereto are unable to agree upon such a stipulation, then upon the expiration of such 180 day period, application shall be made by them, or either of them, to this Court for the appointment of a Commissioner with full power to hear evidence and locate and mark the boundary as settled and make a return of his actions to this Court, the costs of which proceedings shall be shared equally by the two States.

16. The State of Maine, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the territory adjudged to her by this decree.

17. The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

By the Court

Reps. Spirou, Griffin, Splaine, Maynard, James O'Connell, Cotton, Dame, McEachern, Thomas Connors, O'Keefe, Krasker, Peterson, Hobbs, William Keefe, Reese, Hoar, Cressy, Anthony Randall, Cunningham, Gillis, Kelley, Parr, Wolfsen, Richards, Ellis, Green, Appel, Lockhart, Chambers, George Gordon, Belair and Dudley

HOUSE CONCURRENT RESOLUTION NO. 4

in favor of establishing the "lights on range" line
as the most proper boundary between the
States of Maine and New Hampshire.

Resolved by the House of Representatives; the Senate
concurring:

That, the General Court, being the duly elected representatives of the sovereign people of the State of New Hampshire, in light of chapters 58, 564 and 580 of the laws of 1973, hereby declares that it regards that section of the lateral marine boundary between the states of New Hampshire and Maine lying between the mouth of the Piscataqua River and the mouth of Gosport Harbor in the Isles of Shoals to be the line of "lights on range", so-called, as defined in RSA 1:15, I: and

That, the general court is of the opinion that no agreement, undertaking or stipulation by any officer, representative, attorney or agent of the state of New Hampshire, which would have the effect of establishing as said section of the lateral marine boundary any line other than said line of "lights on range" shall bind the state of New Hampshire, unless such agreement, undertaking or stipulation is entered into in accord with RSA 1:15; and

That, the general court hereby urges the attorney general and special counsel actively to claim and defend in any litigation currently pending in the United States Supreme

Court said line of "lights on range" or a line claimed to be the true and legal boundary line by the amicus curiae pursuant to the order of the special master in said litigation issued on December 16, 1974.

25a

Sep. 3 1975

BCR
RJG
90-4-19

sm

Honorable Tom C. Clark
Associate Justice (Ret.)
Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Justice Clark:

Re: New Hampshire v. Maine, S.Ct.,
No. 64, Original

Early in August, the United States was informed that you, as Special Master appointed by the Supreme Court in the above-captioned proceedings, had distributed to the parties to this case a draft of the report you propose to submit to the Court. We received a copy of that report from the State of Maine on August 25. In your letter distributing the draft report, you requested comments from the States by no later than September 10.

As you may be aware, the United States has recently been engaged in litigation before the Court with all of the Atlantic Coast States over ownership of the natural resources of the Atlantic outer continental shelf. The Supreme Court handed down its decision in that case last March. United States v. Maine, et al., 420 U.S. 515. However, in June the Court granted a motion by the United States that the Court retain jurisdiction in that case in order to entertain such further proceedings as may from time to time be deemed necessary to give force and effect to their decision. Unites States v. Maine, et al., 43 L.W. 3601.

The Court's decision in the Maine case settled the basic question of the applicability of the Submerged Lands Act,

67 Stat. 29, 43 U.S.C. 1301, et seq., to the Atlantic Coast. It is now clear that the rights of the Atlantic Coast States to the natural resources of the seabed of the Atlantic Ocean are limited to those expressly conferred by the Act. The tidelands issues that remain subject to dispute between those States and the United States pertain to the determination of the geographical extent of the rights so conferred. The Act grants to the Atlantic Coast States the right to exploit the natural resources of the seabed lying within 3 geographical miles seaward of their respective coastlines. Section 2(c) of the Act defines "coastline" as "the line of ordinary low water" and the line marking the seaward limit of inland waters.

Supplemental proceedings pursuant to the jurisdiction which the Court retained in the Maine case will be initiated by Massachusetts and the United States to determine the coastline of that State and, in particular, the determination of the existence and extent of any inland waters. We anticipate similar proceedings with other Atlantic States, possibly both New Hampshire and Maine. In our view, your proposed report can be construed as dealing with these issues.

One of the issues which was raised in the Maine case was whether the boundaries of the colonies under their original grants and charters extended offshore. The question of offshore lateral boundaries arose in connection with this issue. Considerable expert testimony and evidence were introduced in regard to these issues. The United States took the position before the Special Master that such boundaries did not exist. On August 27, 1974, the Special Master concluded that the colonies were not granted areas of the adjacent seas and that they were bounded by the Atlantic Ocean. Report of the Special Master in United States v. Maine, et al., S.Ct., No. 35, Original, pp. 47-60.

The Complaint and Answer in this case are subject to the construction that both of these States contend that a 1740

Order of the King in Council established an offshore lateral boundary. After receiving copies of the Complaint and Answer of these States, we recognized that issue could be decided in these proceedings, possibly in a manner conflicting or inconsistent with the then forthcoming decision of the Special Master in the Maine case. Such a result in our view could have prejudiced our position in the Maine case.

While the United States was considering the possibility of intervention in these proceedings to protect its interests, we were informed by New Hampshire and Maine that they intended to file a joint motion for entry of consent judgment. In a letter to us of September 17, 1974, forwarding copies of the proposed motion, New Hampshire indicated that it desired to make that letter official notice to the Department of Justice of the action being proposed by the two States. We reviewed the proposed decree to determine if anything in the decree or supporting memorandum would affect our consideration regarding intervention in these proceedings. After reviewing the proposed decree and memorandum, we suggested several changes which were intended to remove from these proceedings questions of colonial law and practice relating to offshore boundaries, the resolution of which might be prejudicial to the United States in pending or future litigation with the East Coast States. Upon being informed that the parties accepted our suggestions, and that Your Honor had been made aware of our informal participation, the United States determined that no further participation in these proceedings was necessary. It now appears that you have rejected that decree and memorandum and, instead, have submitted a report that can be construed as concluding that the colonies extended into the adjacent seas.

Initially, the United States has no objection to the particular boundary line you have proposed. However, in our view those aspects of the report relating to colonial law and practice may be construed as recognition that a lateral marine boundary between these States existed in colonial

times. As we have previously indicated to the States, such a construction would conflict with the position of the United State and the report of the Special Master in the Maine case. We have also indicated to the States that it is, in our view, unnecessary to the purpose of this litigation for the Special Master or the Court in these proceedings to suggest that the boundary agreed upon by the parties existed during colonial times. After reading your draft report, we felt that it was necessary also to express these views directly to you.

The United States is prepared to elaborate upon these views in an amicus curiae brief if you so suggest. In this respect, we understand that you intend to incorporate the comments that you receive on this draft in another draft of your report. Consequently, the United States will have an opportunity to submit a brief at that time, if that proves necessary or desirable.

We look forward to receiving the next draft of your report.

Sincerely,

Robert H. Bork
Solicitor General

cc: Richard F. Upton, Esquire
Special Assistant to the Attorney General
10 Centre Street
Concord, New Hampshire 03301

Donald G. Alexander, Esquire
Assistant Attorney General
State of Maine
Augusta, Maine 04330

Stephen R. Katz, Esquire
Crane, Inker & Oteri
20 Ashburton Place
Boston, Massachusetts 02108

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Office of the Solicitor General
Washington, D.C. 20530

September 23, 1975

Honorable Tom C. Clark
Associate Justice (Ret.)
Supreme Court of the United States
Washington, D.C. 20543

Re: New Hampshire v. Maine, S.Ct.,
No. 64, Original

Dear Mr. Justice Clark:

Thank you for furnishing us with a copy of your third draft Report in the above-captioned case. That draft in large part answers the concerns of the United States that I expressed to you in my letter of September 3, 1975.

Our only remaining concern is that certain portions (principally at page 53) of the draft may appear to suggest, in our view incorrectly, that the protective maritime jurisdiction exercised by the colonies prior to independence was territorial in nature and that New Hampshire and Maine respectively exercised such jurisdiction within separate geographically fixed areas that shred a common boundary running from Piscataqua Harbor to the Isles of Shoals. Any such suggestion would, we believe, be inconsistent with the determination by Judge Maris as Special Master in United States v. Maine, et al., S.Ct., No. 35 Original, that the colonies were bounded by the Atlantic Ocean and did not have offshore lateral boundaries.

It is the position of the United States that the protective maritime jurisdiction exercised by the colonies prior to independence was not territorial in nature: we would agree, at least for purposed of discussion here, that each colony exercised plenary authority over its inland coastal waters

(territorial jurisdiction), but, in our view, as to open seas each colony exercised a territorially unlimited regulatory authority, but only over the actions of its own residents (personal jurisdiction). See pp. 56-59 of the Report of the Special Master in United States v. Maine, *supra*. Residual general protective maritime jurisdiction over the American coastal waters remained in the Crown. Ibid.

Accordingly, we believe that there was no offshore lateral boundary, regulatory or otherwise, between New Hampshire and Maine prior to independence.

We would be willing to elaborate upon these views in a brief amicus curiae if the filing of such a brief would be helpful to you in the decision of this case.

Sincerely,

ROBERT H. BORK
Solicitor General

cc: Richard F. Upton, Esquire
Special Assistant to the Attorney General
10 Centre Street
Concord, New Hampshire 03301

Donald G. Alexander, Esquire
Assistant Attorney General
State of Maine
Augusta, Maine 04330

Stephen R. Katz, Esquire
Crane, Inker & Oteri
20 Ashburton Place
Boston, Massachusetts 02108

31a

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 64, ORIGINAL

THE STATE OF NEW HAMPSHIRE, PLAINTIFF

vs.

THE STATE OF MAINE, DEFENDANT

JOINT MOTION FOR ENTRY OF FINAL ORDER

On June 14, 1976, this Court ordered entry of the Consent Decree filed by the parties in the above entitled case. Under the terms of the Decree, a stipulation to locate and mark the states' lateral marine boundary was to be filed with the Court by June 9, 1977, an 180-day extension having been granted beyond the original filing date of December 11, 1976.

Pursuant to the terms of the Decree, the parties have examined the various methods by which the boundary line might be located and marked. The State of New Hampshire and the State of Maine agree that the delimitation of the lateral marine boundary on nautical charts, in accordance with the nautical chart filed with the United States Supreme Court in conjunction with the Decree, will be sufficient publication of the Court's decision and that the benefits of locating and marking the boundary by markers and/or navigational aids do not justify the expense that would be incurred.

Consequently, the parties hereby move that paragraph 15 of the original Decree which requires the placement of markers and/or navigational aids to locate and mark the lateral marine boundary be stricken.

Respectfully submitted,

THE STATE OF MAINE

By _____
Joseph E. Brennan
Attorney General

THE STATE OF NEW HAMPSHIRE

By _____
David H. Souter
Attorney General

Dated: July 22, 1977

December 8, 1980

Captain Roger F. Lanier
National Oceanic and Atmospheric Administration
Associate Director, Marine Surveys and Maps
National Ocean Survey
Rockville, Maryland 20852 OA/C322:NB

Re: Demarkation New Hampshire/Maine Marine Boundary

Dear Captain Lanier:

Thank you for your letter of November 20, 1980. I appreciate the time and effort which your staff has put into the depiction of the boundary on your charts. However, I have a problem with the designation of point #1 (and, therefore, #5). I had an earlier discussion in the month of October with cartographer Bill Nottage of the United States Geological Survey in which we discussed this same problem. The Decree of the United States Supreme Court does not fix the geographical point which you label as #1 and #5 in your letter. From the Supreme Court's decision, we know that the boundary line extends from the point which you have labeled #2 northerly along the line of the range lights located in the vicinity of Pepperrell Cove. However, the Supreme Court decision does not provide the geographic position at which the boundary line extending northerly on that bearing ends. I am sure that the Court intended that that segment of the boundary line end "in the vicinity of Fort Point" and, therefore, in the vicinity of the geographic position you have labeled as #1. However, I cannot state with certainty that it is the point you have selected. Recognizing that there are practicalities involved from your point of view (that leg of the boundary line must end somewhere in the vicinity of Four Point), I would be willing to accept your use of the geographic position labeled #1 and #5 providing that the wording in your notice to mariners be changed slightly (as suggested below):

Proposed Wording of Notice to Mariners

The marine boundary line between the States of New Hampshire and Maine has been established by the

United States Supreme Court and is depicted between the following geographic positions. (Listing positions #1 through #5.)

I am sure you view this slight change as legal hairsplitting, but it is necessary, in my opinion, to avoid the inference that position #1 and #5 has been established by the United States Supreme Court, which, of course, is not true.

I must also add the disclaimer that in the event the leg of the boundary depicted on your map between positions #1 and #2 (or for that matter, the boundary leg extending westerly from point #1) ever becomes the subject of dispute between the two states, the State of New Hampshire cannot be bound by the end point (point #1 and #5) that you have chosen to use on the maps. As stated above, my reason for assenting to the use of that position as the end point of that boundary leg is that from a practical point of view, an end point must be selected and for the purposes of depiction on a map, the point you have selected is as good as any.

I am grateful for your assistance in this matter. Assuming that my comments are acceptable to you and to the State of Maine, I assume you will proceed to have the nautical charts marked as indicated in your letter. Please feel free to contact me if you wish to discuss this matter further.

Very truly yours,

E. Tupper Kinder
Assistant Attorney General
Environmental Protection Bureau

jlh

cc: Elizabeth R. Butler
Assistant Attorney General
State of Maine

Dennis E. Murphy, Jr.
Administrative Assistant
Office of the Governor

CHAPTER 264 (SB 754)

AN ACT DIRECTING THE ATTORNEY GENERAL TO PURSUE SETTLEMENT OF THE PORTSMOUTH, NEW HAMPSHIRE NAVAL SHIPYARD AND INNER PORTSMOUTH HARBOR BORDER DISPUTE BETWEEN NEW HAMPSHIRE AND MAINE.

*Be it Enacted by the Senate and House of Representatives
in General Court convened:*

264:1 Findings. In directing the attorney general to pursue settlement under section 1 of this act, the general court makes the following findings:

I. Jurisdiction and control over the whole of the Piscataqua River is and always has been entirely within the county of Rockingham and this state.

II. Complete dominion and ownership of the tidal waters and submerged lands of the whole of the Piscataqua River, and including its Portsmouth Harbor, are solely vested in the sovereign people of the state of New Hampshire, encumbered only by the national navigational servitude over the river and its harbor as a navigable inland waterway and arm of the sea.

III. The Piscataqua River and those geographic features located within it are of immense value to New Hampshire.

IV. The state of New Hampshire holds absolute right and title to those lands submerged under the navigable waters of the whole of the Piscataqua River in trust for the people of the state.

V. The public trust in the Piscataqua River for the public use of the people of this state may only be ensured by the adequate protection, management, and control by the state over the entirety of the river and its submerged lands in which the whole of the people of this state are interested.

264:2 Attorney General Directed to Pursue Settlement. The attorney general shall pursue settlement of the border dispute between the state of New Hampshire and the state of Maine concerning the establishment of the interstate boundary in the vicinity of the Portsmouth, New Hampshire Naval Shipyard and inner Portsmouth Harbor, as recommended by the legislature in 1991, HJR 1. In pursuing such settlement, the attorney general shall affirm the findings of the general court under section 1 of this act. No agreement, undertaking or stipulation by any officer, representative, attorney or agent of the state of New Hampshire, which would have the effect of establishing any boundary line inconsistent with such findings, shall bind the state of New Hampshire, unless such agreement, undertaking or stipulation is approved by the general court through legislation. The attorney general shall submit annual reports to the governor, the senate president, and the speaker of the house on or before June 1, 1994, and every year thereafter on June 1 until the issue is resolved, detailing the progress made in such settlement efforts.

264:3 Effective Date. This act shall take effect upon its passage.

[Approved June 2, 1994.]

[Effective Date June 2, 1994.]

