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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
STATE OF NEW HAMPSHIRE, :  
Petitioner :  
v. : No. 130, Orig.  
STATE OF MAINE. :  
- - - - -X

Washington, D.C.  
Monday, April 16, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:00 p.m.

APPEARANCES:

PAUL STERN, ESQ., Deputy Attorney General, Augusta, Maine;  
for Maine.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; as  
amicus curiae, supporting defendant.

LESLIE J. LUDTKE, ESQ., Special Counsel, Concord, New  
Hampshire; for New Hampshire.

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C O N T E N T S

PAGE

ORAL ARGUMENT OF

PAUL STERN, ESQ.

On behalf of the Defendant

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JEFFREY P. MINEAR, ESQ.

For United States, as amicus

curiae, supporting Defendant

14

LESLIE J. LUDTKE, ESQ.

On behalf of the Plaintiff

22

REBUTTAL ARGUMENT OF

PAUL STERN, ESQ.

On behalf of the Defendant

46

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 130, Orig., the State of New Hampshire v. the State of Maine.

Mr. Stern.

ORAL ARGUMENT OF PAUL STERN

ON BEHALF OF THE DEFENDANT

MR. STERN: Thank you, Mr. Chief Justice, and may it please the Court:

Before the Court today is Maine's motion to dismiss New Hampshire's complaint on res judicata grounds. By its complaint, New Hampshire seeks to redraw its boundaries --

QUESTION: Would you speak up a little, please?

MR. STERN: I'm sorry, Your Honor.

QUESTION: Maybe you can raise the podium and it'll be closer.

MR. STERN: I apologize. By its complaint, New Hampshire seeks with redraw its boundary with Maine by moving the border from the middle of the river onto Maine's shoreline along the Piscataqua River. In 1976, this Court held that the King's 1740 order permanently fixed the boundary as the, quote, middle of the river, closed quote. The consent decree approved by this Court

1 in 1977, according to New Hampshire at the time in a brief  
2 reproduced at 149a of New Hampshire's Appendix, that  
3 decree, quote, contains specific findings and rulings and  
4 sets forth the precise factual basis and legal principles  
5 upon which it, the decree, is founded, closed quote.

6 Paragraph three of that decree sets forth the  
7 pertinent provision of the 1740 King's order, the, quote,  
8 middle of the river, closed quote, language.

9 Paragraph four of that decree is a ruling or  
10 legal principle or finding that as used in the 1740 order,  
11 quote, middle of the river, closed quote, means, not  
12 surprisingly, middle of the Piscataqua River, middle river  
13 of the main channel of navigation of the Piscataqua River.

14 QUESTION: If we agree with your position, does  
15 it become important or do we decide here, or does it  
16 remain in dispute whether the middle means the geographic  
17 middle or the middle of the channel?

18 MR. STERN: No, paragraph four of the 1977  
19 decree specifically held or noted or ruled that as used in  
20 the 1740 order, quote, middle of the river, closed quote,  
21 means middle of the main channel of navigation of the  
22 Piscataqua River. In fact --

23 QUESTION: But what I guess I'm asking is, is it  
24 necessary then, if your position is to be maintained, that  
25 we refer to our own earlier decree as opposed to simply

1 relying on the 1740 decree? Is this issue going to come  
2 up again, or does that depend on how we write the  
3 decision, if you prevail?

4 MR. STERN: Hopefully it will not come up again,  
5 since this is the third time it's come up. The 1976  
6 opinion of this Court confirmed that the 1740 King's  
7 decree permanently fixed, permanently set the boundary as  
8 the, quote, middle of the river, closed quote.

9 QUESTION: Where is that in the Appendix?

10 MR. STERN: That would be the Commissioner's  
11 report is at, I believe, 14a attached to our Appendix, or  
12 attached to our brief. And I believe that 21a or 22a is  
13 the King's affirmance of that.

14 QUESTION: Well, now, the 1977 consent decree I  
15 thought had to do with the lateral marine boundary from a  
16 point going out to sea. And I did not think that it dealt  
17 actually with the upriver area at all and the island where  
18 the naval base is now. Am I right?

19 MR. STERN: No, Your Honor.

20 QUESTION: No?

21 MR. STERN: At the --

22 QUESTION: Where is it -- it is not at 14a -- at  
23 least not on 14a of your brief. I mean, that's what I'm  
24 looking for.

25 MR. STERN: I apologize, Your Honor. It's 7a.

1 Two points I'd like to make in response to your questions.

2 First --

3 QUESTION: It's not 7a either. You want to try  
4 again? You're talking about your brief in opposition to  
5 the motion to dismiss?

6 MR. STERN: No. Our brief -- we're the moving  
7 party.

8 QUESTION: Oh, I'm sorry. Your brief -- I've  
9 got you. I'm looking at the wrong -- I'm with you now.

10 MR. STERN: Second paragraph.

11 QUESTION: 7a.

12 MR. STERN: Second paragraph. And it is  
13 affirmed, I believe, on 21 or 22a.

14 Getting back to your question, Your Honor -- two  
15 points I'd like to make. First, by necessity the terminus  
16 point of the lateral marine boundary from the Isle of  
17 Shoals to the river -- you have to determine where the  
18 location of the boundary is in the river. That's clear  
19 from the very first pleading, the complaint filed by New  
20 Hampshire in 1973 where on the very first page they state  
21 that the boundary between the two States is described in  
22 the 1740 King's decree as the middle of the river. So by  
23 necessity, one --

24 QUESTION: Yeah, but the question might then  
25 become whether it follows the thalweg or it doesn't, and

1 whether the '77 consent decree has res judicata effect  
2 here. It may not in relation to this island where the  
3 naval base is.

4 MR. STERN: The decree on its face in paragraph  
5 four, without reservation, gives meaning to the phrase,  
6 quote, middle of the river, from the 17 --

7 QUESTION: And what page is that on?

8 MR. STERN: Excuse me, Your Honor?

9 QUESTION: Page four, which is where? I'm still  
10 looking for the decree. I can't find it.

11 MR. STERN: You mean the --

12 QUESTION: The '76 decree -- that's what we're  
13 talking about, isn't it?

14 MR. STERN: The 1977 decree is reproduced  
15 attached to the United States brief -- the gray brief --  
16 and I believe the --

17 QUESTION: That's what I've been asking for.  
18 I'm trying to read this --

19 MR. STERN: I misunderstood, Your Honor. I  
20 thought you were referring to the 1740 decree. If one  
21 looks at 2a, paragraph four, without reservation, gives  
22 meaning to the term, quote, middle of the river, closed  
23 quote, from the 1740 decree as the middle of the main  
24 navigational channel of the Piscataqua River. Paragraph  
25 five that I wanted to get to applies that principle to the

1 river. It applies the principle by laying out a mile  
2 portion of the river from its mouth all the way up to  
3 Fishing Island.

4 Of note, in the dissenting opinion written by  
5 Justice White, it's noted that Maine strongly objected to  
6 the proposed geographic midline of the special master  
7 because of the substantial areas that Maine would lose to  
8 New Hampshire in both the river and harbor and seaward  
9 thereof. Before this Court, Maine's Assistant Attorney  
10 General argued, and it's at 104 to 105a of New Hampshire's  
11 Appendix, that as much of an objection as Maine had to the  
12 effect of the geographic line with respect to losing  
13 territory off the coastline outside the harbor, Maine felt  
14 much more -- a much greater prejudice from the effects  
15 inside the harbor. To the extent that the impression has  
16 been left that nobody was thinking about it or nobody was  
17 arguing with respect to the rest of the river, that simply  
18 is not true from both the --

19 QUESTION: But the point is that I at least  
20 looked at New Hampshire's complaint here as resting on an  
21 allegation that the division is the low-water mark of the  
22 Maine shore. That has nothing to do with -- and doesn't  
23 require us to determine whether we follow the thalweg or  
24 the geographic middle of the river if we applied the old  
25 King's decree. But you could deal with your motion and



1 say, sure, we dismiss it because at least it isn't that  
2 the low-water mark of the Maine shore, and not decide  
3 whether it means the thalweg or the geographic middle of  
4 the river.

5 MR. STERN: Exactly, Your Honor.

6 QUESTION: We could do that, and that would mean  
7 they could come back here a fourth time, I assume.

8 MR. STERN: I assume, yes.

9 QUESTION: But to do that we would just as much  
10 have to rely upon the fact that the only thing which the  
11 1977 decree technically held, mainly the outward line,  
12 depended upon a calculation of what the line within the  
13 river was. We'd still have to make that conclusion. And  
14 while we're making that conclusion, we may as well go the  
15 whole hog and accept what that decree said was, namely the  
16 middle of the channel of navigation, rather than the  
17 geographic middle. Isn't that logical?

18 MR. STERN: That's logical. Either approach  
19 would result in the motion --

20 QUESTION: Well, I think the other approach is  
21 illogical. I mean, there's no basis for saying that we  
22 can resolve this matter without deciding where it is in  
23 the River, because the only thing the decree says is that  
24 the line outward into the ocean depends upon the line  
25 inward in the harbor and in the river, and it then goes on

1 to say, and that line is the middle of the navigation  
2 channel, so it seems to me if we buy into the binding  
3 effect of the decree, we buy into the middle of the  
4 navigation channel.

5 MR. STERN: We agree, Your Honor. To the extent  
6 that there's a suggestion that New Hampshire had no reason  
7 or no incentive to press a claim to the shoreline back in  
8 the 1970s, that is simply wrong. Indeed, in response to  
9 the special master's report, New Hampshire filed  
10 exceptions seeking to move the middle of the river line  
11 three hundred and fifty feet closer to Maine's shore. If  
12 the shoreline boundary was correct, if they pressed it  
13 back then, the line would be moved not three hundred and  
14 fifty feet but over half a mile onto Maine's shoreline,  
15 obviously resulting in a substantial additional amount of  
16 territory being in New Hampshire rather than Maine.

17 To the extent that there is the suggestion that  
18 the middle of the river could possibly mean the shoreline,  
19 that's defused by New Hampshire's own -- not only the  
20 decree on its face, paragraph four in particular and its  
21 application in paragraph five, but also with respect to  
22 New Hampshire's own pleadings at the time, own briefs,  
23 where at -- in a brief at 459a of Maine's Appendix, New  
24 Hampshire explained that when, quote, middle of the river,  
25 closed quote, must be interpreted, there are two possible

1 interpretations -- thalweg or geographic middle. New  
2 Hampshire at the time did not identify Maine's shoreline  
3 as a possibility, because New Hampshire had the --

4 QUESTION: Just as a matter of English usage, it  
5 seems that when you're talking about the middle of the  
6 river it would not be Maine's shoreline.

7 MR. STERN: That's what we have been saying,  
8 Your Honor. We are here on a complaint seeking to in  
9 effect that, quote, middle of the river, closed quote,  
10 does not mean the middle of the river, but it gets more  
11 peculiar because as a result of the decree in 1977, at  
12 least the first mile of the river is laid out as the  
13 middle of the river. New Hampshire appears to agree that  
14 once we get up to the head of tide near Salmon Falls, we  
15 jumped back into the middle of the river again, because  
16 apparently the 1740 decree describes the boundary up there  
17 as the middle of the Nuashanog.

18 So the middle of the river means middle of the  
19 river at the mouth. Middle of the river means middle of  
20 the river at its head, but middle of the river does not  
21 mean middle of the river, according to New Hampshire, in  
22 the middle section of the River. It becomes even more  
23 peculiar, because it appears that New Hampshire concedes  
24 that virtually all, if not all, of the islands on Maine's  
25 side of the middle of the river, except the Shipyard

1 Island, are in Maine. So it would have this jogging  
2 boundary with all of the islands except one in the State  
3 of Maine.

4 QUESTION: But the last time around there wasn't  
5 any actual adjudication. As I understand it, the special  
6 master said that the geological line, and this Court said,  
7 no, the parties have agreed on what middle of the river  
8 means, but it was -- one could say that agreement was for  
9 that controversy, and then all bets are off, and we're  
10 talking about a different portion.

11 MR. STERN: We would disagree with that for a  
12 number of reasons. First, we've argued both claim and  
13 issue preclusion. And our view is because the transaction  
14 of the meaning and applicability of the 1740 King's decree  
15 was before the Court in the 1970s, in particular with  
16 respect to the location of the boundary in the river, New  
17 Hampshire is precluded from today coming in presenting a  
18 different theory as to the meaning and applicability of  
19 the 1740 decree.

20 QUESTION: First, on claim preclusion, it isn't  
21 the same claim because it was one portion that was in  
22 contention in '77 and a different portion now, so I don't  
23 see how it could be claim preclusion. The dispute over  
24 lobster fishing is not dealing with the same land as the  
25 current case, is that right?

1 MR. STERN: Not exactly, because back in the  
2 1970s, as it has been explained previously, by necessity  
3 it was essential to determine the location of the boundary  
4 in the river and, in fact, the decree applied the  
5 principle to a portion of the river. But we understand,  
6 as is obvious by comparing the United States' brief and  
7 Maine's brief, that reasonable minds can differ as to  
8 whether we're talking about a claim or an issue. We  
9 believe the claim preclusion and issue preclusion are  
10 different paths that get to the same spot res judicata,  
11 but --

12 QUESTION: The difference is that claim  
13 preclusion would favor you to the extent that it doesn't  
14 matter what was actually litigated if it's part of the  
15 whole claim.

16 MR. STERN: Exactly.

17 QUESTION: Issue preclusion, it usually does  
18 matter whether it was actually litigated.

19 MR. STERN: Yes. If it is a, quote, consent  
20 decree, closed quote, and we would argue that this is not  
21 the type of consent decree described in, for example,  
22 International Building, because here this Court made an  
23 independent determination that the 1740 King's Order and  
24 not the proposed consent decree permanently fixed the  
25 boundary as the middle of the river. We would also

1 suggest that looking at, in particular paragraph four of  
2 the 1977 decree, that that according to New Hampshire, as  
3 we've related, is a specific finding or ruling or legal  
4 principle with respect to the entire river because, in  
5 particular, in paragraph five, it was applied to a portion  
6 of the river.

7 If there are no further questions now, I reserve  
8 the rest of my time for rebuttal.

9 QUESTION: Very well, Mr. Stern.

10 Mr. Minear, we will hear from you.

11 ORAL ARGUMENT OF JEFFREY P. MINEAR  
12 FOR UNITED STATES, AS AMICUS CURIAE,  
13 SUPPORTING DEFENDANT

14 MR. MINEAR: Thank you Mr. Chief Justice, and may  
15 it please the Court:

16 The United States submits that Maine's current  
17 suit is barred by this Court's 1976 decision and its 1977  
18 decree in New Hampshire v. Maine, No. 64, Original. And  
19 we think to understand 64 Original, it's useful to look at  
20 a map here. New Hampshire has provided a lodging of maps,  
21 and I would refer you if you have a copy to map four,  
22 which shows the consent decree line.

23 QUESTION: What?

24 MR. MINEAR: This is in a eight and a half by  
25 eleven document entitled New Hampshire's Map Lodging for

1 Oral Argument. Now, map --

2 QUESTION: Some of us don't have it, Mr. Minear.

3 MR. MINEAR: Okay, perhaps I can describe the  
4 line and that might be helpful to understand the operation  
5 of the consent decree in 1977.

6 This consent decree did provide for a  
7 description of the lateral marine boundary which runs  
8 perpendicular to what would be the coastline of Maine and  
9 New Hampshire.

10 QUESTION: For those of us that do have it, what  
11 is the page?

12 MR. MINEAR: It's map number four. It's tab  
13 four.

14 In any event, the line that was drawn here  
15 includes the lateral marine boundary. But by terms of the  
16 consent decree, it also extended the line up into the  
17 harbor. This is the line that runs almost north-south  
18 that is marked here. That is -- that line is described in  
19 paragraph five of the consent decree. You notice it's a  
20 straight line, and the reason why it's a straight line is  
21 it follows the range of lights that mariners use to  
22 navigate up the channel, and that's why we call this the  
23 main channel of navigation.

24 And you'll see it ends at a point where there is  
25 another line that crosses perpendicular almost east-west.

15

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1 That's another set of range lights where people who are  
2 navigating would follow as well, going further up the  
3 river. But the important point to recognize with regard  
4 to the consent decree is that it did define the channel as  
5 the middle of the river, as the middle of the main channel  
6 of navigation, and it extended that line up into the river  
7 to a considerable degree.

8 QUESTION: When you say that definition of the  
9 middle of the river, the main channel -- is that the  
10 thalweg, or just the channel that is in fact used by the  
11 ships?

12 MR. MINEAR: I think in actuality it is the  
13 channel that is in fact used by the ships. As Justice  
14 White pointed out in his dissent in No. 64 Original, the  
15 thalweg would normally follow the deepest channel or where  
16 the current is fastest, and so it would not necessarily be  
17 a straight line. But by the terms of the consent decree,  
18 and as the line that is drawn show in here, they  
19 compromised their meaning of the consent --their meaning  
20 of the 1740 Order by using where the ships actually  
21 travel.

22 QUESTION: And how does that help us as we  
23 proceed north through -- beyond Seavey Island?

24 MR. MINEAR: Seavey Island is to the left -- to  
25 the west of this line. And if one were to draw the line



1 consistently with the '64 decree, one would travel east-  
2 west along those range lights. They're very faintly  
3 marked, and they begin at, actually at Pierce's Island  
4 which is not marked here, but up north you see Seavey  
5 Island.

6 The important point for purposes of the motion  
7 to dismiss is under any interpretation of the 1740 decree  
8 we think that New Hampshire's complaint must be dismissed.

9 QUESTION: The argument is being made that the  
10 normal conditions for issue preclusion are met here  
11 because this was not an ordinary consent decree -- that  
12 the Court really had to make a legal determination because  
13 of the special nature of the Court's responsibilities with  
14 regard to boundary disputes between the States. If that  
15 is true, I can't understand how the Court could have  
16 simply invented -- certainly in 1740 they meant either the  
17 thalweg or the geographic center of the river. I mean  
18 -- I don't think anybody thought in 1740 they meant the  
19 usual channel of navigation. Did anybody say that?

20 MR. MINEAR: Well, Maine was making that  
21 argument, and it wasn't ultimately resolved. Of course,  
22 the master disagreed with the consent judgment that was  
23 proposed on the basis that it should have been the  
24 geographic middle, and this Court rejected that argument.

25 Now, the Court made two legal rulings and --

1                   QUESTION: Well, you say the Court actually  
2 decided that that's what the 1740 document meant?

3                   MR. MINEAR: No, rather what the Court said in  
4 its 1976 decision was first that it's clear that the 1740  
5 Order of the King controls here, and it's the middle of  
6 the river. And second, that the parties are entitled to  
7 compromise their claim because this is a reasonable  
8 interpretation of the decree, not perhaps the only  
9 interpretation of the 1740 decree, but one that was  
10 permissible. And I don't think the Court wants to go back  
11 and --

12                   QUESTION: The 1740 decree reasonably referred  
13 to harbor lights that were planted out there in what,  
14 1960?

15                   MR. MINEAR: No, I think what the Court was  
16 suggesting is they could have -- that that decree could  
17 reasonably describe what was the main channel of  
18 navigation, however that was determined at that time. And  
19 of course boundaries are ambulatory, they move, and maybe  
20 the main channel of navigation is followed differently  
21 then as now. But for purposes of resolving this dispute,  
22 the Court accepted the parties' agreement that the range  
23 light line would be used to determine the main channel of  
24 navigation as to this settlement.

25                   We think that the Court's consent decree does

1 preclude further litigation, at least to the extent that  
2 certainly the middle of the river is not on the low-water  
3 mark. And furthermore, we would argue that the main  
4 channel of navigation should be continued to be used to  
5 continue up the river. To do otherwise would provide a  
6 discontinuous line, and we do think the 1740 Order of the  
7 King ought to be interpreted in one way as we go from the  
8 mouth of the harbor up the river. Any other  
9 interpretation will lead to discontinuous lines the Court  
10 will have to connect. New Hampshire suggests that's all  
11 right, you simply use your equitable powers. We suggest  
12 that the better approach here is to read the consent  
13 decree as reasonably determining that the King's Order  
14 would have one meaning for purposes of the 1740 Order, and  
15 that should be applied consistently throughout the length  
16 of the river.

17 QUESTION: Is the --

18 QUESTION: Mr. Minear, which preclusion  
19 principle are you relying on? Because it seems to me it  
20 doesn't fit claim preclusion. It is a different claim  
21 that's being made here.

22 MR. MINEAR: We rely on issue preclusion.

23 QUESTION: And even though the Court didn't  
24 actually adjudicate anything, it accepted the parties'  
25 submissions.

1                   MR. MINEAR: Well, the Court did adjudicate the  
2 question of whether the 1740 Order controls. It found it  
3 necessary to reach that issue in order to enter the  
4 consent decree.

5                   As to the line that was drawn, this Court noted  
6 in Arizona v. California, and it noted in United States v.  
7 International Building Company that if questions of law in  
8 fact are resolved in a consent judgment, those can be  
9 binding on the party. And we think it's reasonable to  
10 read this consent judgment as providing a single  
11 interpretation of middle of the river, it would apply  
12 henceforth to all applications of the 1740 decree. After  
13 all, this decree only affects these two states. It's  
14 reasonable for them to conclude, when they drew the  
15 boundary, that they were looking at one definition.

16                   And in fact, the text of the order suggests --  
17 of the 1977 decree suggests that as well. It says what  
18 the word middle of the river means, not what it's meant to  
19 -- what it's deemed to mean for purposes of this case  
20 only. If the parties -- the parties were well-  
21 represented. And if the parties had intended that this  
22 case was only good -- that this ruling was only good for  
23 this stretch of the river, they would have clearly  
24 indicated that by the terms of the consent decree and they  
25 would have put the Court on notice that that's exactly

1 what it was determining.

2 QUESTION: What is -- that vertical blue line  
3 that you're talking about on map four?

4 MR. MINEAR: Yes.

5 QUESTION: On paragraph five of the decree it  
6 says it proceeds southward as indicated by the range  
7 lights located in the vicinity of Pepperell Cove and  
8 Kittery Point. Is that what they're talking about?

9 MR. MINEAR: Yes. They're going, moving from  
10 south -- from north to south.

11 QUESTION: So it starts -- so that phrase in  
12 paragraph five is meant to pick up the top of that  
13 vertical leg and go down.

14 MR. MINEAR: That's right.

15 QUESTION: Okay.

16 MR. MINEAR: And the reason that they say in the  
17 vicinity is they start at that point with the two range  
18 lines intersected.

19 QUESTION: All right. And so this all comes  
20 from some map? The range line is marked on the coast in  
21 geodetic survey chart, 211, et cetera.

22 MR. MINEAR: Yes. Now, the current charts, if  
23 the Court is interested in looking at the current nautical  
24 charts, they're NOAA charts 13278 and 13283. I think  
25 you'll find there's some difficulty sometimes in finding

1 these charts, and I wanted to provide you with those  
2 numbers in case you have the inclination to look further  
3 at the charts that are involved here.

4 If there are no further questions?

5 QUESTION: Thank you, Mr. Minear.

6 Ms. Ludtke, we'll hear from you.

7 ORAL ARGUMENT OF LESLIE J. LUDTKE

8 ON BEHALF OF THE PLAINTIFF

9 MS. LUDTKE: Mr. Chief Justice, and may it  
10 please the Court:

11 I'd like to start by framing what appears to be  
12 the central issue before the Court, and that issue is as  
13 follows: Maine and the United States argue that New  
14 Hampshire is bound by its position in the 1976 case  
15 concerning the meaning of the 1740 boundary decree. That  
16 case involved the determination of the State's lateral  
17 marine boundary that ran between the mouths of Portsmouth  
18 Harbor and Gosport Harbor.

19 Now the boundary decree in question which was  
20 issued as an order in council in 1740, describes the  
21 boundary as follows, and I will paraphrase the  
22 description. The boundary passes up through the mouth of  
23 Piscataqua Harbor and up the middle of the river into the  
24 river Newichwannock and through the same to the furthest  
25 head and it divides the Isle of Shoals. In 1976 Maine and

1 New Hampshire agreed that three phrases in the 1740 decree  
2 had relevance in determining the location of their lateral  
3 marine boundary, and those phrases were as follows. Phrase  
4 number one: The boundary passes up through the mouth of  
5 the harbor. Phrase two: It passes up the middle of the  
6 river. And phrase three, it divides the Isle of Shoals.

7 Since that time, New Hampshire has determined  
8 for good historical reasons after a searching review of  
9 original records and maps that the phrase up the middle of  
10 the river has no relevance to determining the location of  
11 the boundary in the harbor and the tidal portions of the  
12 Piscataqua River.

13 Maine and the United States claim that the  
14 stipulation in 1976 precludes New Hampshire from arguing in  
15 this case that that phrase, up the middle of the river,  
16 has no application to the location of the boundary in  
17 Portsmouth Harbor. New Hampshire contends that it isn't  
18 precluded from arguing that, because that phrase, up the  
19 middle of the river, was not essential to this Court's  
20 jurisdiction to enter judgment approving the consent  
21 decree. We say that it wasn't essential to the Court's  
22 jurisdiction and we say that if anything, it impeded this  
23 Court's ability to enter that Order.

24 QUESTION: You're -- about how you argued in  
25 1977, you said we said, which I take it is something that

1 you said in the past.

2 MS. LUDTKE: Excuse me. I meant it's our  
3 position in this litigation that that phrase and the  
4 parties' stipulation as to the meaning of the phrase, up  
5 the middle of the river, in 1976 impeded this Court's  
6 ability to enter a consent decree.

7 QUESTION: You think middle of the harbor was  
8 also not relevant to that decree?

9 MS. LUDTKE: Your Honor, the consent decree did  
10 not address the phrase, middle of the harbor, nor did it  
11 address the phrase, mouth of the harbor.

12 QUESTION: Paragraph four certainly does.

13 QUESTION: Paragraph four says the terms, middle  
14 of the river and middle of the harbor, as used in the  
15 above quoted order, mean the middle of the main channel of  
16 navigation.

17 MS. LUDTKE: I understand that. I'm referring  
18 to the consent decree that was entered by the parties  
19 where the parties did not address the meaning of those  
20 terms. The consent decree entered by the parties defined  
21 only the term, middle of the river, and the parties  
22 defined the term, middle of the river, in that consent  
23 decree as meaning the 1956 ships' range light channel --

24 QUESTION: Let me just interrupt you to get one  
25 thing straight. The parties signed a consent decree, but



1 this Court didn't enter that decree. Isn't that right?

2 MS. LUDTKE: This Court entered an order  
3 approving the consent decree.

4 QUESTION: Where is the consent decree in the  
5 materials in front of us? I have the order, I don't know  
6 where the consent decree is.

7 QUESTION: It's in page 1a of the Government's  
8 --

9 QUESTION: No, that's the order, I thought.

10 QUESTION: That's the order. That's the order.

11 QUESTION: Are you talking about --

12 QUESTION: Oh, that's the decree.

13 QUESTION: That's right. That's not what she's  
14 talking about.

15 QUESTION: That's not what she's talking about.  
16 She says this decree does say middle of the harbor, but  
17 she says that the parties' consent decree did not say  
18 middle of the harbor.

19 MS. LUDTKE: The parties' consent decree appears  
20 in the appendix to the brief for the United States, and  
21 the paragraph --

22 QUESTION: Whereabouts, Ms. Ludtke?

23 MS. LUDTKE: Excuse me, 1a in --

24 QUESTION: That's what I'm looking at --

25 QUESTION: That's what we're reading from, and

1 it says middle of the harbor. Paragraph four. The terms,  
2 middle of the river and middle of the harbor. Now,  
3 certainly middle of the harbor was essential to drawing a  
4 line outward into the lobster beds. Do you think middle  
5 of the harbor means something different from middle of the  
6 river?

7 MS. LUDTKE: That means the middle of Gosport  
8 Harbor, Your Honor. The boundary line, the lateral --

9 QUESTION: And it means -- it means the --

10 MS. LUDTKE: -- marine boundary line goes  
11 through the middle of Gosport.

12 QUESTION: The regular channel of navigation  
13 through the harbor, and you think that middle of the river  
14 does not mean the regular channel of navigation through  
15 the river. That's rather odd it seems to me.

16 MS. LUDTKE: Your Honor, New Hampshire has very  
17 carefully reviewed the historical documents pertaining to  
18 the 1740 Order and the way in which that language was used  
19 in that 1740 Order.

20 QUESTION: Well, just focusing on number four  
21 for a minute. It said the terms middle of the river as  
22 used in the above quarter mean, then I'll interpolate, (a)  
23 the middle of the main channel of navigation of the  
24 Piscataqua River, and (b) the middle of the main channel  
25 of navigation of Gosport Harbor. So those are -- those

1 are conjunctive phrases each having their own meaning, are  
2 they not?

3 MS. LUDTKE: That's correct. The term middle of  
4 the river refers to the main channel of navigation in the  
5 Piscataqua River, which is then defined by the ships'  
6 range light line. The term, middle of the harbor, means  
7 the middle of the main channel of navigation through  
8 Gosport Harbor, which is in the Isle of Shoals.

9 QUESTION: All right. So then it goes on to  
10 define what they're talking about, and they say the middle  
11 of the main channel of navigation, and that's why I ask  
12 this question, and they say is that blue line. Okay? So  
13 that's what it says right in the decree. It says it's  
14 that blue line. I mean, at least that's what I was told.

15 Paragraph five of that decree means exactly as  
16 if it were written, that blue line.

17 MS. LUDTKE: That's correct, Your Honor.

18 QUESTION: All right. So what's the issue?  
19 Here you agree and they agree that in a consent decree  
20 entered by the Court that the channel is that blue line.  
21 And now you're saying it's not that blue line. All right,  
22 why?

23 MS. LUDTKE: Your Honor, the State of New  
24 Hampshire is not contesting the lateral marine boundary in  
25 the portion, I call it the dogleg portion, that runs up

1 toward Pepperrell Cove, and that is the line that is  
2 referred to that is marked by the 1956 ships' range line,  
3 and that line, by definition, terminates at the location  
4 of the ships' range light lines which are located on  
5 Pepperrell Cove. It is not a continuous line.

6 QUESTION: So can you -- I'm sorry that I may be  
7 -- looking at map four, what part are you talking about?

8 MS. LUDTKE: Looking at map four, the line that  
9 proceeds from here to here, the top towards Pepperrell  
10 Cove, at the turn, represents the 1956 ships' range light  
11 line --

12 QUESTION: Right.

13 MS. LUDTKE: -- determined by that. It  
14 terminates --

15 QUESTION: Which is the blue dogleg.

16 MS. LUDTKE: That's correct.

17 QUESTION: Okay.

18 MS. LUDTKE: And it terminates, by definition,  
19 at the shore right here. We've supplied the United States  
20 coast and geodetic map. It terminates, by definition, at  
21 the shore, which is the location of a ships' range lights.

22 QUESTION: What is it New Hampshire wants?

23 MS. LUDTKE: Pardon?

24 QUESTION: I'm sorry. Don't assume too --  
25 assume I know nothing about this. Look at the blue line

1 -- which is not -- all right. Look at the blue line and  
2 tell me what -- where it is that New Hampshire wants to  
3 go.

4 MS. LUDTKE: The portion of the boundary that is  
5 at issue in this litigation is the portion that starts  
6 from this line that's west of this line, and runs up the  
7 river to the saltwater confluence at the Puchico River.

8 QUESTION: So Seavey Island, that's part of it.

9 MS. LUDTKE: This is Seavey's Island right  
10 there.

11 QUESTION: And you want part of that.

12 MS. LUDTKE: This case is not about the location  
13 of the Portsmouth Naval Shipyard -- it's about the  
14 boundaries of New Hampshire, and it's about whether New  
15 Hampshire has rights to Portsmouth Harbor that  
16 historically have been New Hampshire's. Our case goes  
17 back to 1679 when New Hampshire was created as a royal  
18 province and the Port of Piscataqua, later the Port of New  
19 Hampshire, was annexed to New Hampshire. We historically  
20 have controlled and governed the harbor, our claim goes to  
21 the fact that the historical documents show that at the  
22 time of the American Revolution --

23 QUESTION: But shouldn't all of this have been  
24 fleshed out in the 1976 case?

25 MS. LUDTKE: In 1976 the parties had no motive

1 or reason to litigate these issues. The key matter at  
2 issue in the 1976 litigation concerned New Hampshire's  
3 desire for a straight line lateral marine boundary. And  
4 there have been a number of maps filed that shows the  
5 respective claims of the parties, and I'll refer you  
6 specifically to map number eleven which shows all the  
7 different boundary claims. And people had a lot of  
8 different ideas about where the boundaries should be in  
9 the lateral marine area.

10 QUESTION: That's with the -- these are all --  
11 that refers to the 1976 litigation?

12 MS. LUDTKE: That's correct, Your Honor. And  
13 the location of the starting point was intended to achieve  
14 one purpose as far as New Hampshire was concerned, and  
15 that was to accomplish a straight line lateral marine  
16 boundary.

17 QUESTION: But if in fact the choice of that  
18 starting point also leads to other perfectly logical  
19 conclusions, isn't New Hampshire bound by that?

20 MS. LUDTKE: No, Your Honor. New Hampshire is  
21 not bound by that because there was no actual adjudication  
22 of the issues in 1976. No inference can be raised that  
23 the parties intended to adjudicate that, and I will  
24 address that specifically with respect to the continuity  
25 argument.

1           QUESTION: May I just ask -- you say there was  
2 no actual adjudication, but paragraph four was a subject  
3 of dispute within this Court. Three of us dissented from  
4 paragraph four. How can you say there wasn't an actual  
5 decision on that point?

6           MS. LUDTKE: Your Honor, I think that the  
7 question on whether there was an actual decision goes to  
8 the matter of whether that stipulation was essential to  
9 the Court's authority to enter the decree. And the Court  
10 could have entered the decree as a valid agreement of the  
11 parties establishing the location of the boundary simply  
12 by reference to the phrase in the 1740 decree that  
13 describes the boundary as passing up through the mouth of  
14 Piscataqua Harbor.

15           And the point that I attempted to make before is  
16 that if anything, that was an impediment. The Court  
17 entered the decree despite that, not because of it, and  
18 the reason is because there's no legal authority for  
19 using a modern ships' channel as a divisional principle in  
20 boundary cases. There are a number of boundary cases that  
21 do use ships' channel, but the ships' channel is always  
22 --

23           QUESTION: But you're just repeating Justice  
24 White's argument.

25           MS. LUDTKE: Pardon?

1           QUESTION:  You're just repeating Justice White's  
2 argument that the Court rejected.

3           MS. LUDTKE:  And well -- that's why I think that  
4 the 1976 order issued by this Court does stand for the  
5 proposition that the States have broad latitude in coming  
6 to agreement as to the location of a boundary when the  
7 underlying boundary instrument is imprecise, and I think  
8 the second corollary of that is this Court need not  
9 adjudicate the actual true and correct historical meaning  
10 of the underlying decree in approving such an agreement of  
11 the parties.

12           And I think later on in the Multistate Tax  
13 Commission that we've cited in our brief, in that case the  
14 Court explicitly cited this case as well as the Virginia  
15 v. Tennessee case for the proposition that an approval of  
16 an agreement relative to a boundary line didn't implicate  
17 the Commerce Clause when the underlying instrument was  
18 imprecise.

19           So I think it goes to the point of whether this  
20 Court could have approved that consent agreement entered  
21 into between New Hampshire and Maine, had that stipulation  
22 not been there, regarding the meaning of the phrase middle  
23 of the river.  And the answer to that has to be yes, and  
24 particularly for the reasons you state regarding the  
25 dissent that was raised, because there is no legal or



1 historical authority for defining the term middle of the  
2 river as it was used in 1740 to mean a ships' channel  
3 marked by 1956 range lights that clearly was not located  
4 at the location of the thalweg.

5 QUESTION: Well, I think the Court would be  
6 surprised to learn that the real disagreement between the  
7 majority and the dissent in the case was not over where  
8 the line was, but rather over whether you can accept the  
9 parties' stipulation or not. There is no indication in  
10 the writings as I recall it that that was the difference  
11 between the majority and the dissent. I think both the  
12 majority and the dissent understood that they had to be  
13 determining what the line was, giving some allowance to  
14 the parties' concessions, but that the Court had a  
15 responsibility to determine the line. Both opinions seem  
16 to indicate that, and you're telling us that the basic  
17 distinction is that the majority just thought that they  
18 had no responsibility to come to an independent  
19 determination. I just don't read the order that way.

20 MS. LUDTKE: Well, the consent decree that was  
21 approved stated specifically in the first paragraph that  
22 the master's decision is approved, and the master's  
23 recommendation provided for a line at the geographic  
24 middle. Then the dissent raised questions that it was not  
25 the thalweg -- no representation was made that it was the

1 thalweg -- that it was a 1956 ship channel that was being  
2 used, and raised questions about the legal authority of  
3 those devices to determine a 1740 boundary.

4 New Hampshire at oral argument told the Court  
5 this decision is arbitrary. It's based on administrative  
6 convenience, we want a straight boundary line. And the  
7 reason why that dogleg went up into the harbor instead of  
8 emerged from a closing line is that Maine insisted at that  
9 time that a closing line not be placed across the harbor  
10 so that it could take advantage of the reservation that  
11 this Court had allowed it in the United States v. Maine  
12 case to litigate the legal extent of its seaward  
13 boundaries.

14 So this was not a case where the parties  
15 intended to negotiate or to conclude a boundary in the  
16 harbor. The dogleg portion of it was done to accommodate  
17 Maine's interests in reserving its right to litigate the  
18 question of the legal extent of its seaward boundaries.  
19 Moreover, as the State has submitted to the Court, the  
20 Solicitor General at that time was expressing grave  
21 concern regarding the question of whether this would  
22 implicate rights in the United States v. Maine case by  
23 establishing a ruling that colonial charters had a legal  
24 effect in determining boundaries in the marginal sea.

25 QUESTION: Is your point this, that -- I look at

1 that map four. You say go to the top of the blue line,  
2 and you say we're not talking about the blue line, we're  
3 talking about a line that would be drawn to the left of  
4 the top, past Seavey Island.

5 MS. LUDTKE: That's correct, Your Honor.

6 QUESTION: All right. Now, you're also adding  
7 that that blue line represents some kind of compromise in  
8 the case that doesn't actually make very much sense but it  
9 was a compromise.

10 MS. LUDTKE: That's correct, Your Honor.

11 QUESTION: So now you're saying whatever we  
12 might have done to compromise that blue line, we never  
13 said a word about the line that isn't there, and by the  
14 way, it wasn't in the case, the line that wasn't there, so  
15 we get to litigate that afresh.

16 MS. LUDTKE: That's absolutely correct. The  
17 claim was a very different claim --

18 QUESTION: Okay, I understand.

19 MS. LUDTKE: As stated in the complaint, the  
20 claim was for the lateral marine boundaries that ran from  
21 the mouth --

22 QUESTION: Okay, is there any theory, is there  
23 any theory of law or common sense or anything that would  
24 say, all right, the blue line -- you draw the line at the  
25 lights, but the line, imaginary line, goes off to the left

1 past Seavey's Island, you don't draw at the lights. Now,  
2 is there anybody other than a totally illogical person who  
3 could defend that proposition?

4 MS. LUDTKE: There's no line that is a natural  
5 outgrowth of the line that terminates at the lights.  
6 Those range lights were installed in order to allow  
7 vessels to navigate up through that particular area.

8 QUESTION: And there are no range lights the  
9 other way?

10 MS. LUDTKE: Well, there are actually some range  
11 lights at Pierce's Island, but those range lights weren't  
12 even discussed in the context of the 1976 case.

13 QUESTION: Ms. Ludtke, I mean, the one problem  
14 with what you're saying is that it just doesn't -- doesn't  
15 comport with what is said in the consent decree. I mean,  
16 the consent decree doesn't say, oh, you know, let's just  
17 draw the line here arbitrarily, we have to draw it  
18 somewhere. It begins by setting forth the Order of the  
19 King and Council of April 9, 1740, and it then continues  
20 as used in that Order of the King and Council the term --  
21 not just the term, middle of the harbor, but also the  
22 term, middle of the river, mean the middle of the main  
23 channel of navigation. I mean, there's just no other way  
24 to read the consent decree except as addressing that  
25 precise issue and not coming to some just arbitrary, not

1 based on the 1740 consent decree line through the middle  
2 of the harbor. They thought that they were doing -- being  
3 faithful to the Order of the King and Council.

4 MS. LUDTKE: Your Honor, I would disagree with  
5 that based on the oral argument when New Hampshire  
6 represented to the Court that that was an arbitrary  
7 location based on the administrative convenience of the  
8 parties. Moreover, it does --

9 QUESTION: Where was that? In the oral  
10 presentation? New Hampshire said what?

11 MS. LUDTKE: New Hampshire in the oral arguments  
12 said that those locations were arbitrary and based on the  
13 desire to serve the administrative convenience of their  
14 respective States.

15 QUESTION: But that doesn't certainly mean that  
16 Maine necessarily agreed with that.

17 MS. LUDTKE: Your Honor, Maine did not take the  
18 position at this time that this was a litigated issue or  
19 that this was an issue that actually was tied to the  
20 historical location of the ships' channel --

21 QUESTION: Well, then you shouldn't lie about  
22 it. If you think it's arbitrary, you shouldn't sign a  
23 piece of paper that says the Order of the King and Council  
24 says this, and what that order means is this.

25 MS. LUDTKE: Your Honor --

1           QUESTION: That is simply incompatible with  
2 getting up and saying the line is arbitrary. If you  
3 believed it was arbitrary, you shouldn't have signed this  
4 is seems to me, and I think we can hold you to what you  
5 sign.

6           MS. LUDTKE: Your Honor, the history of the  
7 litigation shows that at the time that Maine and New  
8 Hampshire entered into this decree, which was 1974, both  
9 States did it with the best of intentions. There was not  
10 a searching historical inquiry into what the phrase, up  
11 the middle of the river, might have meant. Both States  
12 did it with the best intentions without a thorough inquiry  
13 into what the history was.

14           QUESTION: Well, at the very least it didn't  
15 mean the low-water mark on the Maine shore, did it? I  
16 mean, no matter what you had in mind, it was some version  
17 of the middle of the river.

18           MS. LUDTKE: Your Honor, I think the question  
19 goes to the applicability of that phrase to describe the  
20 harbor boundary. At that time both Maine and New  
21 Hampshire believed with the best of intentions and the  
22 best of understanding that that phrase applied to the  
23 harbor boundary. We have since changed --

24           QUESTION: Excuse me, I just -- I don't think I  
25 had an answer to my question. How could the term the

1 middle of the river, which you agreed to, mean the  
2 low-water mark on the Maine shore?

3 MS. LUDTKE: Your Honor, our position on the  
4 term, up the middle of the river, means that -- we take  
5 the position that as historically used that was intended  
6 to describe the course of the boundary up the main part of  
7 the Piscataqua River, and it was intended to direct that  
8 the line that proceeded north two degrees west went from  
9 the main tributary that was that the main feeder stream  
10 into the headwaters of the Salmon Falls River, and we have  
11 shown through the 1763 boundary proceedings and the 1828  
12 boundary proceedings that that is how that term was used.

13 We do not think that that term is properly  
14 applied to the harbor boundary. In 1973, both Maine and  
15 New Hampshire and the special master all thought that term  
16 had some relevance to the harbor boundary, with the best  
17 of intentions, because there had not been a searching  
18 historical inquiry into what that language meant, and it  
19 was an easy mistake to make.

20 QUESTION: May I ask then --

21 MS. LUDTKE: The New Hampshire --

22 QUESTION: If I understand you correctly, if you  
23 were counsel for New Hampshire in 1976 and you then knew  
24 what you now know, would you have signed this decree?

25 MS. LUDTKE: No, Your Honor. But that's not

1 what they knew, and they did it with the best of  
2 intentions.

3 QUESTION: All right, so that's what worrying  
4 me, that when I read this, until I heard you actually, I  
5 thought, well, gee, I don't understand what this argument  
6 is, because the reading of this decree seems to say when  
7 you take the middle of the river or middle of the harbor  
8 or middle of anything, it seems to take the main channel  
9 of navigation divided down the river. Now, you've read it  
10 closely and you say that this part of it wasn't actually  
11 at issue. Well, maybe that's true, but if we start  
12 reopening boundary decrees, it seems to me we're going to  
13 get into a lot of trouble because there may be a lot of  
14 boundary decrees among States that have parts that, if you  
15 really looked at them, they might not have been perfect or  
16 perfectly described. So why not just hold you to this,  
17 even though it was all done by mistake and with the best  
18 of intentions and so forth.

19 MS. LUDTKE: Your Honor, we're not trying to get  
20 out of anything that was decided in 1976.

21 QUESTION: It wasn't literally decided, because  
22 it wasn't directly an issue in the case, I assume. But  
23 nonetheless the words in this decree surely cover it,  
24 don't they?

25 MS. LUDTKE: Your Honor, the issue wasn't



1 actually adjudicated. The applicability of this phrase  
2 was an assumption that the parties brought to the  
3 negotiations, and the boundary was set out based upon  
4 those negotiations. There was no actual -- no actual  
5 adjudication of whether this phrase applied. The portion  
6 of the boundary at issue was not the harbor boundary.  
7 There is no intent to make this apply, that was clear.  
8 And I think that the most troublesome aspect, and that's  
9 why I addressed this question first, is whether this Court  
10 could have entered the consent decree in 1976 had the  
11 parties' stipulation pertaining to the meaning of the  
12 middle of the river not been there. And I think the Court  
13 could have entered it, because the boundary description  
14 describes the boundary as passing up through the mouth of  
15 Piscataqua Harbor, and it would have been reasonable,  
16 given that description of the boundary, for the parties to  
17 agree upon a location in the middle. But the point is is  
18 that neither the application nor the meaning of the  
19 phrase, up the middle of the river, was actually  
20 adjudicated in 1976.

21 QUESTION: What effect do you think should be  
22 given to the 1740 decree?

23 MS. LUDTKE: The 1740 decree is a relevant piece  
24 of historical evidence.

25 QUESTION: Is relevant historical evidence, or

1 is irrelevant? I didn't hear.

2 MS. LUDTKE: No, we've actually stated it is  
3 relevant to when we've listed the items that we believe  
4 bear on New Hampshire's boundary claim, and that's on page  
5 12 of our motion and our brief.

6 QUESTION: Well, why can't I read the consent  
7 -- why can't I read our earlier decision, our decree, as  
8 saying that the 1740 determination is controlling of the  
9 boundary?

10 MS. LUDTKE: Your Honor, I don't think that  
11 decree can be read in that way because there was no  
12 adjudication of the issues. The claims are very different  
13 in this case. No intent can be inferred, and it was not  
14 essential to this Court's jurisdiction to enter judgment.  
15 And I think that's been made clear by the Court's citation  
16 --

17 QUESTION: Why should the 1740 decree be  
18 relevant to part of the dispute and not another part of  
19 the dispute?

20 MS. LUDTKE: The 1740 decree describes the  
21 boundary as passing up through the mouth of the harbor,  
22 and we believe that is relevant. But what we think is  
23 more relevant is the historical evidence.

24 QUESTION: They said the middle of the harbor,  
25 precisely.

1 MS. LUDTKE: It doesn't say the middle of the  
2 harbor. It says it shall pass up through the mouth of the  
3 Piscataqua Harbor and up the middle of the river.

4 QUESTION: And that the dividing line shall part  
5 the Isles of Shoals and run through the middle of the  
6 harbor between the islands to the sea on the southerly  
7 side.

8 MS. LUDTKE: That's correct, Your Honor, but the  
9 dividing line is not what's at issue here. What's at  
10 issue is the phrase passing up through the mouth of  
11 Piscataqua Harbor, and New Hampshire has made a claim  
12 based upon its right as a successor sovereign to the Crown  
13 at the Revolution when the province of New Hampshire's  
14 boundaries extended to the Maine shore.

15 QUESTION: At one point it seems to me it does  
16 say just passing -- where is it -- through the mouth of  
17 the Piscataqua Harbor. But then later when it refers to  
18 the same line it says, run through the middle of the  
19 Harbor. So it does say middle of the Harbor, and you're  
20 essentially arguing that the middle of the harbor means  
21 something different than middle of the river.

22 MS. LUDTKE: No, Your Honor. Middle of the  
23 harbor refers to Gosport Harbor and, in fact, there is a  
24 distinction there because the decree says specifically  
25 that it passes through the middle of Gosport Harbor

1       whereas it only says it passes through the mouth of  
2       Piscataqua Harbor which, at that time, was annexed  
3       entirely to the province of New Hampshire, governed and  
4       controlled and administered by New Hampshire provincial  
5       officials. New Hampshire collected tonnage, New Hampshire  
6       collected in imposts --

7                   QUESTION: May I stop you there just for a  
8       moment, because I want to be clear on how much you want to  
9       go back. I understand that you say that the settlement  
10      that was entered into in what, '77, was for that case  
11      only. You have answered Justice Kennedy that the 1740  
12      Order is relevant evidence but not conclusive. Are you  
13      attacking that 1740 Order also as not the basis --  
14      whatever it means? Are you saying it is not the proper  
15      basis for determining this boundary?

16                   MS. LUDTKE: We think that the 1740 Order needs  
17      to be reconciled with history. We don't think that the  
18      apparent meaning of the text can trump history. What we  
19      have done is look at history and try to understand the  
20      text of that Order in a context of history, and that has  
21      been the reason for our great reliance on historical  
22      events and documents in explaining what the terms of that  
23      1740 Order --

24                   QUESTION: Are you saying it's not binding? For  
25      what reason? That was intended to be a settlement, a

1 decision by the King, ultimately by the King. Whatever  
2 those words may mean that are set out in 2(A, isn't that  
3 at least conclusive between these two States?

4 MS. LUDTKE: Yes, and we say those words are  
5 entirely consistent with the boundary located on the Maine  
6 shore, because those words were intended to direct that  
7 the boundary follow the main part. And we have cited the  
8 charter and that --

9 QUESTION: And what language places it on the  
10 Maine shore? I mean, I can understand you're saying  
11 middle of the river means you follow -- you follow the  
12 main channel of the river and not one of the side  
13 channels, but what portion of that 1740 decree -- unless  
14 it's a terribly sloppy piece of work -- what portion of it  
15 says when you follow the main channel you use the Maine  
16 shore?

17 QUESTION: You're talking M-a-i-n-e and  
18 m-a-i-n --

19 QUESTION: The first one is, m-a-i-n, and the  
20 second is M-a-i-n-e. I thought that was clear.

21 MS. LUDTKE: The boundary decree describes the  
22 boundary as passing up through the mouth of Piscataqua  
23 Harbor, and New Hampshire has shown through historical  
24 evidence that the Harbor was annexed to New Hampshire, and  
25 that the boundary commissioners had no authority to divide

1 the harbor. We've cited --

2 QUESTION: But they would have said something  
3 about it. Where in the 1740 Order do they refer to the  
4 Maine -- with an e -- shore? I don't see anything there  
5 that refers to the Maine shore.

6 MS. LUDTKE: Your Honor, may I proceed to  
7 answer?

8 QUESTION: I wish you -- yes.

9 MS. LUDTKE: The boundary decree, although it  
10 says passes up through the mouth of the harbor has to be  
11 construed in the context of the authority of the boundary  
12 commissioners, the authority of the treasury over ports,  
13 the authority of the King to withhold navigable rivers and  
14 ports from royal provinces without charters --

15 QUESTION: Thank you, Ms. Ludtke.

16 Mr. Stern, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF PAUL STERN

18 ON BEHALF OF THE DEFENDANT

19 MR. STERN: Thank you, Your Honor. There's been  
20 a suggestion today that river does not equal harbor. The  
21 special master at the time was pretty sure that the harbor  
22 and the river were coextensive. New Hampshire, back in  
23 the 1970s, specifically stated that the mouth of the  
24 harbor is the same as the mouth of the river.

25 QUESTION: Are there two harbors here, by the

1 way? She said there is Gosport Harbor and another harbor.  
2 What are the two harbors?

3 MR. STERN: Gosport Harbor is the harbor out at  
4 the Isle of Shoals. Out in the islands in the sea.

5 QUESTION: Oh, out by the -- okay.

6 MR. STERN: Piscataqua Harbor or Portsmouth  
7 Harbor is the one we're talking about.

8 QUESTION: I understand.

9 MR. STERN: But in the 1970s New Hampshire was  
10 pretty clear that mouth of the harbor equaled mouth of the  
11 river and they stated that in pleadings to this Court at  
12 315a and 329a of Maine's Appendix.

13 QUESTION: What is the answer to her simple  
14 argument that that area to the left -- you go to the top  
15 of the blue line, you look left, and there's a dotted  
16 line. And she says, is that dotted line -- whatever we  
17 said in that decree, it wasn't an issue in the case, and  
18 therefore we want to go back into it.

19 MR. STERN: The whole river was before the Court  
20 because what's been lost in the argument here, I believe,  
21 is that there were two main events, so to speak, with  
22 respect to the 1970s litigation. One was whether the line  
23 going out from the Portsmouth Harbor to the Isle of Shoals  
24 was straight or crooked in some way.

25 QUESTION: Okay.

1                   MR. STERN: The second one, which is the one  
2 that the dissent addressed, was where in the river was the  
3 boundary because depending upon where it was -- geographic  
4 middle, thalweg, or the Maine shoreline, it would  
5 determine how much territory was in each State. To  
6 suggest that New Hampshire didn't have the incentive to  
7 claim a shoreline on Maine's -- in Maine, I mean, borders  
8 on implausible because it would have resulted in hundreds  
9 if not thousands of additional acres of territory being in  
10 New Hampshire rather than Maine. You'll recall that New  
11 Hampshire filed special exceptions to the special master's  
12 report and argued to this Court that the boundary should  
13 be moved over a bit, three hundred and fifty feet in the  
14 middle of the river, to get some additional territory. A  
15 shoreline boundary would have increased that manyfold, so  
16 New Hampshire had the incentive to press a claim to the  
17 shoreline boundary.

18                   The notion that we can suggest today that the  
19 Attorneys General in the 1970s didn't know anything --  
20 didn't know what we know today -- is exactly why we have  
21 res judicata. The circus of what we almost would have to  
22 do is bring those folk back in and cross-examining them is  
23 why we have res judicata. New Hampshire had the  
24 opportunity to press a shoreline boundary, which had all  
25 the incentive and the fair opportunity to do in the 1970s.



1 Its failure to do so precludes it from doing so now.

2 And the reason we have these specific findings,  
3 rulings and legal principles according to New Hampshire,  
4 as they explained in the 1970s, was to avoid the Vermont  
5 v. New York problem where there was a decree without  
6 findings, without an adjudication of any issues. Because  
7 of that concern that this decree might not be approved,  
8 these specific findings and rulings and legal principles  
9 were laid out here, and they are made without reservation.

10 And getting back to Justice Breyer's questions,  
11 paragraph five, if we can read the line, says, quote, the  
12 middle of the main channel of navigation of the Piscataqua  
13 River, commencing in the vicinity of Fort Point and  
14 Fishing Island, closed quote. It's an effort, maybe not  
15 an exact effort, but it's an effort to lay out the middle  
16 of the main channel of navigation of the Piscataqua River.  
17 There may have been reasons to have it as a straight line  
18 in that channel, but it is an effort.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stern.  
20 The case is submitted.

21 (Whereupon, at 1:59 p.m., the case in the above-  
22 entitled matter was submitted.)

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25