

OFFSHORE BOUNDARIES

by

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INTRODUCTION

The research under Project No. 6 has pursued a comprehensive examination of the water resource in Mississippi, beginning with the most important single water resource, the Mississippi Sound. The Sound is generally described as: The water area lying between the Mississippi mainland and the chain of islands including Petit Bois, Horn, Ship and Cat Islands, bounded on the East by the Mississippi-Alabama boundary, and on the West by the Mississippi-Louisiana boundary. The Sound is of great importance for a number of obvious reasons: The tremendous wealth that it harbors - wealth in the form of fish, shellfish, minerals and other resources; the location on its shores of numerous heavy industries that are dependent upon its waters as avenues for world commerce; and the recreational opportunities afforded by its sands and waters. But for the purposes of the research contemplated under Project No. 6, the Sound assumes primary importance because of three principal problem areas which it presents: (1) the conflicting claims by three states to control and govern its appropriation and exploitation; (2) the conflicting claims by municipalities, Port Authorities, counties, and industries to withdraw its waters for drinking, manufacturing, and channel stabilization; and (3) the rapidly growing usage of its waters for pollution carriage - a usage that poses a threat to all other uses.

A logical first step in the proposed research was the resolution of the first problem area - the conflicting claim to control and govern the Sound. This necessitates a clarification and delineation of the boundaries of the State of Mississippi within the Sound, thus marking the geographical area within which the second and third problems will assume relevance.

THE PROBLEM

The boundaries of the State of Mississippi were fixed by the Act of Congress of March 1, 1817, admitting the new State to the Union. This Act provided in pertinent part:

"The...boundaries of the State of Mississippi are as follows: Beginning on the Mississippi River where the southern boundary line of...Tennessee strikes the same...thence East along said boundary line to a point on the West bank of the Tennessee River...thence up said River to the mouth of Bear Creek; thence by a direct line to the Northwest corner of the county of Washington, Alabama; thence due South to the Gulf of Mexico; thence westwardly, including all islands within six leagues of the shore to the most southern junction of Pearl River with Lake Borgne; thence up said river to the 31st degree of north latitude; thence west along said degree of latitude to the Mississippi River; thence up the same to the beginning." (emphasis supplied)

The Western, Northern and Eastern boundaries of Mississippi were conclusively fixed by this Act of Admission. Unfortunately, however, the language relating to the southern or sea boundary was so vague as to leave the exact location of Mississippi's southern boundary indefinite. Definitely included in Mississippi are the islands within six leagues, or approximately eighteen miles, from the mainland. But the Act did not specify that the waters between the islands and the mainland were also a part of Mississippi, and the Supreme Court, as late as 1960 in the case of United States v. Texas et als., indicated that such waters did not belong to the State. Thus, we are confronted at the outset with the rather surprising fact that the southern boundary of Mississippi has never been conclusively fixed and thus the ownership of the Mississippi Sound is at present legally undetermined. A tracing of the historical pattern of the conflicting claims to this water resource will be helpful.

Conflicting Boundary Claims

For convenience, the water resources whose ownership has been contested between the United States and the several states may be divided into two categories: (1) inland waters, i.e., the tidelands and inland navigable waters; and (2) the three-mile marginal belt along the coast or territorial sea.

The ownership of inland waters was resolved in favor of the states on the theory that after the American Revolution the 13 Original Colonies became sovereign states and, as successors to the Crown, became vested with the title to the tidelands and the internal navigable waters. Under this theory, new states, which were admitted on an equal footing with the original states, acquired the same rights to inland waters. [Martin v. Waddell, 16 Pet. 367 (41 U. S., 1842) and Pollard's Lessee v. Hagan, 3 How. 212 (44 U. S., 1845)]

As to the ownership of the three-mile marginal belt or territorial sea, the general assumption prior to 1947 was that such ownership was vested in the states. On this assumption, California and Louisiana in the early 1920's began leasing large areas of their territorial sea for the purpose of oil and gas exploration. Mississippi, acting under the same assumption, leased most of the Sound for a similar purpose in 1939. It was not until 1945 that the United States effectively asserted any claim in this area by instituting suit in the Supreme Court against the State of California. The decision in this case [United States v. California, 332 U. S. 19 (1947)] was that the Federal Government, as a function of national external sovereignty, "has paramount rights in and power over that belt (the three mile territorial sea)." In fixing the boundary of state proprietorship at the "ordinary low-water mark and the seaward limits of inland waters," the Court not only acted counter to the general expectations that such boundaries extended to the seaward limits of the territorial sea, but aroused Congress to the extent that it enacted the Submerged Lands Act of 1953.

The effect of this Act was to change the law which the Court had laid down in the California case. The Act reaffirmed state ownership of internal waters and, additionally, fixed the seaward boundary of each original coastal state "as a line three geographical miles distant from its coast," and authorized subsequently admitted states to extend their sea boundaries to the same line. The Act further stated that it was not to be construed as "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 had been theretofore approved by Congress."

As a result of this latter clause, all of the Gulf states claimed seaward boundaries beyond three miles, Texas by virtue of the Treaty of Guadalupe Hidalgo, Florida by virtue of Congressional approval of its Reconstruction Constitution of 1868, and Alabama, Louisiana and Mississippi by virtue of the Acts of Congress originally admitting them to the Union. The United States maintained that the sea boundaries of none of these states extended beyond three geographical miles from the coastline.

To resolve the conflicting claims, the United States instituted suit against all of the Gulf states and the resulting decision [United States v. Texas et al., 363 U. S. 1 (1960)] upheld the claims of Texas and Florida but fixed the seaward boundaries of Louisiana, Mississippi and Alabama at three geographical miles from their respective coastlines "wherever those lines may ultimately be shown to be."

The arguments of the latter three states were substantially the same, viz., that the clauses in the several Acts of Admission describing the coastal boundaries as "including all islands within three leagues (six leagues for Mississippi and Alabama) of the shore," fixed each state's seaward boundary as a line three leagues (or six leagues) from its mainland. The Court rejected this argument summarily by holding that "while 'all islands' within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act (of Admission) contemplated no territorial sea whatever." Although the Court noted that it was expressing "no opinion at this time on the location of Mississippi's coastline," it is implicit in the opinion that the Court believed that Mississippi's seaward boundary extended no further than three geographical miles from her mainland. Such a holding would divest the State of approximately three-fourths of the resources of the Mississippi Sound and would be manifestly contrary to the intent of Congress in passing the Submerged Lands Act.

Present Status of Boundaries

As a result of the decisions noted above, the shore boundaries of Mississippi are presently defined at least to the following extent:

1. The water boundary between Mississippi and Louisiana is fixed as the deep water sailing channel emerging from the mouth of the Pearl River, extending through the Mississippi Sound and passing between Cat Island and Isle a Pitre into the open Gulf of Mexico.

2. The boundary separating the claims of Mississippi and of the United States to the water resources of the Mississippi Sound and of the Gulf of Mexico is defined only as a line three

three geographical miles distant from the coast line of Mississippi. In order to fix the geographical location of this boundary, it is first necessary to fix the baseline (coastline) from which the boundary will be measured.

Recommendations Concerning Boundary Conflicts

Positing as our goal the extension seaward of the Mississippi coastline as far as is consonant with the decisions of the U. S. Supreme Court, the provisions of the Submerged Lands Act and the principles of international law, we note first that the term "Coastline" does not necessarily mean the shoreline of the mainland, but is defined as "the line or ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." (emphasis supplied)

Adopting this definition, we then assert that the waters of the Mississippi Sound are "inland waters" and that the coastline (baseline) should be drawn along the outer edges of the fringe of islands extending from Isle aux Petit Bois to Cat Island. This would fix the Mississippi "coastline" at an average distance of 14 miles from the mainland and would thus push the seaward boundary of the state an average distance of 17 miles from the mainland, giving to the State the water resources of a sizable area of the Gulf as well as all of the Mississippi Sound East of the Louisiana boundary.

There is ample authority for drawing the coastline in the manner suggested above.

First. The U. S. Supreme Court, in Louisiana v. Mississippi, said, by way of dicta, that the Mississippi Sound was inland waters

"Mississippi's mainland borders on Mississippi Sound. This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide. Such openings occur between Cat Island and Isle a Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bzy."

Although dicta such as this does not carry the authority of a direct judicial decision, nevertheless it is often persuasive on a later court which is confronted with the same question. Assuming that authoritative weight could be accorded this dicta, the Sound would belong to the State of Mississippi under the

doctrine of Pollard's Lessee v. Hagan, and the coastline would properly be along the outer edges of the island fringe.

Additional indirect authority is found in the fact that, in its briefs before the Supreme Court in United States v. Louisiana, the government conceded that probably the waters between the outer islands and the Mississippi mainland were inland waters and therefore Mississippi territory. The Supreme Court could very easily have settled the issue once and for all in this case by simply holding, as a part of its decision, that the government concession was either correct or incorrect. Unfortunately, the Court avoided the issue and held merely that Mississippi owned the waters extending three geographical miles from its "coastline," wherever that might be!

Second. Article 4, paragraph 1 of the Convention on the Territorial Sea and the Contiguous Zone provides that "if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline." The use of this method is subject only to the requirements that the baseline will follow the general direction of the coast and that the sea area lying within the baseline be "sufficiently closely linked to the land domain to be subject to the regime of internal waters." Both of these requirements are met in the application of this method to the Mississippi coastline, and the baseline would thus be properly drawn joining the outermost points of the offshore islands.

Third. Historically, Mississippi fishermen have freely fished and dredged the waters of the Sound for more than 150 years and the State has undertaken to protect them by enforcing its conservation and licensing laws in this area. As a consequence, a large and valuable seafood canning and processing industry has developed at Biloxi and Pascagoula which employs thousands of people and makes a vital contribution to the financial resources of the State. If the seaward boundary of the State were fixed as a line three geographical miles distant from the mainland, three-fourths of the Sound would be opened to foreign fishermen and the Mississippi industry would be jeopardized. However, Article 4, paragraph 4 of the Convention provides that, in determining particular baselines, account may be taken "of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage." This prescription clearly authorizes the drawing of the baseline along the seaward edges of the island fringe, thus preserving the character of the Sound as inland waters and protecting the vital economic interests of the State's fishing industry.

Fourth. The decision of the New York court in the 1866 case of Mahler v. Norwich and New York Transportation Company although not binding on the United States Supreme Court, is

nevertheless persuasive because the problem with which it dealt is so similar to that with which we are concerned. In Mahler, the court was confronted with the question of whether or not Long Island Sound was inland waters. In holding that it was, the court said:

"The rule is of universal recognition, that a bay, strait, sound, or arm of the sea...admitting no ingress from the ocean, except by a channel between contiguous headlands, which can be commanded by cannon on either side, is the subject of territorial jurisdiction."
(emphasis supplied)

It has already been noted (by the Court in Louisiana) that none of the openings from the sea into the Mississippi Sound are as much as six miles wide. The importance of this geographical fact is that, in international law, a nation can exercise sovereignty over a belt of sea extending three miles from its coast, the range of eighteenth century coastal cannon. Thus, under the Mahler rule, Mississippi's territorial sea would extend three miles from each of its islands and, since they are less than six miles apart, would overlap, forming a continuous belt of territorial sea. All waters within this belt would be inland waters which, under the rule of Pollard's Lessee v. Hagan, would belong to Mississippi.

Fifth. A final authority for the drawing of the Mississippi coastline along the outer fringe of islands is the fact that for more than 150 years, Mississippi has exercised various incidents of sovereignty over the waters of the Sound. These incidents of sovereignty include the prosecution of criminal offenses occurring on ships in the Sound, the prescription and enforcement of regulations governing fishing and oystering in the Sound, and the granting, in 1939, 1945, and 1964 of leases for oil exploration within the Sound. The exercise of these acts, without objection by the United States or any other sovereign, would have persuasive effect on a court considering the question of ownership of these water resources.

Thus, despite the highly restrictive interpretation of the term "coastline" implicit in the Court's opinion in United States v. Louisiana et als., it would appear that the weight of authority would justify fixing the coastline (baseline) of Mississippi as a line, or lines, connecting the outermost points of the islands fringing the mainland.