No. 27 Original

IN THE SUPREME COURT

OF THE UNITED STATES

THE STATE OF OHIO,

Plaintiff,

vs.

COMMONWEALTH OF KENTUCKY,

Defendant.

No. 81 Original

IN THE SUPREME COURT

OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY

Plaintiff,

vs.

THE STATE OF INDIANA and
Theodore L. Sendak
(now Linley E. Pearson)

Defendants.

PETITION OF DOROTHY COLE, ET AL., FOR REHEARING ON MOTION TO INTERVENE DENIAL

Charles S. Gleason, Attorney of Record
for Petitioners-Intervenors,

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1. INTRODUCTION

Potential-Intervenors are all property owners of the Ohio River bottom, and they seek Supreme Court recognition and determination whether or not the Findings in these Original Actions apply to and effect their property rights.

The Report of the Special Master finds their rights to be represented by the Original Parties, and that the Original Parties and their respective counsel of record are competent to protect those property rights. The Seventh Circuit Court of Appeals has repeatedly found to the contrary and in the first such appeal to reach the Supreme Court *certiorari* was denied.

The Special Master's Report found the Ohio River to have been an historically stable river, so stable that there was no significant change between 1792 and the 1911-14 Survey; that the 1911-14 Survey Maps are the best evidence thereof;

that the High-lift Dams have materially changed the course of the river; that the historical OLWM can still be located.

The Special Master's Report rejects any consideration of *Loesch* findings which are diametrically opposed.

No.1 QUERRY: Can Original Action boundary dispute Findings of Fact ignore and not overrule contrary Findings as to the same factual issues as basic as the physical location of property lines?

No. 2 QUERRY: What public purpose can be served by disclaiming the applicability of the Findings of Facts for all purposes?

There should be a modification of the Special Master's expression of representation and his inconsistent holding of non-applicability. Justice requires a recognition of the holdings of the Court of Claims and of the Seventh Circuit Court of Appeals and that to the extent they are inconsistent with the holdings herein they should be and are OVERRULED.

The Commonwealth of Kentucky now tries to portray the Ohio River as a bottomless crevasse with no land beneath the surface of the water, p.3. Yet in the Report of Special Master in No. 81 Original, p.3. he stated:

> "It is further alleged by Kentucky and admitted by Indiana, that a serious and justifiable controversy exists in that Indiana is now assessing property taxes on, and exercising regulatory jurisdiction over, property located below the present low-water mark on the northern shore of the Ohio River in accordance with its view of the location of the boundary line."

Obviously there are more sticks to the whole bundle of rights, than one political boundary line. Below the water surface are mineral rights, sand and gravel rights, gas and oil rights all of which are privately owned, State appraised, and taxed. These private ownership rights stem from State Grants and State Sales. Those

subsequent to 1792 will be affected by the determination herein.

Kentucky now professes, Ballesisen Affidavit, that:

> "3. I also informed the Special Master on October 20, 1981, that the experts advising Kentucky were unanimous in their belief that the 1792 low water mark on the north side of the Ohio River could not be determined with any degree of precision and on many reaches of the river, resort would have to be made to approximation and that substantial differences of opinion could exist as to location of the low water mark in 1792."

This Court already decided in *Ohio v. Kentucky* No. 27 Original January 21, 1980:

> " Locating that line, of course, may be difficult x x. But knowledgable surveyors, as the Special Master's report intimated have the ability to perform this task. Like difficulties have not dissuaded the Court from concluding that locations specified many decades ago are proper and definitive boundaries. See e.g. *Utah v. United States*, 420 U. S.304 (1975) and 427 U. S. 461 (1976); *New Hampshire v. Maine*, 426 U.S. 363 (1976) and 434 U. S. 1 (1977)."

It is interesting to note that one of the experts advising Kentucky that "the 1792 low water mark on the north side of the Ohio River could not be determined with any degree of precision", is Dr. D. Joseph Hagarty (sic) who in *Loesch v. United States* 645 F. 2d 905 (Ct. Claims 1981) cert. pending No. 81-700 Tr. p. 3881 testified with specificity as to particular conditions of the Ohio River bank 7000 years ago to the date of his testimony under oath on January 31, 1978 at 10:10 A. M.

He identified himself to the Court:

"Donald Joseph Hagerty,
H A G E R T Y. Address is
903 **Broadfields** Drive
Louisville, Kentucky 40207

The transcript is on file with the Clerk of the Supreme Court in conjunction with No. 81-700

Both Kentucky and Ohio cite a case to enforce a contract between two states, [*Kentucky v. Indiana* 281 U.S. 163 (1930)].

Obviously only parties to a contract are proper parties to a suit to enforce it,

> "without a showing of any further and proper interest,"

The issue presented is whether, "reliance as to the location of the boundary location of 1792 and thereafter" by transfer of title, payment of taxes etc., is a showing of further proper interest.

Both Kentucky and Ohio misquote The Supreme Court decision in *Ohio v. Kentucky* 445 U.S. 335 (1980) at page 337 which in fact is in the following words to wit:

> " the Special Master recommends x x x that such boundary ' as nearly as it can now be ascertained, be determined either (a) by agreement of the parties, if reasonably possible, or (b) by joint survey agreed upon by the parties,' or, in the absence of such an agreement or survey, after hearings conducted by the Special Master and the submission by him to this Court of proposed findings and conclusions. Report of Special Master 16"(Emphasis added)

The Supreme Court has defined "ascertain"

to find out by investigation. See *U. S. v. Carver*, 43 S. Ct. 181, 182, 260 U.S. 482, 67 L. Ed 361.

Kentucky recognizes subsurface property rights. See *Middleton v. Harlan-Wallins Coal Corp*, 252 Ky. 29, 66 S.W. 2d 30; 15 ALR 957.

The position of Petitioners is particularly that of owner of a particular parcel of real estate part of which lies below the waters of the Ohio River. The addresses of the Petitioners were omitted from the Motion as irrelevant at this point. Each owns real estate in one or more of the States of Ohio, Kentucky or Indiana which will be affected by manipulation of the location of the 1792 low water mark.

Article IV Section 2 of the United States Constitution:

> "Section 2. The Citizens of each State shall be entitled to all Priviledges and Immumities of Citizens in the several States."

This clause forbids any State to dis-

criminate against citizens of other States in favor of its own.

> " It is undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and the pursuit of happiness; and it secures to them in other States the equal protection of their laws." *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869) and see *Slaughter House Cases* 16 Wall (83 U.S.) 36, 77 (1873); *Chambers v. Baltimore & O.R.R.* 207 U.S. 142 (1907), *Whitfield v. Ohio* 297 U.S. 431 (1936). *The Constitution of the United States of America, Analysis and Interpretation* U.S. Printing Office Washington 1973, Stock No 5271, 00308.

The Indiana Supreme Court interpreted

this clause as a guarantee to the citizens of each State of the natural and fundamental rights inherent in the citizenship of persons of a free society, the priviledges and immunities of free citizens, which no State could deny to citizens of other States, without regard to the manner in which it treated its own citizens. *Smith v. Moody* 26 Ind. 299 (1866).

The U. S. Supreme Court has held that without violating this section, a State may limit the dower rights of a nonresident to lands which the husband died siezed while giving a resident dower in all lands held during the marriage. *Ferry v. Spokane P.&.S. Ry. Co.* 258 U.S. 314 (1922), followed in *Ferry v. Corbett* 258 U.S. 609 (1922).

The United States Supreme Court has also held that without violating this section, a State may leave the rights of non-resident married persons in respect of property within the State to be governed

by the laws of their domicile, rather than by the laws it promulgates for its own residents. *Conner v. Elliott* 18 How. (59 U.S.) 591, 593 (1856).

The rights of dower differ among The State of Ohio, Commonwealth of Kentucky, and The State of Indiana. Actions of one, two, or three of the above as to the 1792 Low Water Mark can affect the property rights of the Potential-Intervenors in Violation of the Ninth Amendment of the United States Constitution. See *Griswold v. Connecticut* 381 U.S. 479 (1965):

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments x x"

ARTICLE IV Section 3

> "Section 3. New States may be admitted by the Congress into this Union; but no new

> State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress."

Prior to the adoption of The Constitution Virginia had ceded to the United States large territories held by it, upon condition that new States should be formed therefrom and admitted to the Union on an equal footing with the original States. In *Pollard v. Hagan* 3 How.(44 U.s.) 212,221 (1845) the Court held that the original States had reserved to themselves the the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils of navigable waters passes to a new State upon admission.

While Article IV Section 3 does not

specifically enunciate prohibition against gerrymandering State boundary lines by stipulation or agreement The Ninth Amendment is authority for the local inference under the *Griswold* holding.

PUBLIC SERVICE COMPANY, INC.

The holding to deny intervention to Public Service Company, Inc., is not relevant to the instant Petition.

Public Service denial turned upon the rationale that the Tenth Amendment does not shield the States nor their political subdivisions from the impact of the authority affirmatively granted to the Federal Government. See *Maryland v. Wirtz* 392 U.S. 183 (1968) and see *City of Tacoma v. Taxpayers* 357 U.S. 320 (1958)

Thus if Public Service was granted a permit by the Federal agency to build its plant contingent upon a boundary line, no regulation, stipulation, action or inaction by either the Commonwealth of Kentucky or

the State of Indiana could possibly affect Public Service Company's federally derived authority to build a power plant.

Recognizing that potential the Special Master, p. 19, held:

> "If the litigation before the Nuclear Regulatory Commission becomes, or is, decisive in this case it is your Special Master's view that Indiana Public Service Company, Inc. might well want to renew its Motion to Intervene in this litigation."

While the territorial status continued the United States had power to convey property rights, such as rights in soil below the high-water mark along navigable waters which will be binding on the State. *Shively v. Bolby* 152 U. S. 1 47 (1894) See also *Joy v. St. Louis* 201 U.S. 332 (1906)

SURVEYS

The Government Survey. By the treaty with England at the end of the Revolutionary war, the United States became the owner of the vast Northwest Territory, consist-

ing of the present States of Illinois, Indiana, Ohio, Michigan and Wisconsin. The end of the war found the United States heavily burdened with debts incurred during the war. It was decided that the new land should be sold and the proceeds used to retire the national debt. However, in selling the land to settlers, metes and bounds descriptions could not be used, for the new land was an untrodden wilderness. Hence some new system of describing land was needed. The system so devised was the rectangular system of land surveys, known as the Government Survey. Under this system, whenever a district, such as part of a state, needed to be made ready for private ownership, the Government arranged for a survey of the land to be made. Those surveys made upon the settlement of Ohio and Indiana rest in the National Archives. Representations to the contrary are a misrepresentation to this Court.

INDIANA'S CONFLICT

Recently the Court of Appeals of Indiana, *Ray v. State Election Board*, 422 N.E. 2d 714, Rehearing Denied 425 N.E. 2d 240, held the Indiana Statute of 124 years, involving Election Rights to be unconstitutional. the Election Board was represented by the Indiana Attorney General, Linley E. Pearson.

The opinion quoted *F.N. 7. Cramp. v. Board of Public Instruction* 368 U.S. 278 at 287, 82 S. Ct. 275 at 281, 7 L. Ed. 2d 285.

> " It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [Boards], policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third,but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms'[] Uncertain meanings inevitably lead citizens to "' steer far wider of the unlawful zone' x x x than if the boundaries of the forbidden areas were clearly marked.' [FN *Baggett v. Bullitt, supra* 337 U.S. 360 at 372, 84 S.Ct. 1316 at 1323, 12 L Ed. 2d 377 quoting *Speiser v. Randall* 357 U.S. 513, 526, 78 S.ct. 1332, 1342, 2 L. Ed. 2d 1460 x x x]"

Potential-Intervenors seek competent representation to protect Fifth Amendment

Rights and show the Court that historically the Attorney General of Indiana does not agressively protect the Constitutional Rights of the individuals but limits his efforts to defending the actions of State Agencies who are his only true clients, and most often opposes the rights of the individual.

William E. Daily, Chief Counsel, State of Indiana, Offices of Attorney General, on November 23, 1981 wrote the Clerk of the Supreme Court of the United States a letter in which he carefully avoided an official posture of adoption of the Brief of the State of Ohio or the Response of the Commonwealth of Kentucky, and on behalf of "the State of Indiana waives its right to file a response to the Motion To Intervene of Dorothy Cole, et al."

PRESCRIPTION AND ACQUIESCENCE

As a check on the Surveys made as Ohio and Indiana were settled, there

were individual surveys of individual Tracts as each was reconveyed. These surveys should back to back and side to side produce the same mosaic contour of the Low Water Marks (North Shore and South Shore) and the High Water Marks (North Shore and South Shore).

To contend that the Commonwealth of Kentucky has rounded up a number of experts who can not resurvey from 1792 surveys simply is irrelevant and immaterial to the task at hand. Prescription and Acquiescence should produce no more than nominal deviation.

SUMMARY

the Potential-Intervenors were justified in relying upon the expression of the Special Master and the opinion of The Supreme Court adopting his recommendation to mean a Constitutional result could be achieved by cooperation of the parties in agreeing on the Methodology to be followed. Discovery that the Politicians were preparing "to give away the farm", brought these property-

owners into this litigation.

Methodology for historical data was ably outlined in *We The People by Forrest McDonald* , 1965, The University of Chicago Press, pp. 411-141:

> "The events of American History are intrinsically pluralistic in that they take place simultaneously on personal, local, and state levels as well as the general level. The contest over ratification was on one level a single contest, on another thirteen separate contests, and on still another, that of the local units which elected delegates to the various conventions, a series of almost two thousand separate contests. In view of the three-part federal system of political organization in the United States (general, state and local jurisdictions), and of the not dissimilar structure of the economic and social order, it seems likely, if not certain, that any historical phenomenon above the local level has this pluralistic character.
>
> Research may take place on any of these levels. The findings and conclusions derived from an investigation made on one level can be valid only for that level, and it is always possible that even these findings and conclusions will

be upset by new knowledge derived from research on another level. Since there is one level- the personal- on which investigation is inevitably limited to superficialities, and since on all levels it is limited to the study of inevitably fragmentary relics of the past, absolute certainty in historical study is unattainable. The closer the investigator comes to the primary constituents of a phenomenon, the higher the probability of accuracy, but it must be recognized that a historical phenonenon is more than the sum total of its manifestations on local levels, just as it is more than the phenomonen as it manifests itself on the general level. Ideally, all levels will be perceived studied, and kept in mind simultaneously. The extent to which the historian accomplishes this is, by and large, the extent to which the results of his research can be reliable.

Inside the framework of this pluralistic concept any number of systems of interpretation-economic or otherwise-may prove useful.

But it must be recognized that:

1) Whatever the interpretive system, a carefully drawn operational procedure must be consciously formulated at the time the system is formulated. If any approximation of the ideal of objectivity is to be achieved, the procedures of investigation, particularly the basis for selecting and arranging data, must be strictly defined, in terms of the requirements for verification of the hypothesis. The earlier in the process of gathering data that hypothesizing and selection begin, the greater the dangers of both subjectivity and error; the further along they begin- the more data are in hand before selection and interpretation begin- the greater the probability of accuracy. The more carefully the specifications are drawn and the more rigerously they are adhered to, the closer the investigator comes to objectivity. This ideal of objectivity would be achieved if one observer could be replaced by another in the course of an investigation without altering the outcome of the obser-

vation. The extent to which this replaceability of the investigator is achieved is the measure of the degree of objectivity obtained.

2) No single system of interpretation can explain all historical phenomena; it is even unlikely that a single system can adequately explain all aspects of a single historical event. Obviously romantic as the quest for such single systems may seem, few readers will need to be reminded that it is just such quest that has occupied a very large part of the efforts of American historians. As one critic has phrased it, we have emulated the medieval alchemist, who sought to transmute base elements into gold before learning how to handle simpler things. In working with the simpler things it is useful to be aware that one system of interpretation may work- that is, render intelligible and compatible all the discoverable and verifiable facts- in one aspect of a multi-faceted phenomenon and not in another. That is to say it should be recognized that a full explaination of one complex event may require several systems

of interpretation, or even that several systems which are apparently contradictory may be required for a full explaination.

3) In interpreting a given facet of a given event, any system may prove useful, but the conditions and circumstances of a given situation will ordinarily make it better adapted to interpretation by one system than another. To cite a simple and obvious analogy, the mathematician has several methods for describing various physical phenomena. For example, when he wants to describe physical vibrations in a rectangular space, he uses one method, the mode of description, or coordinates, best suited to that kind of space. When he wishes to describe vibrations in a cylindrical space he uses a different method or set of coordinates, and for a spherical space he uses still another set. Theoretically he can use any set for any kind of space if he does not mind making an unnecessarily large number of calculations and arriving at an obscure result; but there is an easy way, a natural system, for each kind of space.

The historian has at his disposal several interpretive systems comparable to these systems of coordinates, and he is limited in devising additional systems only by his own imagination. For any set of historical conditions, circumstances, situations, and phenomena there may be an interpretive system naturally adapted to it. If there is and one begins with an "unnatural" system- which would not necessarily preclude arriving at a satisfactory answer- one will have chosen the hard way. Before the system of interpretation can be made to work (assuming that the historian is proof against the distortion of facts and editing of data to make them conform to his thesis), much labor will be required and the interpretive system itself will require modification.

For this reason the whole idea (expounded by Beard and many others) of beginning research with a system of interpretation and basis of selection, or with a hypothesis, or even with a question, breaks down. However it might be evaluated in terms of philosophy and pure logic, the fact is that

> it was developed largely for practical reasons, and it is precisely from the practical standpoint that it is weakest. If one guesses wrong,if one investigates a phenomenon in terms of a system of interpretation and selection which proves to be unworkable, all one's efforts may be wasted. An equal amount of effort, applied inductively might have covered less ground, but it would at least have brought the investigator to a stage at which a more tenable system of interpretation could be induced from the body of particulars, and would at least have taught him to ask meaningful questions."

CONCLUSION

The Supreme Court adopted this Methodology in *State Land Board v. Corvallis Sand & Gravel Co.* 429 U.S. 363, at p. 377, 1977, and cases cited therein as to the records of riparian ownership. Without recounting the entire historical review one pertinant quote was:

> " As the Court again emphasised in *Packer v. Bird*, 137 U. S. 661, 669, (1891):
>
> '[W]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.'
> (Emphasis)

RELIEF SOUGHT

Potential Intervenors seek Supreme Court recognition that the findings of fact in these Original Actions apply to and effect their property rights.

The Special Master concludes that such rights may be litigated elsewhere, and in fact that a number of the Potential Intervenors have already had their day in court. But he is incorrect in his assumption as to the *Loesch* holding. For comparison the following should be useful:

Loesch et al v. U.S. U.S. Ct. Claims No. 240-75, Cert. Denied 81-700.	*Ohio v. Kentucky* No. 27 Orig. and *Kentucky v. Indiana*, No. 81 Original.
findings: Ohio River has always been unstable and snaking. – – – – – – – High-lift Dams-no effect. – – – – – – – – OHWM can not be found – – – – – – – – 1911-14 Maps too obscure, and not relevant. – – – – – – – – 7th Cir. Ct. of Appeals held in: *Cole v. U.S. et al.* 80-2021 Cert. Denied 81-569 *Winkler v. U.S.* 81-2852 *Lorch v. U.S.* 81-2613 *Reed v. U. S.* 81-1112 State has no obligation to defend property rights of individual owners	findings: Ohio River has been stable- no change between 1792 and 1911-14. – – – – – – – – High-lift Dams- substantial changes – – – – – – – – OLWM can be found – – – – – – – – 1911-14 Maps are the best evidence. – – – – – – – State protects landowner property rights and personal intervention denied.

It should not strain the resources of the Supreme Court to simply remove the expressed barrier of non-applicability interwoven into the Special Master's Report, especially when it is contrary to his finding that Potential-Intervenors property rights were and are represented in these combined Original Actions.

The location of the boundary can not be said to have no effect on the boundaries of land ownership abutting thereon.

CERTIFICATE OF COUNSEL

Comes now Charles S. Gleason, Attorney for Potential-Intervenors and certifies that this Petition For Rehearing is meritorious, is presented in good faith, and not for delay.

Respectfully submitted,

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