No. 74, Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF GEORGIA,

Plaintiff,

v.

STATE OF SOUTH CAROLINA,

Defendant.

MOTION FOR LEAVE TO FILE REBUTTAL BRIEF AND REBUTTAL BRIEF OF THE STATE OF SOUTH CAROLINA

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MOTION FOR LEAVE TO FILE REBUTTAL BRIEF

The State of South Carolina respectfully moves for leave to file the attached Rebuttal Brief. The consent of the attorney for the State of Georgia has been obtained.

The Order of this Court dated April 24, 1989, mentioned only the filing of Exceptions with supporting briefs and reply briefs to those supporting briefs. However, in this case, as in most others, the reply brief of Georgia (analogous to an appellee's brief) contains several matters not specifically addressed in South Carolina's opening brief filed with South Carolina's Exceptions. The nature of these contentions, and South Carolina's response thereto, are set forth in the attached proposed Rebuttal Brief. Because of the need to file a short response to Georgia's contentions, South Carolina respectfully requests that in this case, as in most other

cases before this Court, a rebuttal brief, analogous to a reply brief in an appellate case, be permitted.

Respectfully submitted,

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REBUTTAL BRIEF OF THE STATE OF SOUTH CAROLINA

ARGUMENT

I. The additions to Denwill and the Horseshoe Shoal area are accretions to the South Carolina mainland and should remain in South Carolina.

Georgia does not deny that the newly-made land in the southeastern Denwill and Horseshoe Shoal areas was

formed through a combination of natural sedimentation behind training walls and the placement of dredged material behind the walls. *See* Ga. Reply Br. at 5, 7, n. 8, and 10. The only dispute as to those areas concerns the applicable legal principles.

Georgia makes several arguments concerning the legal principles which it claims should govern the location of the boundary in the above areas. Georgia first argues that the placement of dredged material along a waterfront is an avulsive change which does not change the boundary. However, this contention is completely negated by the numerous cases in this Court and others which hold that when a third party, not the riparian owner, places fill along the shore, the newly-created land belongs to the riparian owner. *See* S.C. Exceptions & Br. at 10-12. No case cited by Georgia departs from this general rule.

Georgia also cites a number of cases in which it is held that placement of a dam across a river will not change a boundary. Ga. Reply Br. at 15 and n. 14. However, South Carolina contends only that the accumulation of land changed the boundary, not that the erection of training walls by itself wrought the change.

Finally, Georgia argues that since the filled land in the southeastern Denwill area began as marsh islands behind the training wall, rather than as an extension of the South Carolina shore, it cannot be considered accretion to the South Carolina shore.[1] Ga. Reply Br. at 10 and

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[1] Georgia makes this contention only as to the Denwill area. The Horseshoe Shoal accumulations apparently either extended from both Jones Island and Oyster Bed Island or simply grew up more or less uniformly along the length of the training wall. Compare the 1924 and 1931 charts, Ga. Exhibits 329 and 330.

n. 11. Under the rule thus suggested by Georgia, the boundary would have moved northward to Georgia's advantage. Whatever the merits of this approach in a case of completely natural accretion, it should not apply in this case where the accretion was significantly assisted by the deposit of dredged material. If it were held that a party who is not the riparian owner can create an island in the middle of a river by dredge spoil placement and then deprive the riparian owner of his status as such by extending the island across the centerline to the opposite bank, the result would create the same inequity which the cases seek to prevent. Those cases, cited at pp. 11-12 of South Carolina's Exceptions & Brief, protect the riparian owner from acts of another party which would eliminate the riparian character of the tract. Once the fill is completed, it is solid land without regard to the starting point. While all the reported cases known to South Carolina involve situations where the party creating the fill began at the shore and worked outward, the effect on the riparian owner is exactly the same when the fill begins in the middle of the river and moves inland. South Carolina submits that the same principle applies, and for the same reasons, regardless of the location from which the fill begins and the direction in which it proceeds. To hold otherwise would create two different rules even though the result of both processes is identical.[2]

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[2] By contrast, where the accretion to an existing island is natural, the courts of at least some states award the accreted land to the owner of the island up to the point where the accretions join the mainland. *See, e.g., Tyson v. Iowa*, 283 F.2d 802, 811 (8th Cir. 1960). In that situation, where artificial filling is completely absent, the fruits of natural processes are simply distributed as equitably as possible.

Georgia also cites a number of cases dealing with the rights of private riparian owners as against the state. Ga. Reply Br. at 12-15 and n. 13. It is obvious that these cases have no bearing on the boundary issue between the states. In this case, as in most interstate boundary cases, the State does not necessarily claim to hold the title to the land in issue; instead, the State seeks to protect the riparian status of land which it claims to be within the state. If there is any question about state versus private ownership, that question is one for the state courts.

The result sought by Georgia would not only cut off South Carolina's riparian status along several miles of the northern bank of the river, but also would permit Georgia to reap, at South Carolina's expense, the benefit of both the dredging and the filling. It would allow Georgia a basis for future riparian claims using the same process. Georgia's port was the only beneficiary of the dredging, and Georgia now seeks to profit from the cavalier placement of the dredged material along South Carolina's shores or in her waters. South Carolina submits that settled principles of riparian law should be extended to prevent any further benefit to Georgia as a result of the instant unique situation.

II. The most appropriate location for the lateral seaward boundary is the center of the navigation channel.[3]

Georgia's suggested lateral seaward boundary line is based on a view of both the geography and the appropriate

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[3] It is assumed for purposes of this discussion that the starting point for the lateral seaward boundary is where the

(Continued on following page)

legal considerations which is constricted well beyond what recognized principles require. Georgia would focus only on the immediate three miles or less of the coast which surrounds the boundary area, no matter how much that area varies from the general pattern of the geography of the region; and instead of testing the geography by the various recognized alternative methods of analysis, as nearly all the cases have done, Georgia would start with an unspoken presumption that the equidistance principle should govern, and that no other method even needs examination.[4]

Georgia claims that the regional geography of the two states and every method of analysis except equidistance can be discarded because the boundary in the territorial sea is only 3 to 12 miles long. However, if the line inequitably divides the sea, its inequity is of the same nature whether the line is 3, 12 or 200 miles long. South Carolina submits that the Special Master's line, based entirely on the Hilton Head-Tybee closing line, is inequitable regardless of length because the closing line does

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Special Master (correctly, in South Carolina's view) located the mouth of the Savannah River. Georgia's alternative argument that the mouth should be located halfway between Hilton Head and Tybee is discussed at pp. 32-39 of the Response of South Carolina to Georgia's Exceptions and Brief.

[4] Georgia overstates the effect of *Texas v. Louisiana*, 426 U.S. 465 (1976), by asserting that this Court "applied" the equidistance principle in that case. Ga. Reply Br. at 19. In fact, however, both parties agreed to the use of the principle. 426 U.S. at 468. The present case is therefore the first interstate boundary case in this Court in which the applicable principles are in dispute.

not represent the direction of either state's coast or any other relevant factor.[5]

The rule which Georgia advocates would rely almost entirely on equidistance, with special circumstances being used only for fine-tuning purposes. Such a view would surprise the authors of the equidistance principle and would be equally startling to those courts and other bodies which have applied it in practice. A review of nearly all the cases indicates that the equidistant line is at most one possible starting point. The practice has been to examine all the relevant geography to see whether any special circumstances are presented. The rule thus is distilled into one which simply requires an equitable result in light of all the circumstances. No more definite statement of the rule is possible, because coastlines do not fall into regularly recurring patterns such as are found in contract cases or others involving regular human transactions. Here, the only relevant circumstances are geographical, because there is no historic usage nor are there any presently-known material resources.

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[5] The two amici, the United States and the State of Alaska, disagree over whether the Hilton Head-Tybee line is properly called a baseline or a closing line. The point need not be discussed by the Court, because both Georgia and South Carolina agree that the line was drawn in the appropriate place by the United States Baselines Committee. Moreover, both parties have stipulated that the decision in this case shall not have any adverse effect on the interests of the United States. Even if the Court deems it necessary to discuss this point, South Carolina submits that its outcome should in no way prejudice the interests of either state.

In this case, as South Carolina has previously noted, Georgia's coast runs northeast to southwest at a 20-degree angle overall, and South Carolina's coast lies at a 47-degree angle. The Hilton Head-to-Tybee closing line runs at only a 14-degree angle. It is not representative of anything except the geography of that immediate area. Since Georgia's coastal front, when extended, cuts across South Carolina, Georgia would be granted too much if the line ran at the north edge of its coastal front. The Special Master's line, which runs to the north of Georgia's coastal front, grants Georgia even more.

Georgia suggests that to analyze this question using coastal fronts and other standard methods "muddles a perfectly clear picture of the facts." Ga. Reply Br. at 23. This is true only if one accepts the microcosmic picture advocated by Georgia. To look at a flower petal through a magnifying glass gives a "perfectly clear" picture of the petal, but tells nothing about the entire plant.

Finally, the lateral seaward boundary line drawn in this litigation will undoubtedly influence, if not control, the line drawn to the limit of the 200-mile Exclusive Economic Zone established by Presidential Proclamation No. 5030, 48 F.R. 10601 (1983). The Coastal Zone Management Act, 16 U.S.C.§ 1456a(4)(B) provides for extension of the states' lateral seaward boundaries. While the particular program referenced therein is not currently funded, it is inevitable that the extended lateral seaward boundaries of the states will become important for this or other purposes as time progresses. And while 16 U.S.C. § 1456a(4) is silent as to the effect to be given a post-1976 judicial determination of the lateral seaward boundary, it is likewise inevitable that the method of determining the first 3 to 12 miles of the line will be accorded great weight in determining the extended boundary. *See* 15 C.F.R.

§ 931.82(c), which provides that a line such as the one now to be determined "may be used . . . in establishing a line of delimitation." If the Special Master's line were to be so extended, its aberrational geography would further exaggerate the line's inequity as it moved seaward.

CONCLUSION

For the foregoing reasons, South Carolina respectfully submits that the Court should fix the boundary in the Denwill area and in the territorial sea as set forth above and in South Carolina's Exceptions and Brief.

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