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# OBSERVATION

## THE SABINE RIVER BOUNDARY BETWEEN TEXAS AND LOUISIANA

by

*Price Daniel, Sr.\**

**I**N an original action filed by the State of Texas against the State of Louisiana in the Supreme Court of the United States in 1969, the Court upheld Texas' claim to the western half of the Sabine River from its mouth to the 32d degree of north latitude.<sup>1</sup> Texas' complaint and a subsequent stipulation by the two states limited the controversy to the river boundary,<sup>2</sup> thus postponing determination of the location of their common boundary in the Gulf of Mexico. Since that determination is now pending in the Supreme Court,<sup>3</sup> the gulfward boundary between the two states will not be discussed except to say that it was first necessary to obtain a decision as to the location of the river boundary before a court could decide at what point and at what angle to begin measuring seaward from the mouth of the river into the Gulf.\*

The background of this Sabine River controversy involves interesting chapters in the history of the United States, France, Spain, Mexico, and the Republic of Texas. Both Spain and France had exercised sovereignty over the Sabine at various times prior to 1801. In that year the area known as the Louisiana Territory was retroceded by Spain to France. It was transferred by France to the United States in 1803.<sup>4</sup> The location of the western boundary of the Louisiana Purchase was indefinite and immediately became a subject of controversy between the United States and Spain. Thomas Jefferson, on behalf of the United States, asserted that the Purchase extended to the Rio Grande and, thus, included all of the area which comprises the present State of Texas.<sup>5</sup> On the other hand, Spain insisted that the Province of Texas was never owned by France and that the eastern boundary of

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1. Texas v. Louisiana, 410 U.S. 702 (1973).

2. The term "Sabine River" was used throughout the proceedings to include Sabine Pass and Sabine Lake unless otherwise noted. The term is so used here. It was agreed that these streams form a continuous body of navigable water collectively referred to as Sabine River.

3. Texas v. Louisiana, No. 36 Orig. (U.S., filed Feb. 27, 1970).

\* Editor's Note: On Jan. 19, 1976, oral arguments were conducted before the United States Supreme Court regarding the lateral gulfward boundary between Texas and Louisiana.

4. Treaty with the French Republic, April 30, 1803, 8 Stat. 200; T. MARSHALL, A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA PURCHASE, 1819-1841, at 1-16 (1914).

5. Jefferson, *The Limits and Bounds of Louisiana* 27-32, in DOCUMENTS RELATING TO THE PURCHASE AND EXPLORATION OF LOUISIANA (1904).

Spanish Texas extended east of the Sabine and included a large strip of what is now the western part of Louisiana. This assertion of conflicting claims by the United States and Spain persisted until 1819.<sup>6</sup>

It was during this period of diplomatic conflict between the United States and Spain that Louisiana was admitted as a state on April 8, 1812, with its western boundary described as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude . . . ."<sup>7</sup>

In 1819 the United States and Spain ended fifteen years of negotiations over the "limits of their respective bordering territories in North America."<sup>8</sup> By the final terms of the Treaty of 1819 the United States relinquished all of Texas west of the west bank of the Sabine River in exchange for Florida and the Spanish claim to the Oregon Territory.<sup>9</sup> Henry Clay and John Quincy Adams *immediately* initiated efforts to regain Texas by diplomacy or purchase, and these efforts continued after Mexico declared its independence from Spain in 1821 and even after the United States and Mexico agreed to the same boundary in their Treaty of 1828.<sup>10</sup> President Andrew Jackson's negotiations to purchase Texas from Mexico continued until 1833, only three years before Texas won its independence from Mexico in 1836.<sup>11</sup> In 1838 the Republic of Texas and the United States entered a treaty recognizing the west bank of the Sabine as the common boundary between the two countries and providing for its survey on the ground.<sup>12</sup> Texas was annexed to the Union with the same eastern boundary in 1845.<sup>13</sup>

From the foregoing summary of historical facts, it would appear rather certain that in 1845 Louisiana's western boundary was in the middle of the Sabine, Texas' eastern boundary was on the west bank of the Sabine, and title to the western half of the Sabine was in the United States. The legislatures of both Louisiana and Texas recognized this to be so in 1848, when each passed resolutions petitioning Congress for permission to extend its state boundary over the western half of the river.<sup>14</sup> Congress decided in favor of Texas effective July 5, 1848.<sup>15</sup> The Act provided:

6. T. MARSHALL, *supra* note 4, at 13-16, 21-22, 55-60; 3 H. MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3 (1934).

7. Act of April 8, 1812, ch. 50, 2 Stat. 701. The boundary in the middle of the Sabine had been previously described in almost identical language in the Enabling Act of 1811, 2 Stat. 641, and in the Louisiana Constitution adopted January 22, 1812. LA. CONST. Preamble (1812).

8. The Treaty of Amity, Settlement, and Limits, with Spain, Feb. 22, 1819, 8 Stat. 252.

9. T. MARSHALL, *supra* note 4, at 46-70.

10. Treaty of Limits, with Mexico, Jan. 12, 1828, 8 Stat. 372; T. MARSHALL, *supra* note 4, at 86-123.

11. T. MARSHALL, *supra* note 4, at 86-102; Stenberg, *The Texas Schemes of Jackson and Houston, 1829-1836*, 15 Sw. Soc. Sci. Q. 229 (1934).

12. Convention with the Republic of Texas, April 25, 1838, 8 Stat. 511.

13. Joint Resolution for the Admission of the State of Texas into the Union, Dec. 29, 1845, 9 Stat. 108; 2 H. GAMMEL, LAWS OF TEXAS 1228 (1898).

14. RESOLUTION OF THE LOUISIANA LEGISLATURE, MARCH 16, 1848, S. DOC. MISC. No. 135, 30th Cong., 1st Sess. (1848); RESOLUTION OF THE TEXAS LEGISLATURE, S. DOC. Misc. No. 123, 30th Cong., 1st Sess. (1848).

15. An Act giving the consent of the Government of the United States to the State of Texas to extend her eastern Boundary, 9 Stat. 245 (1848).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this 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, also one half of Sabine River, from its mouth as far north as the thirty-second degree of north latitude.*<sup>16</sup>

Pursuant thereto Texas passed an Act in 1849 as follows:

Sec. 1. *Be it enacted by the Legislature of the State of Texas, That in accordance with the consent of the Congress of the United States, given by an act of said Congress, approved July 5th, 1848, the Eastern Boundary of the State of Texas be, and the same is hereby extended so as to include within the limits of the State of Texas, the western half of Sabine Pass, Sabine Lake and Sabine River from its mouth as far north as the thirty-second degree of north latitude . . .*<sup>17</sup>

After ninety years without disputing Texas' exercise of jurisdiction and ownership over the western half of the Sabine, Louisiana Governor Sam Jones began in 1941 to assert title to the entire river. Governor Jones protested Texas' claims in letters to Texas officials, arguing that the United States was acting on behalf of Louisiana in establishing its western boundary on the west bank of the Sabine by the Treaty with Spain in 1819; that Louisiana's western boundary necessarily coincided with that of the United States; and that, therefore, Congress had no power constitutionally to give the west half of the Sabine to Texas in 1848.<sup>18</sup> Mineral leases by Texas were often protested after 1941, but neither state desired to litigate the controversy until their common fight against federal claims to submerged lands within their seaward boundaries in the Gulf of Mexico had been won. This so-called "tidelands" controversy was decided by Congress in 1953 in favor of all states as to all lands beneath navigable waters within the boundaries of the respective states.<sup>19</sup> Thereafter, adverse federal claims as to the extent of state boundaries in the Gulf caused further delays. These were determined by the Supreme Court for Texas at three leagues (10-1/2 miles) from shore and for Louisiana at three miles from shore.<sup>20</sup>

By 1969 Louisiana's Board of Mineral Development was protesting more vigorously against Texas' mineral lease offerings in the western half of the Sabine and west of the line claimed by Texas in the Gulf. Louisiana's claims were casting a cloud on the title Texas and its grantees had asserted to 36,000 acres of submerged lands beneath the western half of Sabine Pass, Sabine Lake, and Sabine River. This included many producing oil and gas wells and three thousand acres of land within the city limits of Port Arthur which had been filled and reclaimed after state grants were made to the city.

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16. *Id.*

17. Act of Nov. 24, 1849, vol. 3, pt. 1, [1849] Tex. Laws, 3 H. GAMMEL, LAWS OF TEXAS 442 (1898). County boundaries were also extended to this line by the same Act.

18. This and other evidence is summarized from the record and the Report of the Special Master, *Texas v. Louisiana*, 410 U.S. 702 (1973) [hereinafter cited as Report of the Special Master].

19. Submerged Lands Act of 1953, ch. 65, 43 U.S.C. § 1301 (1970).

20. *United States v. Louisiana*, 363 U.S. 1 (1960).

These circumstances led to Texas Attorney General Crawford Martin's suit against Louisiana in 1969 to establish Texas' jurisdiction over, and ownership of, the disputed lands. This writer was employed as a special assistant to prepare the pleadings and try the case before a Special Master appointed by the Supreme Court.<sup>21</sup>

It was stipulated that each state would have access to the other's records in all relevant state agencies and that affidavits and certified copies of documents would be admissible except when cross-examination was demanded. This resulted in a record consisting of over two thousand pages of maps, documents, and affidavits, and only one day of testimony.<sup>22</sup>

Texas asserted both record title and title by prescription and acquiescence. Louisiana lodged two alternative claims in the event it was held not to own to the west bank: (1) that any "middle" boundary should be the middle of the deepest and most navigable channel, under the thalweg doctrine,<sup>23</sup> rather than the geographic middle of the stream; and (2) that title to any islands in the western half of the Sabine should be awarded to Louisiana.<sup>24</sup>

The Master held with Texas on both its record and prescriptive claims to the geographic middle of the Sabine. His holding on the record title was based upon a summary of the treaties and congressional and legislative acts heretofore mentioned in outlining the history of the controversy.<sup>25</sup> Practically all of the remaining ninety pages of the Special Master's Report were devoted to the law and the evidence upon which he found that "Texas has claimed a mid-Sabine boundary for over a century and Louisiana has acquiesced in that claim." He quoted from *Michigan v. Wisconsin*<sup>26</sup> as follows: "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."

Among other items in support of his finding on prescription by Texas the Master listed: the Texas Legislature's extension, with approval of Congress,

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21. Judge Robert Van Pelt, Senior Judge of the United States District Court of Nebraska, was appointed as Special Master to hear the evidence and make recommendations to the Court on the facts and the law. *Texas v. Louisiana*, 398 U.S. 934 (1970).

22. An index of evidence, including exhibits, prepared by the Master is printed at Report of the Special Master 110-16.

23. The "thalweg" is the middle of the navigable channel of a river. See *Texas v. Louisiana*, 410 U.S. 702, 709 (1973). In a boundary dispute between Iowa and Illinois the Supreme Court interpreted the "middle" of a river to mean the thalweg. *Iowa v. Illinois*, 147 U.S. 1 (1892). In *Texas v. Louisiana*, however, the Court noted that such a construction was not authoritative prior to 1892, and, more significantly, was not the law when Louisiana was admitted to the Union. 410 U.S. at 709 n.6.

24. Texas denied that anything but man-made islands existed in the western half of the Sabine, replying that the "so-called" islands referred to by Louisiana were battures, shell banks, or appendages to the mainland, covering less than 100 acres, and urging that questions relating to this small portion of the controversy be deferred until the basic boundary issues were resolved. Brief of the State of Texas in Support of the Master's Report, *Texas v. Louisiana*, No. 36 Orig. (U.S., filed Feb. 27, 1970). The Special Master had concluded that any real islands, as distinguished from oyster reefs and shell banks, which existed west of mid-stream in 1812 would belong to Louisiana if they had not been acquired by Texas through prescription, but agreed that a final determination on islands should await approval or disapproval of his report on the boundary issues. Report of the Special Master 35-37.

25. Report of the Special Master 12-26.

26. 270 U.S. 295, 308 (1926).

of the state's eastern boundary to include the western half of the Sabine in 1849; extension of adjacent county boundaries in the same year; extension of Port Arthur and Orange City boundaries into the western half of the Sabine beginning in 1911; collection of taxes since 1914 from five railroads and since 1933 from 15 crude oil pipelines which extend across the western half of the Sabine; 66 maps prepared since 1930 by Texas agencies showing the state boundary in the geographic middle of the Sabine; and execution of 50 mineral leases, numerous easements, and shell permits since 1930 on the western half of the stream.<sup>27</sup>

Evidence of acquiescence by Louisiana was found by the Master to include recognition by the Louisiana Legislature in 1848 that the state boundary did not extend beyond the middle of the Sabine; failure to extend county boundaries west of the middle of the Sabine or to assert any claim against Texas' jurisdiction from 1849 to 1941; failure to collect taxes on railroads, pipelines, or any other property west of the middle of the Sabine; execution of 29 mineral leases and numerous pipeline easements bounded on the west by the middle of the Sabine; 55 maps prepared by federal agencies since 1879, usually in cooperation with Louisiana, showing the boundary between Louisiana and Texas to be the middle of the Sabine; the official map of Louisiana prepared in 1937 and official state highway maps for 1937 and 1970, and county highway maps for 1937 and 1970, showing the boundary in the middle of the Sabine; and interstate bridge contracts signed by Texas and Louisiana officials providing for joint payment for construction and "State Line" signs above the geographic middle of the Sabine.<sup>28</sup>

The Master also cited as further evidence of acquiescence *State v. Burton* in which the Supreme Court of Louisiana held that the state's boundary was in the middle of the Sabine.<sup>29</sup> The court reversed the conviction of a bootlegger for selling whiskey in a boat tied to the Louisiana bank but floating on the west side of the Sabine. Reciting the relevant congressional and legislative acts, the court held that "the middle of the Sabine is the boundary line between Louisiana and Texas . . . ," adding "the jurisdiction of the Louisiana courts cannot be extended over Texas Territory by means of a rope."<sup>30</sup>

The Supreme Court of the United States, in an opinion by Mr. Justice White, approved and adopted the Special Master's Report on the location of the Texas-Louisiana boundary in the geographic middle of the Sabine.<sup>31</sup> Mr. Justice Douglas dissented and agreed with Louisiana's claim that its

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27. Report of the Special Master 28, 45-49, 63-67, 93-105.

28. *Id.* at 28-30, 42-44, 53-63, 67-89.

29. 105 La. 516, 29 So. 970 (1901).

30. 29 So. at 971. The Louisiana Supreme Court reaffirmed the statement that the state boundary was the middle of the Sabine in a subsequent prosecution of Burton, this time affirming a conviction based on a fact finding that Burton's boat was floating on the Louisiana side of the river. *State v. Burton*, 106 La. 732, 31 So. 291 (1902).

31. The Court withheld judgment with respect to the ownership of islands in the western half of the Sabine. *See* note 24 *supra*. It said that any such islands which existed in 1848 are owned by the United States unless the United States conveyed them to Louisiana or Texas. *Scott v. Lattig*, 227 U.S. 229, 242-43 (1913). This side issue was re-referred to the Special Master for further hearings, and it was still pending at the time of this writing. 410 U.S. at 712-14.

western boundary necessarily coincided with the western boundary of national territory as fixed by the Treaty of 1819.<sup>32</sup> In deciding otherwise the Court said:

There is not a whisper in these statutes and instruments that the western boundary of Louisiana was on the west bank of the Sabine. Clearly the boundary was along the 'middle' of the Sabine, not on the west bank. Louisiana argues, without substance we think, that the boundary was extended to the west bank by the Treaties of 1819 and 1828 with Spain and Mexico respectively, when the United States established and confirmed its own western boundary on the west bank of the Sabine. As the Special Master correctly noted, however, the United States was acting in its sovereign capacity throughout these events, and there is no indication that the United States was in any way representing Louisiana or intending to relocate the State's western border.<sup>33</sup>

The Court noted and approved Texas' argument that the United States contemplated admission of states beyond the Sabine in the future and that it was more consistent with the policy of the United States "to grant only the east half of the river to Louisiana and reserve the west half for a future State or States."<sup>34</sup> It also implied that once a state boundary is fixed by Congress and the state's legislature, it cannot be changed except by joint action of the same legislative bodies.<sup>35</sup>

In passing, the Court reaffirmed as "the unquestioned rule" that the states entering the Union acquire title "to the lands under navigable streams and other navigable waters within their borders."<sup>36</sup> This rule, however, had been questioned as to lands beneath navigable waters within the seaward boundaries of the states in the so-called "tidelands" cases.<sup>37</sup>

Having decided for Texas on the basis of title emanating from the United States when it consented for Texas to extend its eastern boundary to include the western half of the Sabine, the Court said it was unnecessary to pass upon the Master's conclusion that Texas must prevail, in any event, by reason of prescription and acquiescence. The Court said "we need not pass upon this aspect of the Special Master's Report, although we note that the facts relied upon by him are consistent with and support the other ground for his conclusion as to Louisiana's Sabine boundary."<sup>38</sup>

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32. 410 U.S. at 714.

33. *Id.* at 708-09.

34. *Id.* at 709.

35. *Id.* at 707-09.

36. *Id.* at 713, citing *Scott v. Lattig*, 227 U.S. 229, 242-43 (1913).

37. *See, e.g., United States v. California*, 332 U.S. 19 (1947). Congress dealt with the stated Rule, *inter alia*, in the Submerged Lands Act of 1953, 43 U.S.C. § 1301 (1970), and reconfirmed the proposition that states entering the Union acquired title to all lands under navigable streams and waters within their boundaries.

38. 410 U.S. at 712.

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