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In the

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# Supreme Court of the United States

THE STATE OF TEXAS,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE STATE OF LOUISIANA,	)
	)
Defendant.	)

No. 36, Original

Washington, D. C.  
December 11, 1972

Pages 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

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: THE STATE OF TEXAS, :  
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: Plaintiff, :  
: :  
: v. : No. 36, Original  
: :  
: THE STATE OF LOUISIANA, :  
: :  
: Defendant. :  
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Washington, D. C.  
Monday, December 11, 1972

The above-entitled matter came on for argument  
at 1:44 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

S. D. McDANIEL, ESQ., P. O. Box 12548, Austin,  
Texas 78711; for the Plaintiff.

OLIVER P. STOCKWELL, ESQ., P. O. Box 2900, Lake  
Charles, Louisiana; for the Defendant.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 36, Original, Texas against Louisiana.

Mr. McDaniel, you may proceed whenever you are ready.

ORAL ARGUMENT OF S. D. McDANIEL, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. McDANIEL: Thank you, Your Honor. Mr. Chief Justice, may it please the Court:

Former Governor and Senator Daniel asked me to express to you his regrets that he could not appear and argue this case. He has been appointed to the Supreme Court of Texas, and our canons of judicial ethics prevent him from appearing as an advocate. He did handle the case before the Special Master, however.

The maps which are behind me, one, you have an individual map which I have had furnished to the Court. The large map is furnished by Mr. Stockwell, the counsel to Louisiana. I apologize to the Court that only three of the copies which should be in Justice Marshall, the Chief Justice, and Justice Blackmun's hands, so that all of you could see for reference purposes, were all the color copies that the Geological Survey Office here in Washington had of the map. The others are reproductions made here. I will refer to that map some in the latter part of my argument. It is a duplication of Texas Exhibit A47.

As I understand the procedure that is to be followed in this case, there will be no rebuttal, even if I wanted to save time for it, so I ask the Court to please ask any questions that you may have of me concerning any arguments that Mr. Stockwell has raised in his briefs in order that I may have the opportunity to respond to them; and I also-- unless the Court has some question about it--will pass over the question of jurisdiction of course and also the question of whether or not the United States is a necessary party.

Q Where does the idea come from that you would not have rebuttal if you wanted to save a few minutes?

MR. McDANIEL: That was the arrangement that we were told by the Clerk, Your Honor.

Q You mean in the arguments here today?

MR. McDANIEL: Yes.

Q There is some misunderstanding. You arrange your argument as you wish. If you wish to save five minutes rebuttal, that is the conventional pattern.

MR. McDANIEL: All right, thank you, Your Honor. I am glad to have that clear.

Q I do not mean to limit you to five minutes.

MR. McDANIEL: No, I understand. Thank you.

Q We expect, however, that you make your argument in chief in your--

MR. McDANIEL: Yes, by all means.

Let me commend Judge Van Pelt, the Special Master, not only because I believe--

Q You have got to keep your rebuttal within your 30 minutes.

MR. McDANIEL: Yes, I understand.

Let me commend Judge Van Pelt for his report which, in the great part, I speak in support of. We have one exception that we took to his report. Really it is more of a quibble than an exception, almost, under the facts of the case. I shall cover that last in my argument.

I particularly commend Judge Van Pelt and commend to your use the appendix of the evidence which he has put in the report, which is in great detail discussing the various individual exhibits that he considers to support his findings. This is a boundary case, as you know, and it is over the Texas-Louisiana boundary below the 32nd degree of north latitude, which is the boundary in the Sabine River.

Q One reason that you might have been told you have no rebuttal is that you are the equivalent of the--not of the appellant or the petitioner here but basically of the respondent, are you not?

MR. McDANIEL: That is correct.

Q You were the plaintiff below, but the Master did what you wanted him to do, with one minor exception.

MR. McDANIEL: With one minor exception.

Q And so this case is reversed from its ordinary posture, the ordinary posture of an appellate case before our Court.

MR. McDANIEL: That is correct.

Q Mr. McDaniel, what was the significance of the 32 degree point?

MR. McDANIEL: The 32nd degree of north latitude is the point at which the Sabine River ceased to be the boundary between Texas and Louisiana.

I will discuss the specific language of the boundary in a moment and its significance to the case.

Texas claims by grant from the United States made by act of Congress on July 5, 1848 and also claims title by prescription and acquiescence. Now, it should be pointed out here I think, because this does bear on the point of whether or not the United States should conceivably be a party in this lawsuit. The area which is involved in this lawsuit was never a part of the Republic of Texas and it is not a part of Texas' historic claim. We claim purely as a grantee of the United States.

Louisiana claims by theory of agency or osmosis or something to have had prior title in 1848 as a result of the treaty of 1819 with Spain settling the territorial boundaries of the United States and Spain. This treaty makes no mention whatsoever of Louisiana. To Texas, the basic

question in the lawsuit is as between the United States and Louisiana on July 5, 1848, who had title to the western half of the Sabine River, including Sabine Lake and Sabine Pass.

Q The question is who had title as between the United States and the State of Louisiana, is it not?

MR. McDANIEL: Yes, Your Honor.

Q There are no other possibilities?

MR. McDANIEL: That is correct. At least certainly none insofar as the lawsuit shows, the record indication.

Q As far as either one of you on either side of this.

MR. McDANIEL: Yes, that is correct.

We contend that Congress never granted the area in dispute to Louisiana and that Louisiana's theory of the case in addition to being wrong because the instruments just do not grant it to Louisiana is constitutionally wrong because Article 4, Section 3, gives to Congress the exclusive power to dispose of the territory of the United States. And the first sentence of the Constitution defines the Congress as consisting of the Senate and a House of Representatives. And a treaty which acquired property to the United States is an executive action ratified by the Senate and it cannot dispose of property to one of the states of the union.

The history of the thing starts with the 1803



purchase of Louisiana at a time when the westward claim of the Louisiana Purchase was completely unsettled. Jefferson and many other prominent people thought that the claim extended clear to the Rio Grande.

In 1811, the Congress authorized the formation of the State of Louisiana from the Orleans Territory. Part of the description relative to the case is in the Special Master's report on page 41. What I am reading is from the statutes at large, which has a little more in it than the Master quoted. It reads that "The inhabitants of all that part of the territory are country ceded under the name of Louisiana," and then talks about the cession from France "contained within the following limits. That is to say, beginning at the mouth of the River Sabine, thence by line to be drawn along the middle of said river, including all islands to the 32nd degree of latitude."

The Louisiana Constitution of 1812 is in virtually identical language, except it inserts the word "its" between "all" and "islands." And the 1812 Act of Admission by the Congress is, I believe, in precisely the same language. The "its" is not in it.

The 1812 act admitting Louisiana as a state is also pertinent, it seems to us, in another regard, because Section 3 of that act reads this way, that "The said state"--speaking of Louisiana--"together with the residue of that

portion of country which was comprehended with the Territory of Orleans, as constituted by the act entitling an act directing Louisiana into two territories and providing for temporary governments thereof, shall be one district and be called the Louisiana District, and there shall be established in the said district a district court to consist of one judge."

And in the 1850 publication of the statute at large, which is the ones we have down in Texas, there is one of these little marginal squibs here that says the inhabitants of Louisiana within directed limits to be authorized to form a constitution and state.

We contend that the Congress of course knew exactly what they were doing and were acting within what was the normal procedure of erecting state boundary in the middle of a stream when they defined Louisiana's eastern boundary up to the 32nd degree of latitude here as being in the middle of the Sabine River.

It becomes a lawsuit and a controversy because of the 1819 treaty with Spain. When that treaty was executed after a considerable period of negotiation, the treaty called for the boundary between the two countries to be the western bank of the Sabine, starting at the westward mouth of the Sabine and then up the westward bank. This treaty was ratified by Mexico in 1828; by the Republic of Texas in

1838. The boundary was actually surveyed in 1840-41 by a joint commission of the Republic of Texas and the United States and was marked on the ground. That was the extent of Texas's historic claim.

In 1845, of course, we had the annexation of Texas into the union, or as President Polk referred to it in his inaugural address, the reannexation of Texas into the union. We do not think that there was anything at all out of the ordinary about the fact that the people who were the leaders of this country in the early part of the last century fully expected that there would be more states organized to the westward of Louisiana. Certainly President Jackson and others never ceased their efforts to get Texas, and ultimately they did.

The next act of significance in this controversy is important enough that if the Court will indulge me, I will read it with you. It is on page 42 of the Special Master's report. It is a resolution not by some petty functionary of the government of Louisiana but a solemn declaration of the Louisiana Legislature, passed in 1848. It reads as follows:

"Whereas the Constitution and the Laws of the State of Louisiana, nor those of any other State or Territory extend over the waters of the Sabine River, from the middle of said stream to the western bank thereof; and that it is of importance to the citizens living contiguous thereto, and to

the people in general, that the jurisdiction of some State should be extended over said territory, in order that crimes and offenses committed thereupon should be punished, and wrongs and damages inflicted should be redressed in a speedy and convenient manner:

"Therefore, be it resolved by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened: 1st, That the constitution and the jurisdiction of the State of Louisiana shall be extended over part of the United States, embraced in the following limits (whenever the consent of the Congress of the United States can be procured thereto), viz.: Between the middle of the Sabine river and the western banks thereof, to begin at the mouth of said river, where it empties into the Gulf of Mexico, and thence to continue along the said western bank to the place where it intersects the thirty-second degree of north latitude, it being the boundary line between the said State of Louisiana and the State of Texas."

Counsel for Louisiana argued that this is an assertion of Louisiana's boundary to the west bank. We argue the exact contrary, that it is an admission by the Louisiana Legislature that they did not own the west bank in a petition to Congress to allow them to extend their boundaries too on it.

Texas passed a similar resolution in the same

month of 1848 and sent it to Congress. Congress denied Louisiana's petition and granted Texas's petition, and on July 5, 1848, passed the act consenting for Texas to extend her boundary over the eastern half of the Sabine River. I would like to read that particular language because it is relevant to an argument I will make a little further on.

"Be it enacted"--and so forth--"that the Congress consents that the Legislature of the State of Texas may extend her eastern boundary so as to include within her limits one half of Sabine Pass, one half of Sabine Lake, and also one half of the Sabine River from its mouth as far north as the 32nd degree of north latitude."

The Congress apparently realized full well that Louisiana did not own this area and that the United States did because on page 43 of the Master's Report is quoted the report of the senate committee on this bill. And in the last paragraph appearing on the page, it says, "Mr. Butler asked for the immediate consideration of the bill and briefly explained its character. The boundary of the United States, it was known, embraced the Sabine River and lake to its western shore. The boundary of the State of Louisiana extended to the middle of the Sabine; so that the half of the river and lake, to the western shore, belonged to the United States, and was not included in the State of Louisiana; therefore, the boundary of the State and that of the United States,

was not identical. The bill before the Senate gives the half of the river beyond the boundary of the State of Louisiana to the State of Texas, for the purpose of enabling the latter to extend her criminal jurisdiction to the Louisiana boundary."

Louisiana has also argued that all the bill does is allow Texas to extend its criminal jurisdiction. But, of course, it does more; it allows them to extend their boundary. That is the way they allowed them to extend their criminal jurisdiction.

And then it concludes: "Mr. Johnson, of La., and Mr. Downes in behalf of the State of Louisiana, expressed their acquiescence in the arrangement," which, of course, were their two senators at that time.

Contrary to the statement in the Master's Report on page 9, which I think is an inadvertence, the statement of the second question, "Does the doctrine of acquiescence and prescription apply to the claims of either State and if so, what is its application to the facts of this case?" Louisiana has never pled nor claimed title by acquiescence and prescription in this lawsuit. And we contend that on the law, Texas is entitled to judgment confirming her title in the western half of the Sabine River.

Turning to--

Q You are going to talk about the islands

then?

MR. McDANIEL: I am going to talk about them a little later. I would be happy to answer any specific questions you have at this time, but I am going to talk about it.

Q Is there any claim to the islands by prescription?

MR. McDANIEL: Texas claims the ones in the western half by prescription. Louisiana does not claim any islands by prescription.

Q They claim it as by grant, by the original instrument?

MR. McDANIEL: Yes, that is their claim for the islands.

Q But not any of them by prescription?

MR. McDANIEL: That is correct. Only Texas makes that claim.

Q Are there any islands that straddle the mid-line anywhere?

MR. McDANIEL: Yes, I suppose in a broad sense they are, and we concede that a line drawn along the middle of the river when it intersects the line would have to go in the western channel so that it would leave that island on Louisiana's side. But we do not concede that an island completely on the western side of the river over in the

western half of the river would be Louisiana's island.

Q Even if it were formed at the time of the 1812 or whatever--

MR. McDANIEL: That is correct, even if it were in existence in 1812. As a practical matter, and this is the reason I said our exception was more a quibble, there are few, if any, islands presently in the river that were there in 1812. There are very few islands in the river at all now. Even most of the ones that are shown on some of these maps are not there. And we feel confident that the ones we are interested in, at least, we could prove title to by acquiescence and prescription, because Texas has used them and made use of them for many years.

Q Incidentally, I take it there has never been any question of the right of Texas or Louisiana for that matter to free access?

MR. McDANIEL: No, the statute admitting Louisiana into the union in 1812 provides for free right of navigation to the citizens of the State of Louisiana and all other states, and the treaty of 1819 with Spain, if that is of any benefit to Texas--and there is some question as to whether it would be in this context or not--also provides for free navigation of the Sabine, even though the boundary is placed by that treaty on the west bank.

The Special Master on the issue of prescription



and acquiescence has detailed a great deal of evidence, and even what he details is not all of it. What I am going to briefly summarize is not all of what he details either.

On maps that he discusses as supportive of his finding in favor of Texas, he discusses 12 maps by Texas, 18 by the Federal Government, and 31 by Louisiana, all of which recognize the mid-boundary. This is typical of the maps. You will notice down here in the center on the bottom it says, "For Sale by the U. S. Geological Survey in Denver and Washington and by the State of Louisiana, Department of Public Works, Baton Rouge." This is their map and the Federal Government's map. It is not Texas's map.

Q Do you not have to know something about how a map like that was prepared and who actually made the decision as to where this line should go? It may have been a surveyor hired a couple years ago that was not vested with any decisional authority on the part of--

MR. McDANIEL: We do not say it is conclusive, Your Honor. We just say that it is modus to them in their own instrument, that there is a claim here to the middle of the Sabine River that has existed for many, many years and that they have done nothing about.

Q You do not treat it as an admission against interest on their part, then?

MR. McDANIEL: I do not think that when you are

talking about acquiescence and prescription you are talking about the same thing as an admission against interest in the normal sense.

Q You treat it as evidence of--

MR. McDANIEL: In other words, what I am saying is, I agree with you that whoever drew the map could not make an admission against interest that would be binding against the State of Louisiana. It is only an evidentiary matter.

As to leases, there are 32 Texas sand and gravel and shell leases that go to the middle of the river. The Master refers to a whole list of Texas oil and gas leases and some pipeline easements. There are 30 Louisiana mineral leases to the middle of the river and five Louisiana pipeline easements to the middle of the river. Both states have closed parts of their respective half of Sabine Lake to oyster dredging because of pollution.

The federal rivers and harbors appropriations made to Texas over the years for use in the Sabine have been numerous, which Special Master found to be a federal recognition of Texas title. The period 1852 to 1913 there were 61 such appropriations. In the period 1914 to 1969 there were 40 such appropriations. Texas has participated with the State of Louisiana in the erection of eight bridges across the Sabine River which were built to and maintained to and policed to the middle by both states.

Taxes are assessed by both states on pipelines and railroad bridges across the Sabine River on the basis of a division line in the middle of the river, and this arrangement has been worked out particularly by Kansas City Southern Railway Company, which owns more than one of the bridges across the river, with the officials of both states.

Police jurisdiction--both states through their highway patrols and their wildlife officers patrol to the middle line.

On the map you will note a long sliver of land right off of Port Arthur. This is Pleasure Island, which you probably recall from the Special Master's Report. It is an area of 3,000 acres which has been reclaimed from the western half of the Sabine River. That reclamation work started in 1911, and Louisiana has never made one peep about Texas doing it. Pleasure Island contains a golf course, it contains a pleasure pier and marina, it contains the Reserve Army and Marine Training Station, and it contains a carnival and amusement area in addition to just having land out there. It also is reached by a very high span bridge under which large freighters and tankers can sail with sufficient clearance. Port Arthur is the 12th port in the United States, 12th seaport, in terms of tonnage. And Beaumont, which also uses this channel, which is right up the Neches River here, out of Lake Sabine, is the 8th largest port in the United

States. Together, I believe their combined tonnage makes them the 4th largest port behind New York, New Orleans, and Houston.

The evidence of prescription, voluminous as it is in all of these little acts, it is not nearly as strong as four things which I will now detail to the Court which seem to me to be very strong on this point. First, of course, is the solemn declaration of the Louisiana Legislature, which we read a few moments ago, expressly admitting that they do not own the western half of the Sabine River. That was followed by another legislative act which the Master's Report mentions on page 106 in the form of an appropriation by the Louisiana Legislature in 1857, \$15,000 for improvement of the navigation of the Sabine River, conditioned upon Texas making a like appropriation for a like purpose.

In 1901 we have a judgment of the Supreme Court of Louisiana which has been affirmed three or four times since, holding that Louisiana did not hold the western half of the Sabine River and could not exercise criminal jurisdiction therein. The facts of the case are somewhat amusing and are pertinent, I think. De Soto, a parish in Louisiana, and Shelby County, Texas, both border on the river. Apparently gambling was illegal in Shelby County, Texas, and the retail sale of alcoholic beverages was against the law in De Soto Parish, Louisiana. So, Mr. Burton hit upon the solution of anchoring

his gambling establishment in Louisiana's half of the river and his whiskey establishment in the western half of the river and rigging up a system of pulley ropes between them so that you could step on a dinghy and just pull yourself down the rope over to the bar, if you wanted to, and get a drink and then come back to the gambling establishment. The Louisiana officials prosecuted him for selling alcoholic beverages at retail in De Soto Parish without a license and the Louisiana Supreme Court said that although this was manifestly an attempt to subvert the law, nevertheless Louisiana could not extend its jurisdiction over Texas territory by means of a rope. The next time he got caught, a year later, he miscalculated the middle of the river and they put him in jail.

In 1938 we have several leases--these are discussed on page 68 and 69 of the Master's Report--signed by the Governor of Louisiana, which not only call for the middle of the Sabine River but call for the boundary as set by the Act of Congress of July 5, 1848.

Also in 1938 we have an opinion issued by the Louisiana Attorney General's office advising a man in Monroe, Louisiana, a Mr. Igoe--I-g-o-e I believe it is--this is at 69 and 70 of the Special Master's Report--that the Louisiana boundary was set by Act of Congress of April 6, 1812--that is the act of admission defining the middle of the

river--and the Texas boundary by Act of Congress of July 5, 1848. The man had written in and apparently he had gotten a lease which purported to give him all of the river bottom, and he wanted to know whether he got all or half, and the Louisiana Attorney General said he got only half.

So, we have a declaration by all three of the departments of government in Louisiana, the legislature in 1848, the supreme court in 1901 and subsequently, and the governor and the attorney general in 1938, all clearly recognizing that Texas owned the western half of the Sabine River.

In her answer to all this, Louisiana alleges that three parishes purported to extend their boundary to the west bank. I would point out to this that all three of those attempts were before the Act of Congress of July 5, 1848, and from the date of the Act of Congress on July 5, 1848 until the inception of the current controversy with the beginning of oil and gas activity in the area about 1940 or '41 there was no question of title.

The Special Master refers to the desirability of having settled these cases years ago and quotes the first Justice Harlan's comment to that effect in United States v. Texas in 1895 or '96. The simple truth is a hundred years ago there was simply no controversy about this matter.

Louisiana also argues that the Thalweg should be

applied. We say that it is not applicable in this case for four reasons. Number one, there is no reason for it where navigational rights are not at issue, and we cite Georgia v. South Carolina for that proposition. Secondly, we say that prescription and acquiescence establish a line to the geographic center of the Sabine River and that prescription and acquiescence would overcome the Thalweg doctrine in any event. Thirdly, and this is not mentioned by the Master, there is considerable evidence in the record that there is no Thalweg in Sabine Lake. The maps show a reasonably uniform depth throughout the lake; there is even one in the record made in 1777 that has uniform soundings throughout the lake. And, fourthly--and the Master emphasized this--the Act of Congress of July 5, 1848 indicated that it was the view of Congress that Texas was to get one half, one half, one half, not merely to the middle of the river.

As to the islands--

Q Is this a river that shifts the way the Mississippi River has or used to?

MR. McDANIEL: It shifts to some extent but not nearly like the Mississippi, Your Honor.

Q Would there be any difficulty--I am thinking about contrasting the Thalweg with the geographical center of the river; which would be the easiest to apply as a practical matter?

MR. McDANIEL: As a practical matter, the geographic center would be far easier to apply. In Sabine Lake, for example, you would have to go out there and I suppose take specific soundings all through the lake to try to find a channel through it, which we do not believe would be found.

Q You say it is at least arguable that it is almost of equal depth throughout most of it?

MR. McDANIEL: Yes.

On the island question, we think that the Special Master only was interpreting the phrase "including all islands" to refer to the whole river rather than the area of the river defined by the call for a line to be drawn along the middle of said river.

Q Which are the islands on this map?

MR. McDANIEL: On this map, Your Honor--

Q Give them to us by name.

MR. McDANIEL: Sabine Island up here, which we recognize is Louisiana's. The islands coming to the west there, West and Middle Pass, Sydney Island; those are spoil banks and are not islands. Stute's Island is not an island at all. It is an area cut off by the intercoastal canal off the mainland. The little area there that is called Dunes Island, there is some controversy as to whether or not it was in the Sabine in 1812 or not. It is not there now, so it probably does not make too much difference unless the



Court should decide that Louisiana's line is entitled to be swung to the west of the furthest island. Then it might become pertinent.

Q What did you say about the Sabine? I am sorry, Mr. McDaniel, I did not catch you. Is that one of the islands, Sydney Island?

MR. McDANIEL: Sydney Island is a spoil bank, Your Honor. You see, the intercoastal canal runs right there behind it. It is spoil from the intercoastal canal.

In fact, one of the reasons that the island controversy is not too significant to the lawsuit is because, with the possible exception of Dunes Island, we do not believe there are any islands there that were there in 1812.

My time has expired. I am sorry.

Q Mr. McDaniel, the shipping that comes into Port Arthur and Beaumont, I take it, uses the Port Arthur Canal rather than coming into Sabine Lake; is that right?

MR. McDANIEL: That is correct, Your Honor. The channel here is shown to be 12 feet deep, which is the normal channel of the intercoastal canal. In fact, I feel certain--and I do not think there would be any dispute about this--the ship channel which comes up by Port Arthur and then goes on up the Neches to Beaumont is considerably deeper than that, because it uses full size tankers and freighters all the time and they draw more than 12 feet. But they do use that area and

not Sabine Lake.

Q Are there any islands upriver to the 32nd degree from this map?

MR. McDANIEL: There is only one that I know of at a place called the Narrows, and that was decided by the Department of the Interior in, I believe, 1910, to belong to Louisiana, that it should be measured from the western channel.

Q Why is Texas objecting to that provision of the Master's Report if there are no islands here to worry about?

MR. McDANIEL: Well, I say it is more of a quibble really than an exception about the thing. The only thing that scares us a little bit about the island issue is that if the Court should determine, as Louisiana contends, that the boundaries should come over here if they can prove, say, that Dunes Island existed in 1812, and fix a boundary on the west side of Dunes Island because Dunes Island actually is an alluvion island in the mouth of the Neches River.

Q What, if anything, does this controversy have to do with the boundary between Louisiana and Texas seaward of the coast out to the three leagues for Texas and three miles for Louisiana?

MR. McDANIEL: It has nothing whatsoever to do.

Q It certainly has something to do with the

starting point, does it not, of such a line?

MR. McDANIEL: That gets us back to whether or not the United States has an interest in it or not, and my answer to that is this, Your Honor. It does have an interest in the starting point, yes, as to the boundary between Louisiana and Texas, whether it is the mouth of the Sabine or the west bank.

Q Whether it is the middle of the mouth or the west bank.

MR. McDANIEL: That is correct. This does not affect the United States, I do not think, because as to the United States, the three-league limit only comes as far as our historic boundary, and Congress has not consented for us to extend it here any more than they have consented for us to extend up here north of the 32nd degree of latitude. So, we have no controversy with that.

Q But as between Texas and Louisiana, that boundary that is seaward of the shoreline, is affected by this controversy?

MR. McDANIEL: It is affected, and both states have stipulated that that issue is to be excluded from this lawsuit. It will determine it obviously, but this lawsuit will not determine what tangent that line should take, whether it should be perpendicular from the coast or whether it should follow some other line. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Stockwell.

ORAL ARGUMENT OF OLIVER P. STOCKWELL, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. STOCKWELL: Mr. Chief Justice, may it please the Court:

I think that it is very important from Louisiana's standpoint to have the Court appreciate the early history of this particular area. As Mr. McDaniel mentioned, when Louisiana was purchased from France in 1803 there was a dispute over what its western boundary was going to be. So, in 1804 they created the Territory of Orleans, which extended to the 32nd degree north latitude, which is the north boundary of Louisiana. So, in 1806--and I think this is very important, neither the Special Master nor Texas have really covered this issue--in 1806 the United States and Spain entered into an agreement creating what was known as a mutual zone. This mutual zone extended from the Mermentau River up to the Red River. The Red River is part of the Mississippi watershed. The big issue was, Louisiana was only to cover the Louisiana watershed. And the Louisiana watershed fell somewhere between the Atchafalaya and the Mermentau. So, Spain had brought troops into this area and the United States had brought troops in there, and they were getting ready to have a confrontation. So, they entered into this agreement in 1806 and provided that neither the United States nor Spain

would occupy this area. They were to assert no jurisdiction over it, and it really became a no-man's land. And when Louisiana was admitted as a state in 1812, it was admitted subject to this outstanding agreement. Louisiana could not take possession of this area of land. They could not go in there and enforce any laws at all. Of course, this was not settled until the treaty of 1819.

In other words, Spain and the United States negotiated a treaty to settle the western boundary of the Louisiana Purchase and also the Florida parishes. Of course, the boundary was not confined just to Louisiana. It went on up to the Red River and out to the Pacific. But when they settled that boundary, they settled it on the west bank of the Sabine up to the 32nd degree north latitude and then north to the 33rd, which is the northwest corner of Louisiana.

So, no patents were issued in this area by the United States. When Louisiana was admitted as a state, the Federal Government retained all unappropriated land. Texas, when it was admitted as a state, retained its land. So, all of the titles to Louisiana lands emanate from the Federal Government except that of the streams. So, during this period, there was no title issued in here at all.

Q That was known as the Free state of Sabine.

MR. STOCKWELL: Yes, sir.

Q I read that story about Mr. Murrell.

MR. STOCKWELL: In my brief I took the liberty of putting a chapter out of this book of Murrell, who was a freebooter in this particular area. As a matter of fact, I live in Lake Charles which is in this particular area. It is about 70 miles from the Sabine across to the Mermentau, so you can see that there was quite a question when Louisiana was admitted into the union up till they settled this dispute in 1819, and finally they did not issue patents there yet till about 1824. They started issuing some patents. And even when they surveyed this line in 1844-41, Mr. Overton, who represented the United States, pointed out the lawlessness in this area. Even when Texas was admitted as a state in 1845, they still had this problem.

Texas did have settlements along the Sabine on the west bank. But Louisiana had no settlements. All this was marshland and it is marsh today, and way up the river it is marsh. The only settlements were along the western bank. I think that is important because, as the Court will note in my appendix, I mentioned a letter from the Secretary of State of the Republic of Texas to the Representative of the United States concerning an interpretation of the word "use" in the treaty of 1819. Both the Special Master and Texas have avoided a discussion of this particular phrase, which I think is a main issue in the case. The Representative

of the Republic of Texas said the word "use" meant the exercise of jurisdiction over this water.

You see, in the treaty both the inhabitants of Texas and the inhabitants of Louisiana had equal use in navigation of the water, which gave them a use throughout the whole river, and this use was not limited to navigation. That was something separate. And Texas in this letter, which is in the appendix, defines what they consider this use to be. They had forts here and ships were coming in and smuggling, and they wanted to have the right to go out there and exercise jurisdiction to stop this smuggling, which they said they had a right to do.

This discussion was going on--this was just prior to 1845 when Texas was admitted. So, it was not unusual for Louisiana in 1848 to say that there was some question as to whether or not they had full jurisdiction over the Sabine even though their boundary was on the west bank, because the Constitution said, "Commencing at the mouth of the Sabine, thence along the middle to the 33rd degree north latitude and then north to the 33rd."

So, in this resolution that was ready by Mr. McDaniel accurately, they said they were talking about extending jurisdiction. Here was both Louisiana and Texas that had equal jurisdiction over this body of water by virtue of the use. And so it was a question of either Louisiana

having the full jurisdiction or like Congress decided to do, they gave half of the jurisdiction to Texas so that they could enforce the criminal law.

Even Texas--I think it is real important because Texas talks about the fact of Louisiana being able to acquire this territory without a specific act of Congress. In one of Texas' briefs--it is the Plaintiff's Reply Brief before the Special Master--on page 6 they admit that--in other words, they say, "Louisiana obtained title to the unsold federal lands adjacent to the Texas eastern land boundary line by grants from the United States Government under the Swamp and Overflow Lands Act. After its jurisdiction over the area had been recognized and acquiesced in by the United States Government's resurvey of such line as the west line in 1846."

What happened was, before Texas was admitted to the union and before they made this joint survey, the United States had gone in and surveyed a lot of this land, and they have surveyed as part of the land that they considered Louisiana that extended west of this line. So, when they made this survey in 1840-41, they had to readjust these townships, and some of the people that had purchased land from the United States Government in Louisiana received indemnity for it and so that meant that Louisiana had to give up some land out in this area. And lines were readjusted,



as Texas admits, in 1846 to conform to this boundary agreement in 1819.

Texas, in bringing this suit, they limited it to this water boundary. But Louisiana feels that the only way the Court can appreciate this boundary dispute is that it must consider the total boundary of Louisiana. Texas' view that Louisiana's boundary from the 33rd to the 32nd degree north latitude would have to be recognized as a treaty boundary. They are saying that we are not entitled to the treaty boundary from the 32nd degree to the Gulf of Mexico by virtue of the language in the constitution of 1812 of Louisiana which is the same constitution that covered the northern boundary, which said that we are entitled to it.

So, we say that when the Court considers this case in the light of the historical facts, that this act that they rely on, this resolution, shows that Louisiana considered that this was their west boundary. They were only asking to give them the jurisdiction, and the Congress gave the jurisdiction to Texas.

If it is intended by this act that they transfer this title to Texas, then under this Court's case of Mississippi v. Louisiana, Congress could not deprive Louisiana of title to its land. So, we say that is one of the reasons why you find all of these maps and things with this line in them.

In other words, there has been no question about the question of jurisdiction, of fishing, hunting, and various other activities on these navigable bodies of water, because the citizens of both states had equal rights, unless you consider that the jurisdiction was going to be exercised in limited areas by either one or the other.

This particular body of water here is of recent origin. As a matter of fact, this was brought about by a compact between Texas and Louisiana in 1954, creating the Toledo Bend Dam. In this compact it was specifically stated that this would not attempt to settle a boundary.

In other words, Texas knows there has been a real dispute over this boundary for many years, and they have not been misled. As a matter of fact, Governor Jones in 1941 wrote a letter to the Governor of Texas stating that Louisiana owned the west bank of the Sabine under the treaty of 1819. As a matter of fact, Mr. Giles, who was then land commissioner of Texas, he claimed that Texas owned a 150-foot strip from this point on the Sabine 32nd to the 33rd. In other words, at that time, they were trying to claim that they owned over to Louisiana's boundary under what they said the wording of the constitution. Now they admit that Louisiana owns that.

So, it all goes to show that Texas really has never had any firm--had any doubt that Louisiana has this claim.

Now they bring in a picture like this, which shows, you know, on this fill-in here. Actually all this fill was done by the Corps of Engineers in digging these channels. This was not done by Texas. The fact that Texas's use of them--and, of course, the United States has a navigation easement over this whole body of water. So, we say that Louisiana by virtue of the fact that--

Q Who built the Port Arthur pleasure pier?

MR. STOCKWELL: The Port Arthur people built it on this hill, Your Honor.

Q But the United States Government did not build that?

MR. STOCKWELL: No, I am not trying to say--I said the fill was built by the Corps of Engineers. They built on that, but most of that was built after 1941 when they were put on notice by Governor Jones that Louisiana claimed to the west bank.

Q Would you repeat that answer to Mr. Justice Marshall?

MR. STOCKWELL: In answer to Justice Marshall, he asked me who built the pleasure pier and all these works on this island, and I said Port Arthur did. The fill was made by the Federal Government, but most of this work was done after Texas had been put on notice by the Governor of Louisiana in 1941. In other words, it was not done where they

were not put on notice that Louisiana was claiming--

Q In other words, your position is the fact that Louisiana tried to do nothing about that has no relevance at all to the question of time?

MR. STOCKWELL: We are saying, Mr. Justice, that actually as far as I can understand and as far as the record showed--and I was not in this in the beginning, so I certainly would not have any personal knowledge--the world war took place in '41, which we all know about that. And then soon after that, Texas and Louisiana got involved in the tideland litigation. And from all the information we have--as a matter of fact, when I argued the matter before Judge Van Pelt, I mentioned that fact and it was not disputed, that there was a kind of gentlemen's understanding that neither side would do anything pending the settlement of this tideland litigation.

Texas settled that and immediately filed this suit. And we say that there has been no evidence to refute it, although in the brief they say they now deny that.

Q This is an argument that Texas cannot make anything out of the fact that Pleasure Island was built on this fill.

MR. STOCKWELL: That is exactly what we argue, Your Honor, because of the fact that we had put them on notice and decided not to do anything pending this tideland.

As a matter of fact, following this very suit, Texas asked us not to bring in the tidelands issue on it, which, like Justice Stewart said, we are going to have to settle some day. Where the line is going to start and what direction it is going to take into the Gulf.

Q You are not trying to convince me that Texas made this contribution to Louisiana, this pier?

MR. STOCKWELL: No, sir, I am not.

Q It is a big state, but I did not know they were that generous.

MR. STOCKWELL: I do not think they intended to make this. But, of course, Mr. Justice Marshall, actually many things are built on fills and navigable streams without affecting the title to the subsoil. In other words, if, say, the Federal Corps of Engineers gave Port Arthur the right to put these works up, that does not mean they would have title to the subsoil on which this fill has been made. And that is one of the arguments that we make in here.

Q Who had title to the bridges over the Sabine River?

MR. STOCKWELL: We take the position, Justice Marshall, that it was in the interest of both parties--this was a navigable stream, both parties wanted to have commerce across it. The testimony would show that these bridges were not owned to one point in the river. They were owned half

and half all the way across. In other words,--

Q Is that the same for the police jurisdiction, half and half all the way across?

MR. STOCKWELL: No, sir, but some of our people testified they did arrest all the way across. I would say that most of them recognized a division line. I mean to be perfectly candid to the Court. I think that this--

Q The division line was in the middle?

MR. STOCKWELL: Well, it was along somewhere in there. They were thinking about a criminal jurisdiction. But I think as far as the bridges were concerned, they were built maybe on a fifty-fifty basis, and they owned the whole bridge together, and I think you will see from the testimony there was not any line picked out in any part of the river.

Q Mr. Stockwell, as I understand the common law, anyway, if you were to occupy property which I claim and possess it, a mere letter from me to you saying, "I claim it as mine," which did not change your possession, would not stop the prescriptive period from running. I would have to commence a lawsuit to evict you from the property rather than simply send you a letter. Would you not agree, at least generally, that that same doctrine--

MR. STOCKWELL: I would agree generally with that premise, Your Honor, but I feel if the parties mutually understand that they have got another matter to settle and

they are not going to litigate over it, then I think that is another matter.

Q I would agree with that. But so far as Governor Jones' letter is concerned, it seems to me that if Texas was exercising possession prior to that and continued to exercise it afterwards, I don't think that the letter would be terribly relevant.

MR. STOCKWELL: I think it would have a bearing because states really act a little different from individuals. I mean, I think that it is harder to get them to get into lawsuits with each other, particularly friendly states. I mean, I think that is a matter that certainly I do not think if you--but we say that beyond that, that they agreed that they would not litigate this, pending this tideland litigation, which is evident in this very case, because we are not litigating the part that extends into the Gulf.

Your Honor, we feel that the question of--

Q Do you make any contention that prescription does not run against a sovereign state?

MR. STOCKWELL: We do not make that in reference to-- one state to another state. We would not make it as to individuals.

Q But you think the same, the ordinary rule would apply between states?

MR. STOCKWELL: I think this Court has said that

you could acquire title by acquiescence and prescription--I mean settle a boundary. So, I would accept what this Court said on it. That as far as between the states, in other words, we could not say prescription would run against Louisiana in favor of Texas or vice versa. So, I would think if it was an individual, it would be a different problem.

As a matter of fact, Texas had this very same problem in the Mexican Boundary. In the case of Figuerosa they had a treaty in 1905 in which they settled some banco, as they call it, which is made by the Rio Grande River. Part of these bancos were taken from Mexico and given to the United States and part of them went to Mexico. The question came up in this case, is whether or not a party acquired a title to one of these bancos by limitation. And the only way he could acquire that title was that Texas got title to this banco by virtue of the treaty and not by virtue of some acts that were passed in 1923. and the court held that when the United States and Mexico settled this boundary, that those lands immediately became part of Texas and they did not need any further action. They said Texas had given up some land and they acquired some land, and that is the same thing as Louisiana has done here.

Your Honor, on the question of the Thalweg, we say that certainly Louisiana is in this position--this is an alternative plea if the Court feels that we are not entitled



to it. This Court held in the case of State of Louisiana v. Mississippi that the Thalweg applied to the east boundary of Louisiana in the Pearl River and extending all down into the Gulf, interpreting the same language in the constitution that is involved in this case, the middle of the Sabine to the middle of the Pearl. They both had a right of navigation. And, of course, we feel that certainly this Court in making other cases dealing with navigable streams where you have equal rights of navigation have always held that the Thalweg applied.

The case of Georgia v. North Carolina is kind of an unusual case, and we do not believe that that was more or less--the parties more or less committed themselves in that kind of a position, but we feel that the majority of the jurists in particular interpreted their own constitution. This Court has held that the Thalweg rule would apply if you feel that we are not entitled to the west bank boundary.

As far as islands, I want to make a quick reference to that.

Q Have you any idea what difference that would make?

MR. STOCKWELL: Your Honor, it makes a good deal of difference as to how they come out of the Sabine Pass. As a matter of fact, you see, they have got a lot of channel work in here. The question is, When are we entitled to the

middle of the river? Are we entitled in 1848? You see, there was about four or five islands up here, and the channel came out--in other words, when they made the survey in 1840-41, they made it on the west bank of the furthest island. So, we say that it would make a lot of difference in coming out of here. In that survey, they also found what they called Dunes Island right off of the Neches. That was in the survey and referred to it. In other words, they made notes of all of these surveys. So, they referred to them. If you follow the case of South Carolina v. Georgia, then the Court, if the language of that case would be accepted, would take the channel west of these islands. That is what they did in that case.

And then there are other islands up the river further too. As a matter of fact, it is kind of unusual, Your Honors, because Texas in their motion for judgment and memorandum with respect to the motion on page 9, they admitted this. They say that Congress permitted Louisiana to include within its state boundary all of the eastern half of the Sabine, including all islands within the stream.

So, we say that they only changed their position later in this case. As a matter of fact, we have a letter from Mr. Giles that urged this same thing. In other words, he urged that they were entitled to the west half, exclusion of all islands. So, Texas in its own brief in the early

stages of this case, admitted Louisiana was entitled to all the islands in the Sabine. So, we say this is important to be considered by the Court and considered in this case.

I certainly thank you, gentlemen.

Q Mr. Stockwell, you spoke of the Sabine Pass and pointed at the top of the map. Down at the bottom of the map it says Sabine Pass. Is it also Sabine Pass up above?

MR. STOCKWELL: No, sir. That is the Sabine River. The Sabine River--you see, the Sabine River--

Q The Pass is at the lower end?

MR. STOCKWELL: The Pass is down here. You see, they did not show all this. One of the things that is unusual here, they are trying to make us take these lines on this map. But now out in the Gulf they want us to take another line. They say they do not want the same lines on the maps out in the Gulf. So, I mean, it is a kind of anomalous case. That is the reason you see they do not have it all the way down on here. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stockwell. Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:44 o'clock p.m. the case was submitted.]

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