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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 81

COMMONWEALTH OF KENTUCKY,
Plaintiff,

vs.

STATE OF INDIANA and
THEODORE L. SENDAK, Attorney
General of Indiana,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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**BRIEF IN OPPOSITION TO
MOTION FOR LEAVE TO FILE COMPLAINT**

Come now the Defendants, State of Indiana and Theodore L. Sendak, Attorney General of the State of Indiana, (hereafter Indiana), by Theodore L. Sendak, Attorney General of Indiana and Donald P. Bogard, Chief Counsel, and pursuant to Rule 9 of the Rules of this Court, submit their Brief in Opposition to the "Motion for Leave to File Complaint" (hereafter Motion) filed by the Plaintiff, Commonwealth of Kentucky (hereafter Kentucky).

JURISDICTION

Jurisdiction is proper in this Court for controversies between two states pursuant to 28 U.S.C. § 1251(a)(1) as established by Article 3, § 2 of the Constitution of the United States.

QUESTION PRESENTED

Whether Kentucky's Complaint presents a justiciable issue regarding the boundary line between Indiana and Kentucky in view of this Court's previous opinions.

STATEMENT OF THE CASE

Kentucky's Motion was filed to seek leave from this Court to file a Complaint against Indiana requesting the establishment of the boundary line between Indiana and Kentucky "as being the low-water mark on the northerly side of the Ohio River as it presently exists, subject to the normal processes of accretion and erosion."

There have been previous cases in this Court concerning the boundary line between Indiana and Kentucky. In *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820), a case involving a peninsula of land extending from the Indiana side of the Ohio River which was usually separated from the main land by a dry channel, Chief Justice Marshall held that the boundary of Kentucky extended to the low-water mark on the Indiana side of the River, and the peninsula was thus in Indiana.

Seventy years later, in *Indiana v. Kentucky*, 136 U.S. 479 (1890), this Court considered the boundary issue in regard to an island in the Ohio River, and stated that the boundary was the low-water mark on the Indiana side of the River as it existed when Kentucky became a state in 1792. Following that opinion, the States jointly petitioned

this Court to appoint commissioners “to ascertain and run the boundary line between the said States of Indiana and Kentucky as designated in the said opinion of this Court heretofore filed,” and to report thereon. *Indiana v. Kentucky*, 159 U.S. 275, 277 (1895). That report was filed and confirmed during the same term. *Indiana v. Kentucky*, 163 U.S. 520 (1896). The report made after erection of the permanent markers was likewise confirmed. *Indiana v. Kentucky*, 167 U.S. 270 (1897).

There has been no further litigation by the states in this Court regarding the boundary between Indiana and Kentucky until this present action was filed in November, 1978.

ARGUMENT

I.

This Court has already determined the legal location of the Indiana-Kentucky boundary.

Litigation regarding various boundary disputes between Indiana and Kentucky was commenced as early as 1820, or four years after Indiana became a State. Those various disputes have resulted in decisions favorable to both states. One common thread connecting the decisions issued by this Court in those cases is that *the boundary line is the low-water mark on the Indiana side of the Ohio River as it existed when Kentucky became a state*.

Now, however, Kentucky is asking this Court to declare the boundary line between Indiana and Kentucky to be “the low-water mark on the northerly side of the Ohio River as it presently exists. . . .” This change of position, coming more than eighty years after the last decision by this Court, is completely unjustified and should be disallowed.

The first case decided in regard to this dispute was *Handly's Lessee v. Anthony, supra*, in 1820. Chief Justice Marshall held that the boundary line between the States was the low-water mark, 18 U.S., at 383:

. . . The principle, that a country bounded by a river, extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason, why it should not apply to this.

In 1890, this Court stated in another such boundary dispute, 136 U.S., at 508:

. . . But the question here is not, as if the point were raised to-day for the first time, to what state the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a state, separated from the mainland of Indiana by the waters of the Ohio River. . . . If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

This Court then concluded, at pages 518-519:

Our conclusion is, that the waters of the Ohio River, *when Kentucky became a State*, flowed in a channel north of the tract known as Green River Island, and that the *jurisdiction of Kentucky at that time extended, and ever since has extended, to*

what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled. (Emphasis supplied).

Thus, almost 100 years after Kentucky became a State, this Court held that the northern boundary "at that time extended, and ever since has extended" to the low-water mark of the Ohio River as it existed in 1792.

In implementing that decision this Court issued several decrees appointing commissioners and confirming reports.¹ In one of those, 163 U.S. 520 (1896), this Court held that its confirmation of the Green River Island boundary was without prejudice to the rights of the parties to bring further proceedings to resolve disputes over parts of the boundary not settled therein.

Kentucky did not see any "need" for further proceedings until almost eighty years had passed and it was unsuccessful in stopping the construction of a nuclear generating plant located entirely on Indiana soil² and until Indiana started construction of a port facility on the Ohio River which would compete with similar facilities in Kentucky. By bringing this instant action Kentucky hopes to do indirectly what it has failed to do directly,³ and asserts

¹ *Indiana v. Kentucky*, 159 U.S. 275 (1895); *Indiana v. Kentucky*, 163 U.S. 520 (1896); *Indiana v. Kentucky*, 167 U.S. 270 (1897).

² Proceedings before the Atomic Safety and Licensing Appeal Board, In the Matter of Public Service Company of Indiana (Marble Hill, Units 1 and 2), Docket Nos. STN 50-546 and 50-547.

³ Two recent decisions in the proceedings cited in footnote 2 have gone against Kentucky. In the Decision dated February 16, 1978 (ALAB-459) the Appeals Board held that it was bound by this Court's prior decisions that the boundary line is the low-water mark as of 1792. See pages 23-26 of that opinion attached hereto at page A-1. In the Decision dated August 30, 1978, (ALAB-493) the Appeals Board reaffirmed its February 16, 1978 Decision.

that it always has maintained that its boundary extended to the low-water mark as it presently exists.

Indeed, Kentucky boldly asserts on page 16 of its Brief that none of the decisions of this Court "has ever purported to resolve the issue presented in this action." That issue, as framed on page 7 of the brief, is simply what is the boundary line between Indiana and Kentucky, and, as shown above, this Court has long ago determined that that boundary line is the low-water mark on the Indiana side of the Ohio River as it existed in 1792.

In support of its new theory, Kentucky says that the boundary line "will follow changes in the shoreline, unless those changes are sudden or avulsive." Page 18 of Brief. It is precisely that statement which supports Indiana's position in this issue. As Kentucky acknowledges, a recognized exception to the accretion rule arises when there has been an avulsive change in some part of the river boundary. Citing *Gould on Waters*, § 159, Kentucky agrees that:

. . . if the change is violent and visible and arises from a known cause, . . . the original thread of the stream continues to mark the limits of the two estates.

Having cited that authority Kentucky then chooses to ignore it and to ignore the fact that beginning in 1950, the United States government constructed a series of high dams and locks on the Ohio River, five of which were between Indiana and Kentucky. Those dams and locks have raised the river level, thereby having a significant impact on the present low-water mark of the River, and thus, on what Kentucky now perceives to be its northern boundary. However, those changes fit perfectly into the definition cited above as being sudden, visible changes

which arise from a known cause. Therefore, the "original thread of the stream" *i.e.*, the low-water mark of 1792, continues to be the boundary between Indiana and Kentucky.

As stated above this Court held in 1896, 163 U.S. 520, that its decision was without prejudice to the rights of Indiana or Kentucky to bring further boundary proceedings. That statement was made in a case that went against Indiana's position because the Court found that Indiana had acquiesced in Kentucky's exercise of jurisdiction over Green River Island for over seventy years. In the instant proceeding, Kentucky, after eighty-eight years, seeks to have this Court change its determination that the boundary line is the low-water mark as of 1792. 136 U.S. at 518-519. Indiana would submit that Kentucky's position is completely untenable, and should be rejected.

Indiana would assert that if any action is taken by this Court in this matter, that action should be limited to appointing a Commission to determine physically the low-water mark of the Ohio River as of 1792 between Indiana and Kentucky and formally to declare that line to be the boundary between those states.

CONCLUSION

For all the above and foregoing, Indiana urges this Court to deny Kentucky's Motion for Leave to File Complaint, and for all other just and proper relief.

Respectfully submitted,

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APPENDIX

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman

Dr. John H. Buck

Michael C. Farrar

In the Matter of

PUBLIC SERVICE COMPANY OF INDIANA, INC.

(Marble Hill Nuclear Generating

Station, Units 1 and 2)

} Docket Nos.

} STN 50-546

} STN 50-547

* * *

[23] The upshot of our reasoning is that we agree with the Commonwealth of Kentucky; if the Marble Hill discharge pipe terminates in that state's waters, the applicants must furnish a section 401 certification from the Commonwealth. This does not finish the matter, however. The question remains whether the pipe will end in Kentucky. As there is no controversy over the physical location of the pipe, the answer depends on the location of Kentucky's border with Indiana. On this matter we can go along with the Commonwealth only part way. We agree with it that [24] controlling Supreme Court decisions tell us where to look for that state line. But for reasons which will become apparent, the record is insufficient to establish whether the projected end of the discharge pipe will intrude into Kentucky waters.

As our decision on the motion for stay foreshadowed, we consider ourselves bound on this question by *Indiana v. Kentucky*, 136 U.S. 479 (1890), and 163 U.S. 520 (1896). The case involved the claim of both states to "Green River Island" in the Ohio River which, when Kentucky became a state in 1792, actually was an island. At the time in suit, however, it could be approached "dryshod" from the Indiana side at low water. Indiana invoked the Supreme Court's original jurisdiction to settle the dispute. Although

it acknowledged Kentucky's general authority over the Ohio River to the low water mark on the Indiana shore, it nevertheless claimed Green River Island for itself on the ground that the Ohio had changed course since 1792, leaving the former island an appendage of the Indiana shore. Counsel for Kentucky responded to that claim by insisting that the shift in the river's channel did not affect Kentucky's rights³⁷ and the Supreme Court agreed with him. [25] The Court held the true boundary line to be the low water mark on the Indiana side of the Ohio River as it existed on June 1, 1792, when Kentucky was admitted to the Union (136 U.S. at 508, emphasis added):

If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 401. *Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.*

³⁷ See 34 L.Ed. at 329-30.

The Court then appointed Commissioners to survey the 1792 low water mark. Their report of its location was confirmed by the Court as the boundary between the two states. 163 U.S. 520.

None of the authorities cited by Kentucky supports its contention that we should ignore the clear ruling of [26] *Indiana v. Kentucky* and accept the present low water mark as the boundary. The earlier case of *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820), held only that Kentucky's boundary lay at the low water mark on the northwesterly side of the Ohio. Moreover, the ramifications of Chief Justice Marshall's opinion in that case were fully explored by the Court in *Indiana v. Kentucky* with the result just described. Even were the two decisions in conflict (and in our view they are not), the later would control.³⁸ The case of *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899), also relied on by Kentucky, cuts against the Commonwealth's position. Writing for the Court in that case, Justice Harlan expressly reaffirmed the conclusion in *Indiana v. Kentucky* that the jurisdiction of Kentucky extends to the low water mark of the Ohio River "as it was when Kentucky was admitted into the Union." *Id.* at 613.

³⁸ This also disposes of Kentucky's reliance on the Court's 1870 decision in *Missouri v. Kentucky*, 78 U.S. 395. In any event, that does not govern Kentucky's jurisdiction over the Ohio River.

