No. 10 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 1958

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

Reply to the Motion for Judgment and to the Opposition of the United States to Louisiana's Motion to Take Depositions

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PRELIMINARY STATEMENT

Louisiana filed its answer in these proceedings on November 5, 1956, and in its said answer raised various questions of law and of fact. Thereafter on December 4, 1956, Louisiana filed a motion to take the depositions of some fourteen (14) witnesses to give testimony concerning the factual issues raised by the complaint and answer. United States filed on December 14, 1956, a memorandum in opposition to the motion by the State to take depositions and a motion for judgment, which were served on the State on December 17, 1956, opposing the taking of these depositions for the following alleged reasons:

1. There is no showing that any of the proposed witnesses has peculiar (or, indeed, any) knowledge of any stated subject, material or otherwise, is elderly or in poor health or about to leave the jurisdiction of this Court, or that any other reason exists why their depositions will be needed for use as evidence in this case.

2. This Court by its decision in *United States v. Louisiana*, 339 US 699, held the United States to be entitled to all of the submerged lands and resources seaward of the low-water mark and outer limit of inland waters. The United States remains so entitled, except to the extent that it has since granted such rights to the State by the Submerged Lands Act.

3. The boundary of the State of Louisiana cannot extend farther seaward than the national boundary; the national boundary extends seaward only three miles from the coast of Louisiana. The extent of such national boundary has been conclusively determined by the political branches of the National Government and is subject to judicial notice.

4. The legal question as to the width of the marginal belt should be answered separately and in advance.

These propositions will be discussed in the above order.

I.

REASONS FOR TAKING DEPOSITIONS

Louisiana's motion to take testimony is made pursuant to Rule 9 of this Court and Rule 26 of Federal Rules of Civil Procedure. Rule 9, Paragraph 2 of the Supreme Court Rules reads as follows:

"2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, 28 U.S.C.A., and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

The appropriate procedure for the taking of depositions of witnesses is outlined in Rule 26 (a) of the Federal Rules of Civil Procedure which reads in part as follows:

"(a) **When Depositions May Be Taken.** Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. * * *"

It will be noted that the foregoing Rule permits the taking of depositions without leave of Court unless the notice to take such depositions is served within 20 days after commencement of the action. It was therefore not necessary under the Rule for Louisiana to obtain leave of Court for the taking of these depositions. However, Louisiana has sought the approval of the Court in view of the fact that this Court frequently requires its approval of the filing of documents and its practice differs in that respect from the practice of the District Courts.

The United States objects that there is no showing that any of the State's witnesses has knowledge of any particular

subject material to the issues that have been raised here and that there is no showing why the depositions of these witnesses will be needed for use as evidence in this case. There is no requirement anywhere in the Rules of Civil Procedure nor in this Court's Rule that such a showing be made. A reading of Paragraph 5 of Louisiana's motion does show in general the nature of the testimony expected from these witnesses and the statements made in that paragraph of Louisiana's motion certainly indicate the materiality of the testimony of these witnesses, although Louisiana was not required by the Rules to make any such showing.

It is somewhat paradoxical that Government counsel in a motion for entry of default which they filed in August, 1956, stated:

> "The State of Louisiana appears to have no desire to develop the facts."

It seems to us that Government counsel has no desire to present a record of facts to this Court on which it might base its opinion and conclusions.

Plaintiff's counsel takes a very narrow and restrictive view regarding the purpose and function of depositions. The Federal Rules of Civil Procedure are intended to be very liberal because of the very nature of Federal Procedure under new rules. The purpose and function of Rule 26 is thus stated in Moore's Federal Procedure, Second Edition, Volume 4, Page 1012:

> "Rules 26 to 37, providing for pre-trial discovery of testimony, pre-trial inspection of documentary evidence and other tangible things, and the examination of prop-

erty and person, were an important innovation in federal procedure. The promulgation of this group of rules satisfied the long-felt need for legal machinery in the federal courts to supplement the pleadings, for the purpose of disclosing the real points of dispute between the parties and of affording an adequate factual basis in preparation for trial. The Federal Rules, unlike the common law system of procedure, are not grounded on the supposition that the pleadings are the only or chief basis of preparation for trial. On the contrary, the limitations of the pleadings in this respect are recognized. In most cases under the Federal Rules the function of the pleadings extends hardly beyond notification to the opposing parties of the general nature of a party's claim or defense. It is recognized that pleadings have not been successful as a fact-finding mechanism * * * *"

See *Hickman v. Taylor*, 329 US 495, 67 S. Ct. 385, 91 L.Ed. 451.

The Federal Rules make no exceptions as to the right to take depositions. The Rules apply to all actions including actions by or against the United States. Again quoting Moore's Federal Practice, Second Edition, Volume 4, Page 1031-2:

"* * * Rule 26 and its companion Rules are drawn in accordance with the first type of statutes, and authorize the taking of depositions under the same circumstances and by the same methods irrespective of whether they are to be used for discovery or for preserving testimony or for both purposes. * * *

"No type of action, within the coverage of the Federal Rules, is excepted from the operation of Rule 26 or any of the other Rules in Part V (Depositions and Discovery). Rule 26 applies to actions by or against the United States. * * * *"

The Author just quoted further states that the Rules impose no limitations upon the right to take depositions either of the parties to the proceedings or of prospective witnesses. See Moore's Federal Practice, Second Edition, Volume 4, Page 1036.

Louisiana has consistently objected to the exercise of original jurisdiction by this Court, and in that connection has insisted that this Court does not have the facilities for exercising original jurisdiction in a case of this kind. Pre-trial conferences, requests for admissions, stipulations of facts, and other pre-trial procedures are impractical and non-existent. The salutary fact-finding methods for the formulation of issues provided in the new Rules of Civil Procedure can find no opportunity for application here.

Government counsel wishes to follow the old rules of technical pleading whereby theory takes precedence over fact and the aims of justice are lost in a maze of legal maneuver. *Barron and Holtzoff* in their Federal Practice and Procedure, Sec. 641, make the following appropriate comment:

> "To understand the significance of the improvements made by these rules, it should be remembered that under the prior procedure the means by which parties could narrow the issues and discover information needed to prepare for trial were very limited. Under the philosophy that a judicial proceeding was a battle of wits rather than a search for the truth, each side was protected to a large extent against disclosure of his case. As already pointed out, the federal rules relieved the pleadings of their top-heavy burden of formulating issues and disclosing facts. * * * *"

The authors of the work just quoted then go on to say:

> "* * * The discovery remedies embody a far-reaching step in the direction of achieving the principal goal of the new procedure, to which reference was made at the opening of this discussion, namely, the elimination of the 'sporting theory' of justice."

Plaintiff's counsel is in error in their argument that this Court will take judicial notice of facts which are relevant to the issues here.

The facts pleaded in Louisiana's answer definitely relate to the width of its marginal belt of submerged lands and territorial waters. A decision on this subject presents questions of fact as well as questions of law and the motion to take depositions states that the testimony of the witnesses relate to this subject. Louisiana has raised a number of defenses and among them it has raised the question as to the proper interpretation of the Act of Congress describing Louisiana's boundaries when it was admitted to the Union. The description of these boundaries ends with the statement that the boundary on the east runs "to the Gulf of Mexico; thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast."

The Government takes the position that Louisiana's southern boundary is a land boundary and that the reference to "all islands within three leagues of the coast" merely refers to the land mass of such islands. If this be true then the submerged lands and territorial waters seaward of Louisiana's Gulf Shores were included in its boundaries as an incident to

the transfer of sovereignty, and title thereto passed to Louisiana by necessary implication.[1]

On the other hand this description of the southern boundary of Louisiana may be interpreted as a water boundary and the conclusion might be reached that the three league boundary affirmatively includes not only all islands but all waters and submerged lands within three leagues of the coast.[2] A serious argument may be made in support of either position. Certainly it cannot be said that the description of Louisiana's southern boundary is unambiguous. It would therefore be relevant as an aid to interpretation to show the manner in which the State of Louisiana and the United States have interpreted this description of Louisiana's southern boundary. Louisiana's answer sets forth briefly many facts which would show that the State has from time immemorial exercised jurisdiction three leagues and more off-shore in the Gulf of Mexico, and that the United States through its various departments of Government have acquiesced in the exercise of this jurisdiction on the part of the State. Louisiana expects to show the extent of sovereignty which it has exercised over the submerged lands adjoining its shores by the testimony of witnesses and by documentary evidence taken from State records and State files. The Court will not take judicial notice of these matters and certainly the Court does not know the details of the testimony which the witnesses might give when their depositions are taken. The facts in this regard are set forth in the 5th, 6th and 7th paragraphs of Louisiana's answer.

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1. *Martin v. The Lessee of Waddell*, 16 Pet. 367, 413-17, 10 L.Ed. 997, 1014-15. *Pollard v. Hagan*, 3 How. 212, 11 L.Ed. 565. *Hardin v. Jordan*, 140 US 371, 35 L.Ed. 433. *Massachusetts v. New York*, 271 US 65, 89-90, 70 L.Ed. 838, 849, 850.

2. *Louisiana v. Mississippi*, 202 US 1, 50 L.Ed. 913.

It is alleged in the 5th defense of Louisiana's answer that Louisiana has at all times since its admission into the Union in 1812 exercised unchallenged sovereignty over the submerged lands in the Gulf of Mexico and has had notorious undisturbed and exclusive possession of the area referred to in the complaint and as a result of such possession and jurisdiction there has existed a general conviction and agreement that Louisiana has the title to the said lands. It is also averred that during this entire period of time the executive, legislative and judicial departments of the Federal Government have never believed or asserted that the United States possessed any proprietary right in such lands. It is alleged in the 6th defense that the United States has on numerous occasions and over a great period of time recognized Louisiana's title and proprietary rights of ownership in said lands and has requested the Governor of the State to secure the passage of laws which would permit the Federal Government to acquire sites in the disputed area for game and fish preserves and for lighthouses, jetties and other aids to navigation.

Louisiana's 7th defense alleges that both the State and Federal officials have from time immemorial interpreted and applied the Act of Congress admitting Louisiana to the Union as including within Louisiana's boundaries the marginal seas and submerged lands, and relying on such interpretation Louisiana has for many years expended large sums of money in the administration, regulation and conservation of the fish, oysters, shrimp and natural resources in the Gulf of Mexico and has incurred debt for such purposes.

The foregoing defenses which will be established and supplemented by the testimony of witnesses and by State records and documents are relevant to show that there is a

conclusive presumption that the area in dispute belongs to the State of Louisiana and that the United States had no proprietary right therein. In any event, as alleged in the 6th defense these facts constitute evidence of the intent of Congress in describing Louisiana's boundaries as "including all islands within three leagues of its coast." They constitute a contemporaneous and practical interpretation of the Act of Congress admitting the State to the Union and are entitled to great weight in interpreting this statute.

In the case of *United States v. Hill*, 120 US 169, 30 L.Ed. 627, this Court stated:

> "In Edwards' Lessee v. Darby, 26 U.S. 12 Wheat. 206, 210 (6:603, 604), it was said: 'In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect is entitled to very great respect.' To the same effect are U.S. v. Dickson, 40 US 15 Pet. 141, 145 (10:689, 691); U.S. v. Gilmore, 75 U.S. 8 Wall, 330 (19:396); Smythe v. Fiske, 90 U.S. 23 Wall. 374, 382 (23:47, 50); U.S. v. Moore, 95 US 760, 763 (24:588, 589); U.S. v. Pugh, 99 US 265, 269, (25:322, 323); Hahn v. U.S. 107 US 402, 406 (27:527, 529); and Five Per Cent Cases, 110 US 471, 485 (28:198, 202). In the case of Brown v. U.S. 113 US 568 (28:1079), the same doctrine was applied, the cases in this court on the subject being collected, and it being said that a 'contemporaneous and uniform interpretation' by executive officers charged with the duty of acting under a statute 'is entitled to weight' in its construction, 'and in a case of doubt ought to turn the scale.' A still more recent case on the subject is U.S. v. Philbrick, 120 US 52 (ante, 659) where this language is used: 'A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is en-

titled to great weight; and since it is not clear that the construction was erroneous it ought not now to be overturned."

The Court then went on to say:

"* * * This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the Government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative."

See also Sutherland Statutory Construction, 3rd Ed. Volume 2, Section 5103. This author in Section 5105 states:

"The practice and interpretive regulations by officers, administrative agencies, department heads and others officially charged with the duty of administering and enforcing a statute will carry great weight in determining the operation of a statute."

Furthermore, the testimony of witnesses together with documentary evidence in the files of the State will be relevant to show the extent of Louisiana's historic boundaries at the time of and prior to the time that it was admitted to the Union. This evidence is certainly relevant in view of the following provision contained in Section 4 of the Submerged Lands Act (67 Stat. 31, 43 U.S.C. 1312):

"* * * * Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws **prior to or at the time such State became a member of the Union**, or if it has been heretofore approved by Con-

gress. May 22, 1953, c. 65, Title II, § 4, Stat. 31." (Emphasis supplied.)

Counsel for plaintiff has argued that only the laws of the state at the time of its admission to the Union are relevant. The Court, however, must accept the law as written and must consider the status of Louisiana's laws and boundaries prior to and at the time of its admission to the Union.

It will be noted that the Submerged Lands Act specifically provides that the location of a State's historical boundary as provided by its law prior to the time of its admission into the Union is not in any way prejudiced by the Act. Obviously, Louisiana's laws prior to its admission into the Union were the laws of France and of Spain. Treaties made by France and Spain with England and other world powers that were concerned in the colonization of the American Continent outlined the extent of Louisiana's boundaries prior to the time that it was admitted to the Union. By virtue of the Treaty with France whereby the Louisiana Purchase was made the United States obligated itself to incorporate the territory within these boundaries into States of the Union. Louisiana's claim to the submerged lands in the Gulf of Mexico under the Treaty of Paris is set forth in its brief in opposition to motion for leave to file complaint #15 Original October Term 1955. The obligations assumed by the United States to incorporate the land and seas constituting the Louisiana Territory into States are set forth on pages 11 to 21 inclusive of that brief to which the Court is respectfully referred. The various foreign treaties, laws, and documents relating to Louisiana's historic boundaries are not a part of the records of the United States and the Court will not take judicial notice of them. Louisiana is entitled to give evidence on this subject.

In any event the depositions of Louisiana's witnesses will amplify and supplement the pleadings in accordance with the Rules of Federal Civil Procedure so that Louisiana's claim to its submerged lands and territorial waters will thereby be fully developed. Louisiana submits that under the Rules it is entitled as a matter of right to take these depositions.

II.

THIS CASE INVOLVES MUCH MORE THAN A SIMPLE APPLICATION OF THIS COURT'S FORMER DECISION AND THE SUBMERGED LANDS ACT.

The United States in its opposition to Louisiana's motion states that the decision of this Court in *United States v. Louisiana*, 339 US 699, held that the Federal Government is entitled to all of the submerged lands seaward of the low water mark and remains so entitled except to the extent that it has since **granted** such lands to the State by the Submerged Lands Act. The Government therefore argues that the right of the United States to the Judgment it seeks depends upon propositions of law and matters subject to judicial notice, and the taking of testimony is not appropriate. This case is not quite that simple—not by far.

The action taken by Congress in passing the Submerged Lands Act and the Outer Continental Shelf Lands Act requires a reconsideration of all the jurisprudence of this Court prior to the decisions that were rendered by this Court in the California, Texas and Louisiana cases regarding the ownership of submerged lands and territorial waters. The Acts of Congress have nullified the theory on which these latter decisions were based.

In the case of *Superior Oil Company v. Fontenot*, 213 F. 2d 565, Cert. Den., 348 US 837, 99 L.Ed. 660, the Court of Appeals of the Fifth Circuit held that the Acts of Congress nullified the theory on which the opinion and decree of the Supreme Court had been based in these cases. The Court said (213 F. 2d 569):

> "So here, when the long and heated struggle over the title and right to possession of the land, which had been waged between the government and the state, came to an end in Public Law 31, the state and appellants, as its lessees, found themselves in one of two positions equally favorable in law. By virtue of the act which nullified the theory on which the opinion and decree of the Supreme Court had been based, they must be held, notwithstanding the opinion of the Supreme Court, to have always and at all times had the title and right of possession, or, if the passage of Public Law 31, which brought the long struggle to an end, is to be regarded as then conferring title on them, this title, by the very terms of the Act declaring and establishing it, related back so as to confirm and maintain the possession and title of State and lessee as good from the beginning."

The foregoing opinion of the Fifth Circuit Court of Appeals necessarily result from the wording of the Submerged Lands Act and from the Reports of the Congressional Committees recommending the passage of that Act. In Section 3 of the Submerged Lands Act (67 Stat. 30, 43 USC 13), Public Law 31 declares it to be in the public interest that the ownership of these lands be "recognized, confirmed, established and vested in and assigned to the respective States." And in subparagraph (b) of section 3, "the United States hereby releases and relinquishes unto said States . . . all right title and interest of the United States, **if any it has,** in and to all said

lands." It therefore appears from the wording of the Act itself that Congress recognized and confirmed a title already possessed by the States, and quitclaimed any interest that the United States might possibly have in these lands. It is therefore apparent that this was not intended to be a grant of lands but rather a confirmation and recognition of pre-existing title. This conclusion is found in the Reports of the Congressional Committee that recommended passage of the act.

The legislative history of the Submerged Lands Act appears in House Report No. 215 and Senate Report No. 133 of the 83rd Congress, 1st Session. House Report No. 215 makes the following statement on page 34 regarding the unchallenged ownership of the States of the Union during the 160 years of the Nation's history:

> **"One Hundred and sixty years of unchallenged ownership by the States.**
>
> "Throughout our Nation's history the States have been in possession of and exercising all the rights and attributes of ownership in the lands and resources beneath the navigable waters within their boundaries. During a period of more than 150 years of American jurisprudence the Supreme Court, in the words of Mr. Justice Black, had 'used language strong enough to indicate that the Court then believed that the States also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not.'
>
> "That same belief was expressed in scores of Supreme Court opinions and in hundreds of lower Federal courts' and State courts' opinions. Similar beliefs were expressed in rulings by Attorneys General of the United States, the Department of the Interior, the War Depart-

ment, and the Navy Department. Lawyers, legal publicists, and those holding under State authority accepted this principle as the well-settled law of the land. * * *"

The Report after discussing the decision in the California case then makes the following statement on page 36:

"* * *This committee, having heard the testimony of many able and distinguished State attorneys general, of representatives of the American Bar Association and State bar associations, and of other able and distinguished jurists and lawyers, is of the opinion that no decision of the Supreme Court in many years has caused such dissatisfaction, confusion, and protest as has the California case. We have heard it described in such terms as 'novel', 'strange', 'extraordinary' and 'unusual', 'creating an estate never before heard of', 'creating a new property interest', 'a threat to our constitutional system of dual sovereignty', 'a step toward the nationalization of our natural resources', 'causing pandemonium', etc."

The Committee then goes on to state on page 46 of its Report:

"The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law."

With respect to the claim that the enactment of the Submerged Lands Act would constitute a gift of property belonging to the United States to the coastal states, the Congressional Committee says: (page 47)

"* * * The committee cannot agree that the relinquishment by the Federal Government of something it never believed it had, and the confirmation of rights in the States which they always believed they did have and which they have always exercised, can be properly classified as a 'gift,' but rather a mere confirmation of titles asserted under what was long believed and accepted to be the law. * * *"

Senate Report No. 133 makes similar statements which need not be repeated here. However, attention may be directed to the following criticism by the Senate Committee of the Court's holding in the California case that the obligation of the United States to defend the marginal seas from foreign attack gives it a prior claim to the ownership of the submerged lands adjoining our shores. Answering this contention the Senate Committee said (Page 58-59):

"Mr. Justice Black, in speaking for the majority of the Court in the California case, said:

" 'The very oil about which the State and Nation here contend might well become the subject of international dispute and settlement.'

"If the Court in making the statement had reference to the military power of a foreign nation to dispute the rights of the States to take oil under submerged lands within their boundaries, then the same statement could correctly be made about oil under uplands, providing of course, the foreign nation possessed a military force strong enough to compel a settlement by the United States. However, if the statement was made because the Congress had never legislatively asserted on behalf of the United States or the State's title to the submerged lands within their boundaries, then we think that is all

the more reason why the Congress should now remove all doubt about the title by ratifying and confirming the titles long asserted by the various States, subject always, of course, to the paramount powers of the Federal Government under the Constitution, which titles have never been disputed by any foreign nation. * * *

"* * * It is beyond doubt that the Federal Government cannot assert any lawful control over lands or resources that are not located within the borders of the several States or the Territories or which has not been committed to it by treaty or other international negotiations. "

In *Massachusetts v. Manchester*, the Supreme Court said:

> " 'There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the states.' "

The foregoing statement in an endorsement by the Congress of Mr. Justice Reed's dissent in the California case, wherein he said (332 US 42-3):

> "This ownership in California would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the nation. While no square ruling of this Court has determined the ownership of those marginal lands, to me the tone of the decisions dealing with similar problems indicates that, without discussion, state ownership has been assumed. Pollard v. Hagan, 3 How (US) 212, 11 L.Ed. 565, supra; Louisiana v. Mississippi, 202 US 1, 52, 50 L.Ed. 913, 931, 26 S.Ct. 408, 571; The Abby Dodge, 223 US 166, 56 L.Ed. 390, 32 S.Ct. 310; New Jersey v. Delaware, 291 US 361,

78 L.Ed. 847, 54 S.Ct. 407; 295 US 694, 79 L.Ed. 1659, 55 S.Ct. 907.

"* * * Of course the United States has 'paramount rights' in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?

"To declare that the Government has 'national dominion' is merely a way of saying that vis-a-vis all other nations the Government is the sovereign. If that is what the Court's decree means, it needs no pronouncement by this Court to confer or declare such sovereignty. If it means more than that, it implies that the Government has some proprietary interest. That has not been remotely established except by sliding from absence of ownership by California to ownership by the United States."

The following statements of Senate Joint Resolution No. 13, which became the Submerged Lands Act, regarding the purpose of the bill and the effect of its enactment are quoted. The purpose of the bill is thus stated on page 5 of the Senate Report:

"Purpose of Bill

"Senate Joint Resolution 13, as amended, determines and declares that it is in the public interest that title and

ownership of lands beneath navigable waters within the boundaries of the respective States, and of the resources therein, be established and vested in the respective States. Insofar as the Federal Government has any proprietary rights in such lands and waters, that interest is relinquished or 'quitclaimed' to the individual States. * * *"

The conclusion of the Senate Committee is stated on page 24:

"IX Conclusion

"The committee submits that the enactment of Senate Joint Resolution 13, as amended, is an act of simple justice to each of the 48 States in that it re-establishes in them as a matter of law that possession and control of the lands beneath navigable waters inside their boundaries which have existed in fact since the beginning of our Nation. It is not a gift; it is a restitution. By this joint resolution the Federal Government is itself doing the equity it expects of its citizens.

"The committee recommends enactment of Senate Joint Resolution 13."

The actions of Congress outlined above very strongly suggest that the Court should reaffirm "as a rule of property law" its repeated assertions "for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not." It should, by the same token, renounce the theory that national responsibility or national interest in the submerged lands and territorial waters adjoining our nation's shores gives to the federal government any title to or ownership of such lands and waters. The conclusion to be reached from the Submerged Lands Act and its legislative history is that external national sovereignty per-

tains only to matters of national defense, interstate and foreign commerce, and other international relationships. It would therefore follow that the jurisprudence of 160 years establishing these principles should be applied to the case at bar. In the light of this jurisprudence Congress has correctly declared that submerged lands belong to and are a part of the individual coastal state which they adjoin. Louisiana's answer raises questions as to **validity of the limitation of boundaries** to three-leagues in the Gulf of Mexico contained in the Acts of Congress. However, these propositions need not be discussed at this time.

The legislative history of the Submerged Lands Act also points up the necessity for considering the equities of the case as between the United States and the coastal states. House Report No. 215, 83rd Congress, 1st Sess. distinctly states that equity should be done by the Federal Government and that the individual States in this respect should be treated as sovereign States, not as private individuals would be treated. On Page 46 of House Report No. 215 the following statement appears:

> "The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.

"If these same facts were involved in a dispute between private individuals, an equitable title to the lands would result in favor of the person in possession. The Court in the California case states, as a matter of law, that the Federal Government—

> " 'is not to be deprived of these interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; * * *'

"The effect of this ruling of the Court is to place the State of California in the same legal position as an individual, thereby depriving it of its status as a sovereign. It should be noted that the case of U.S. v. California was a controversy between two sovereigns, namely, the United States on the one hand and the State of California on the other, both of which occupied equal dignity as sovereigns. The sovereign rights enjoyed by the United States were in the first instance derived from the States and the sovereign powers of the United States can rise no higher or have any greater effect than that which was delegated to the Central Government by the Constitution. The committee believes that, as a matter of policy in this instance, the same equitable principles and high standards that apply between individuals, should be applied by Congress as between the National Government and the sovereign States. (See Indiana v. Kentucky, 136 U.S. 479, 500 (1890); U.S. v. Texas, 162 U.S. 1, 61 (1896); New Mexico v. Texas, 275 U.S. 279 (1927)."

The facts regarding Louisiana's possession of and exercise of jurisdiction over its submerged lands in the Gulf of Mexico are relevant not only to explain and interpret the Act of Congress which admitted Louisiana to the Union, but also to determine the historic boundaries of the State, and to develop

the equities as they exist between the national sovereign on the one hand and the State sovereign on the other so as to properly resolve this domestic dispute as to the title and ownership of these lands and resources.

Although paragraph IX of the Government's complaint states that the fundamental issues in its controversy with Louisiana "involve inquiry into and application of the foreign policy of the United States in a matter of peculiar importance and delicacy," the Plaintiff now says on page 3 of its statement with respect to its motion for Judgment that the "location of the seaward boundary of the United States is a political question" and that the boundary has been determined "since the beginning of our history as a nation . . . and is a matter subject to judicial notice." The matter of inquiry into foreign policy has apparently passed out of the case. The government now admits that the controversy is one to determine the location of a boundary and the ownership of property in submerged lands. The government therefore appears not as a superior sovereign exercising paramount rights but as a claimant to lands whose title and limits are a matter of dispute. Prior to this litigation the United States was not in possession of these lands and asserted no rights therein. A mere assertion of title now cannot supply a sovereign right which would follow a recognition of title in either claimant by the Court. The government asks the Court to declare its rights but seeks to litigate the controversy as if its alleged rights had already been favorably adjudged.

When the Federal Government goes into the Court of Justice as a suitor it is subject to the same rules, and is bound by the Judgment to the same extent as private parties. It

agrees by implication that justice may be done with regard to the subject matter.[3]

III.

NATIONAL AND STATE BOUNDARIES CO-EXTENSIVE

In its opposition to Louisiana's motion the Government states that the boundary of Louisiana cannot extend farther seaward than the National boundary. Government Counsel then goes on to make a statement that is strangely paradoxical and utterly inconsistent with the claim of the United States in this litigation. On page 2 of the Memo in opposition to Louisiana's motion to take depositions the statement is made:

> "The national boundary extends seaward only 3 miles from the coast of Louisiana."

In the Government's motion for judgment on page 2 the statement is repeated that "the United States claims that the State boundary is only 3 miles from the coast" and then on page 3 of the motion for judgment says again "the State cannot have a boundary farther seaward than the boundary of the United States." Government counsel then goes on to say that the marginal sea of the United States does not exceed 3 miles in width and that this is a matter subject to judicial notice.

Although the United States says that the National boundary extends only 3 miles seaward it nevertheless alleges in

3. *Brent v. Bank of Washington*, 10 Pet 596, 9 L.Ed. 547. *The Siren v. United States* (The Siren), 7 Wall 152, 19 L.Ed. 129. *United States v. O'Grady*, 22 Wall 641, 22 L.Ed. 772. *Carr v. United States*, 98 US 433, 25 L.Ed. 209. *Curtner v. United States*, 149 US 662, 13 S.Ct. 985, 37 L.Ed. 890. *Lukenbach v. The Thekla*, 266 US 328, 45 S.Ct. 112, 69 L.Ed. 313.

paragraph 6 of its complaint that "United States is now entitled to exclusive possession of and full dominion and power over the lands, minerals and other things underlying the Gulf of Mexico, lying more than 3 geographic miles seaward from the ordinary low water mark." The prayer of the complaint is that this Court declare the rights of the United States as against the State of Louisiana in the lands, minerals and other things underlying the Gulf of Mexico lying more than three geographic miles seaward from the ordinary low water mark and from the outer limit of inland waters on the coast of Louisiana "and extending seaward to the edge of the Continental Shelf." Louisiana claims, among other things that it is entitled in any event to extend its boundaries to the full limit of the National boundaries. The National boundaries have undoubtedly been extended to the edge of the Continental Shelf as a result of Presidential Proclamation No. 2667 issued September 28, 1945 (10 FR 12303), the Submerged Lands Act, and the Outer Continuental Shelf Lands Act.

The Presidential Proclamation declares that "the government of the United States regards the natural resources of the sub-soil and seabed of the Continental Shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control." The proclamation recites that "such jurisdiction is required in the interest of their conservation and prudent utilization and that the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the Continental Shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it."

Section 9 of the Submerged Lands Act, 67 Stat. 32, 43

USC 1302, states that nothing in that Act "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the sub-soil and seabed of the Continental Shelf lying seaward" of the area 3 miles or 3 leagues from the coast of the adjoining state.

Likewise the Outer Continental Shelf Lands Act provides in Section 3, 67 Stat. 462, 43 USC 1332:

> "It is declared to be the policy of the United States that the sub-soil and seabed of the Outer Continental Shelf appertained to the United States and are subject to its jurisdiction, control, and the power of disposition as provided in this sub-chapter."

This Court has freqently stated that jurisdiction, territory and ownership are co-extensive.

New York v. Connecticut, 4 Dall. 1 (1799)

United States v. Bevans, 3 Wheat 336 (1818)

Corfield v. Coryell, 6 Fed Cas. No. 3,230, p. 546 (1823)

Rhode Island v. Massachusetts, 12 Pet. 657 (1838)

Martin v. Waddell, 16 Pet. 366 (1842)

Pollard's Lessee v. Hagan, 3 How. 212 (1845)

Manchester v. Massachusetts, 139 US 240 (1891)

Smith v. Maryland, 18 How. 71, 74 (1855)

McCready v. Virginia, 94 US 391, 394 (1876)

For instance in the case of *United States v. Bevans*, 3 Wheat 336 (1818), Chief Justice Marshall stated (3 Wheat 386-7):

> "What then is the extent of jurisdiction which a State possesses? We answer, without hesitation, the jurisdiction of a State is co-extensive with its territory; coextensive with its legislative power."

It is therefore obvious that the national boundary has been extended to the edge of the Continental Shelf.

We again refer to the statements of Government counsel that the boundary of the State of Louisiana cannot extend farther seaward than the National boundary. The implication of the Government's argument in this connection is that the State boundary can extend as far as the National boundary goes. Thus in the Government's Memorandum in reply to Louisiana's brief in opposition to motion for leave to file complaint (No. 15 Original, October Term, 1955) Plaintiff's counsel says:

> "In our view, the State's boundary cannot extend beyond that of the Nation. Thus our present problem involves finding, as a limiting factor, the location of the National Maritime boundary."

This Court has many times held that the boundaries of the coastal States are coextensive with the boundaries of the nation. So in *Harcourt v. Gaillard*, 12 Wheat 524, 6 L.Ed. 716 (1827), the Court said:

> "There was no territory within the United States that was claimed in any other right than that of some of the confederate States; therefore, there could be no ac-

quisition of territory made by the United States distinct from, or independent of some one of the States."

Pollard v. Hagan, 3 How. 228-9, 11 L.Ed. 573 (1845), specifically refers to the title in the coastal states created out of the Louisiana territory, as follows:

"We think a proper examination of the subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama or any of the new States were formed; except for temporary purposes and to execute . . . the trust created by the treaty with the French Republic of the 30th of April 1803, ceding Louisiana."

In *Dred Scott v. Sanford*, 19 How. 393, 446-8, 15 L.Ed. 691, 718, the following statement appears:

"There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. . . . No power is given to acquire a territory to be held and governed permanently in that character."

In *Brown v. Grant*, 116 US 207, 212, 20 L.Ed. 598, 600 (1885), the opinion states:

"Unless otherwise declared by Congress, the title to every species of property owned by a territory passes to the State upon its admission into the Union."

Similarly, in *Commonwealth of Massachusetts v. Manchester*, 152 Mass. 230, 26 NE 113, 116 (1890), affirmed 139 US 240, 35 L.Ed. 167, we find this statement of the law:

"There is no belt of land under the sea adjacent to the coast which is the property of the United States, and not the property of the States."

The opinion of the Supreme Court in the above quoted case bearing the title of *Manchester v. Massachusetts*, 139 US 240, 264, 35 L.Ed. 159, 166, this Court in affirming the judgment in the Massachusetts Supreme Court said:

"The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control over this territory has been granted to the United States, this control remains with the state. . . ."

"Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea, and the boundaries of its counties."

The foregoing decisions of this Court have been frequently reaffirmed and quoted in numerous decisions that have been handed down since they were decided.

The statement of Government counsel that the boundary of the State of Louisiana extends no further seaward than the National boundary therefore carries with it as a corollary the proposition that the State's boundary does extend as far as the National boundary extends. And the National boundary has been extended to the edge of the Continental Shelf. Within that boundary the United States can exercise only those powers conferred on it by the Constitution, namely; regulation of Interstate and foreign commerce, navigation, and National defense. Since the theory underlying the California, Texas and Louisiana Tidelands cases that the external

sovereignty of the United States over these submerged lands can in some way be translated into property ownership, has been nullified by the National Congress, the United States can claim and exercise no proprietary rights in this disputed area.

It is not the purpose of this memorandum to argue the government's motion for judgment inasmuch as that motion declares on page 7 thereof, "The United States expects to file at an early date its brief on the merits in support of the present motion." The State of Louisiana reserves its right to answer such brief when filed, but nevertheless considers it appropriate to challenge the statements made by the United States in support of its motion.

IV.

THE CASE SHOULD NOT BE DECIDED IN PIECEMEAL FASHION

Louisiana in its brief in support of its opposition to Plaintiff's motion for leave to file its complaint urged that this Court would waste its time in a partial and piecemeal determination of the issues that are raised by the pleadings. There is no need to repeat that argument now and we respectfully refer the Court to pages 38 to 41 inclusive of Louisiana's brief in Docket No. 15 Original, October Term, 1955.

The statements made by government counsel on pages 4 and 6 of its statement with respect to the motion for Judgment support Louisiana's position that this entire controversy should be decided in one proceeding and that such a proceeding could be more appropriately presented in the normal way in a District Court. Louisiana still urges its motion contained in its answer that this matter be transferred to a District

Court for a full development of the issues of fact and law raised in this proceeding.

CONCLUSION

Louisiana submits that under the Rules it is entitled of right to take the depositions of witnesses prior to the hearing of this case in order to fully develop the issues involved. A proper decree would grant the motion of the State to take these depositions and order that this cause be transferred to a District Court for trial. It is inappropriate that a motion for judgment should be considered by the Court at this time.

Respectfully submitted,

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PROOF OF SERVICE

I, _____ one of the attorneys for the State of Louisiana, defendant herein, and a member of the Bar of the Supreme Court of the United States, certify that on the _____ day of _____, 195_____, I served copies of the foregoing Reply to the Opposition of the United States to Louisiana's Motion to Take Depositions, by leaving copies thereof at the offices of the Attorney General and of the Solicitor General of the United States, respectively, in the Department of Justice Building, Washington, D. C.

_____

Of Counsel