In the

# Supreme Court of the United States

October Term, 1978

No. 81, Original

COMMONWEALTH OF KENTUCKY,

*Plaintiff,*

vs.

STATE OF INDIANA AND
THEODORE L. SENDAK,
ATTORNEY GENERAL OF INDIANA,

*Defendants,*

## REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U.S. District Judge
Lincoln, Nebraska
Special Master

JOE CHRISTENSEN, INC., 1540 Adams Street, Lincoln, Nebraska 68521

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## I. INTRODUCTION

This original action involves a determination of the boundary between the Commonwealth of Kentucky and the State of Indiana. Jurisdiction is invoked under Article III, Section 2, clause 2 of the Constitution of the United States. Indiana admits this Court's jurisdiction. Your Special Master is of the opinion, and reports, that this Court has jurisdiction.

Heretofore there was referred to the Special Master a motion of the Public Service Company of Indiana, Inc. for leave to intervene. Your Special Master recommended that the motion for leave to intervene should be denied but that permission be granted the Public Service Company to file briefs *amicus curiae*. No exceptions were taken to this report. A helpful *amicus* brief has been filed and considered in preparing this report.

In the previous report reference was made to the stipulation signed in July, 1979 by all of the parties, including the Public Service Company. The original stipulation is on file with the Clerk of this Court, having been filed when the report on the Motion to Intervene was submitted.

Your Special Master, who is also Special Master in No. 27, Original, *Ohio v. Kentucky*,[1] calls attention to paragraphs 3, 4, 5, 6 and 12 of the stipulation, above mentioned, believing that these paragraphs frame the issues to be covered by this report.

> 3. In his report filed on January 3, 1979 in the United States Supreme Court, the Special Master

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[1] Your Special Master was appointed the Special Master in No. 27, Original, succeeding Judge Phillip Forman, now deceased.

in *Ohio v. Kentucky*, No. 27 Original, recommended:

> That the Supreme Court of the United States determine that the boundary between the State of Ohio and the Commonwealth of Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 and that said boundary is not the low-water mark on the northerly side of the Ohio River as it exists today.

4. Indiana has taken the position in this case that the report of the Special Master in *Ohio v. Kentucky* correctly decided the issue of law that the boundary between Kentucky and Indiana is the low-water mark on the northerly side of the Ohio River as it existed in 1792.

5. Kentucky contends the boundary between Kentucky and Indiana is the low-water mark on the northerly bank of the Ohio River as it exists from time to time and that the Special Master was in error in *Ohio v. Kentucky*, No. 27 Original.

6. The question of which of the above two lines is the boundary between Kentucky and Indiana can be decided as a matter of law and the parties have agreed to submit that question to the Special Master on briefs.

* * *

12. Evidence by metes and bounds as to the exact location of either of the two alleged boundary lines is unnecessary at the present stage of the case.

It is alleged by Kentucky, and admitted by Indiana, that the Commonwealth of Kentucky since the 1st day of June, 1792 to the present, and the State of Indiana since the 16th day of December, 1816 to the present, have each been states of the United States. Kentucky was thus the fifteenth and Indiana the nineteenth state to enter the Union. Kentucky entered the Union only two

years and two days after Rhode Island, which was the last of the thirteen seceding colonies to ratify the Constitution.

It is further alleged by Kentucky, and admitted by Indiana, that a serious and justiciable 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.

There is an allegation that several boundary disputes between Kentucky and Indiana have occurred in the past. It is admitted that there have been "original action boundary disputes between Indiana and Kentucky in this Court." Both parties discuss only one such dispute, namely, *Indiana v. Kentucky*, No. 2, Original, hereafter mentioned and cited as 136 U.S. 479 (1890). This case was before the Court on three subsequent occasions, as follows: 159 U.S. 275 (1895), appointing three commissioners to determine the boundary; 163 U.S. 520 (1896), approving the report of the three commissioners as to the metes and bounds course of the boundary line and allowing fees, expenses, etc.; 167 U.S. 270 (1897), approving a further report of the three commissioners for the erection of three permanent markers and for payment of the cost thereof and for the further payment of services and expense of the three commissioners.

Kentucky claims in paragraph 8, and Indiana denies, that the northern boundary of Kentucky was established from the Cession of Virginia and the Virginia-Kentucky Compact as the low-water mark

as it may from time to time exist on the northerly side of the river.

In its brief Kentucky claims the two States, with the approval of Congress, entered into a compact with respect to the boundary in the Green River Island area.

Kentucky makes the claim that the 1792 northerly low-water mark has been obscured by the normal and gradual processes of erosion and accretion and is presently unascertainable at various locations and alleges it has no adequate remedy at law, which is denied by Indiana. Indiana denies that the 1792 low-water mark may not reasonably be ascertained along the entire length of the boundary.

Kentucky further alleges in paragraph 11 of its complaint:

> 11. That the Commonwealth of Kentucky through the acts and statements of its officials has claimed in the past, and now claims, that the boundary line between the States of Kentucky and Indiana is subject to change from time to time and is the low-water mark on the present northerly shore of the Ohio River rather than the partially undeterminable 1792 northerly low-water mark.

Indiana admits what it terms the material allegations of this and of seven other paragraphs of the complaint. The effect of this admission is discussed in a separate section of this report.

Kentucky in its prayer, among other things, asks that:

> . . . this Court by order and decree, declare and establish the boundary line between the Commonwealth of Kentucky and the State of Indiana 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 which may occur from time to time.

Indiana in the prayer of its answer asks, among other things:

. . . that the boundary line between Indiana and Kentucky be reaffirmed as the low-water mark on the northwest side of the Ohio River as of 1792.

## II. THE ISSUE

The issue before the Court can be stated: Is the boundary between the Commonwealth of Kentucky and the State of Indiana the low-water mark on the northerly side of the Ohio River as it existed in 1792 or is it the low-water mark on the northerly side of the Ohio River as it exists from time to time?

As a corollary the question is raised as to whether your Special Master was in error in his report filed in *Ohio v. Kentucky*, No. 27, Original.

Several matters are discussed by counsel in the various briefs which your Special Master concludes are not presently before him for report under the limits of the stipulation. They will be mentioned hereafter but not discussed at length.

## III. PRIOR DECISIONS

On one previous occasion, as above mentioned, Indiana and Kentucky conducted boundary line litigation in this Court. The case is entitled *Indiana v. Kentucky*, No. 2, Original, 136 U.S. 479 (1890). It was argued April 9, 10, 1890 and decided May 19, 1890 by the unanimous opinion of Mr. Justice Stephen Johnson Field. The subsequent orders in this case above cited, while implementing the 1890 opinion, are not decisive of the issues now presented and are not included in the index of cases.

The issues in No. 2, Original, were framed by the complaint of Indiana and a cross-bill filed by Kentucky. The contentions of Indiana are extensively set forth preceding the Court's opinion.[2]

Bearing particularly on this case are the issues set forth in Parts II, III, IV, V, VI, VII and VIII of the outline of Indiana's argument *See* 136 U.S. at 493-497. Your Special Master concludes from this outline that the Court, when it adopted its opinion had before it, among others, the following contentions: 1) Whether Indiana's boundary was the low-water mark "at the present time", 2) whether the boundary in 1816, when the State of Indiana was formed, made the location of the boundary prior to that date immaterial, 3) whether the boundary has ever since remained as located in 1816, 4) whether the boundary line was fixed by the deed of cession from Virginia to the United States in 1784, 5) whether the boundary line has ever since remained as it was in 1783 and 1784, 6) whether the boundary line is that of 1816 or 1783,

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[2] Whether such notes were in 1890 prepared by the Reporter or by Mr. Justice Field is not known to your Special Master.

7) whether the low-water mark has changed, 8) whether, if changed, the change has been gradual or sudden, and 9) whether the state boundary has changed its location in consequence of the change, if any, in the location of the low-water mark.

Without unduly prolonging this report with lengthy quotations from Mr. Justice Field's opinion, your Special Master believes the nub of the opinion is found in two paragraphs. They are:

> 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. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. 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. *Mis-*

> *souri v. Kentucky*, 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.

*Indiana v. Kentucky*, 136 U.S. 479, 508 (1890). The opinion concludes on pages 518-19:

> 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.

Subsequently, in *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 612-13 (1899), Mr. Justice Harlan writing for the Court, in construing *Indiana v. Kentucky*, *supra*, said:

> The question of boundary was again before this court in *Indiana v. Kentucky*, 136 U.S. 479, 505, 519. That was a controversy between Kentucky and Indiana as to the boundary lines of the two States at a particular point on the Ohio River. Mr. Justice Field, delivering the unanimous judgment of the court, after referring to all the documentary evidence relating to the question and to the decision in *Handly's Lessee* v. *Anthony*, above cited, said: "As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry therefore is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river." Referring to the channel of the Ohio River as it was when Kentucky was admitted into the Union, this court

> stated its conclusion to be 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."
>
> The same view of the question of boundary was taken by the Court of Appeals of Kentucky in *Fleming* v. *Kenney*, 4 J.J. Marsh, 155, 158; *Church* v. *Chambers*, 3 Dana, 274, 278; *McFarland* v. *McKnight*, 6 B. Mon. 500, 510; and *McFall* v. *Commonwealth*, 2 Met. 394, 396, and by the General Court of Virginia in *Commonwealth* v. *Garner*, 3 Gratt. 655, 667.

Later in the opinion at page 621 the Court stated:

> Touching the first branch of this question, it is to be observed that Kentucky was admitted into the Union with its "actual boundaries" as they existed on the 18th day of December, 1789, that is, with its northern and western boundary extending to low-water mark on the opposite side of the Ohio River.

The boundary involved in the *Henderson Bridge* case was not the same as the boundary involved in the *Green River Island* case and is separated from it by several miles. Your Special Master calls attention in the language above cited from the *Henderson Bridge* case quoting from *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheaton) 374 (1820), that when Kentucky became a State "the jurisdiction of Kentucky extended, and ever since has extended, to what was then low-water mark on the north side of that channel." This same quotation appears in the 1890 opinion in *Indiana v. Kentucky*, *supra*. The claim is made by counsel for Kentucky that the opinion in *Handly's Lessee* supports Kentucky's position. Your Special Master agrees with the position of Indiana and the Public Service Company of Indiana, Inc. in their reading of the *Henderson Bridge* case that it supports Indiana's position and does not support the position of Ken-

tucky. The word "then" can only refer to "when Kentucky became a State", namely, 1792.

Your Special Master believes also, as is above indicated, that *Handly's Lessee v. Anthony*, *supra*, supports Indiana's claim.[3]

When Chief Justice Marshall said in 1820 in *Handly's Lessee*, *supra*, that when Kentucky became a state the jurisdiction of Kentucky extended, and ever since has extended, to the *then* low-water mark on the north side of that channel there is historical reason, briefly mentioned in note 3, to believe that he knew of what he spoke better than any of us can know today.

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[3] Important history relating to Virginia, Kentucky, and the so-called Northwest Territory, is set forth in Chief Justice Marshall's opinion. Your Special Master should also state that many months prior to his appointment herein he read JOHN MARSHALL, A LIFE IN LAW by Leonard Baker, and had observed that Baker in outlining Marshall's activities as a lawyer and at a time prior to the admission of Kentucky as a State, documents that he had served "as a lobbyist for Kentucky in Richmond" and as "the political agent for the district of Kentucky." *See Baker*, page 120. As late as 1890 in the outline of the argument of Indiana above noted, which precedes Mr. Justice Field's opinion in *Indiana v. Kentucky*, *supra*, mention is made, pages 491-2, of the provision in the Act of Virginia of 1783 respecting the free navigation of the Ohio River. It is argued:

> It compelled Kentucky to agree with the United States that it would never attempt to control the navigation of the Ohio River. If Kentucky had gone over to Spain, the first act, of course, would have been to close the Ohio and Mississippi rivers to navigation. By keeping Kentucky in the Union and binding her to exercise only that concurrent jurisdiction which States bounded by navigable rivers would be entitled to exercise by the rules of international law, the possibility of either the Ohio or the Mississippi rivers being closed to navigation would be done away with, since Spain, without Kentucky and the southwest territory, east of the Mississippi, would not have been strong enough to have violated the obligations of the treaty of 1783, which provided for the free navigation of the Mississippi.

The opinion itself also narrates history bearing on the creation of the Northwest Territory.

Approving the language of *Handly's Lessee*, *supra*, this Court as recently as *Ohio v. Kentucky*, 410 U.S. 641, 645 (1973), has said:

> In *Handly's Lessee v. Anthony*, 5 Wheat. 374 (1820), this court stated that the boundary between Indiana and Kentucky was the low water mark on the western or northwestern side of the Ohio River.

These cases also refute Kentucky's argument that *Handly* and *Indiana v. Kentucky*, *supra*, apply only to a small part of the border and are contrary to Kentucky's claim that the case was "not a determination of the entire boundary between the two states" or that "that opinion relates only to a small portion of the boundary line." In Mr. Justice Blackmun's opinion in *Ohio v. Kentucky*, *supra*, 410 U.S. at 649, we read:

> The Court in *Handly* concluded that the entire border between Indiana and Kentucky was the river's northern edge.

Kentucky makes an argument based upon the differences between accretion and avulsion and in effect urges that for the Court to adopt the 1792 boundary would eliminate such natural boundary changes as come about through accretion or avulsion. Your Special Master believes that previously this Court has confronted this issue. This is not a thalweg case or a geographical middle case. The right of the adjacent states to use the Ohio River for commerce is not involved. Previous cessions and compacts resolved such issues. The facts in these Ohio River cases are different than in most other river cases. They involve the ancient rights of Virginia and the creation of what came to be known as the Northwest Territory, matters which were so ably discussed first by Chief Justice Marshall and then by Mr. Justice Field.

Your Special Master concludes that these cases along the Ohio River are different from other river cases and that this Court's decisions in 1820, 1890, 1899 and 1973 should stand as the law in all cases involving Kentucky and any of the states formed out of the territory ceded by Virginia.

On the previous occasion when this dispute was before this Court Mr. Justice Field used language which your Special Master concludes is broad enough to include both accretion and avulsion. Your Special Master believes that it decides the claim Kentucky is here making. The language referred to is:

> 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, . . . . 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.

*Indiana v. Kentucky*, *supra*, 136 U.S. at 508.

This statement is also broad enough, as your Special Master views it, to show that Kentucky's border cannot be extended by the erection of dams and locks which are clearly artificial extensions. By such artificial barriers the northerly low-water mark is extended farther to the north and west than it was when Kentucky was admitted to the Union.

Your Special Master has examined the cited cases decided by the Court of Appeals of Kentucky, to-wit, *Commonwealth v. Henderson County*, 371 S.W.2d 27 (1963), *Vaughn v. Foster*, 47 S.W. 333 (1898), and *Ellis v. Chestnut*, 289 S.W.2d 740 (1956), and does not believe that they take a

position contrary to the cases decided in this Court and above cited. While it is not decisive of this case, your Special Master reports that he has read and reread the opinion in *Indiana v. Kentucky*, *supra*, several times searching for the quotation from *Indiana v. Kentucky* cited in *Vaughn v. Foster* and cannot find it. Anyway this Court is not bound by opinions of the Kentucky Appellate Court as to the meaning of its decisions. Even if your Special Master is correct that the cited portion does not appear in the opinion it does not imply misconduct to anyone. The matter before the Court in this case was not presented in *Nicoulin v. O'Brien*, 248 U.S. 113 (1918).

Contrary to the position advanced by Kentucky that this Court has not since 1820 taken a position that the boundary is the northerly low-mark in 1792, your Special Master believes that both in the *Henderson Bridge* case and in *Indiana v. Kentucky*, and each of which were decided long after 1820 and again as late as 1973 in *Ohio v. Kentucky*, this Court has approved the holding that the Kentucky border along the Ohio is as it existed in 1792.

Your Special Master concludes, as he indicated in the report in *Ohio v. Kentucky*, No. 27, Original, that the opinion of Mr. Justice Blackmun *supra*, supports the conclusion that the Kentucky boundary along the Ohio is the low-water mark as it was in 1792 and not as it presently exists.

## IV. ACQUIESCENCE AND PRESCRIPTION

This case does not need to be decided by applying the doctrine of acquiescence and prescription if the Court cares to rest its decision upon the cases above cited. For example, in *Texas v. Louisiana*, No. 36, Original, 426 U.S. 465 (1976), the Court properly concluded that it did not need to consider prescription and acquiescence. Nevertheless, your Special Master feels he should discuss the issue.

The history of the doctrine has been set forth in your Special Master's report in *Texas v. Louisiana*, *supra*, and more recently in the report filed in *California v. Nevada*, No. 73, Original. For cases supporting the proposition that the doctrine has long been recognized in this Court see *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 748 (1838); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *New Mexico v. Colorado*, 267 U.S. 30 (1925); *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940), and *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973), in which case it is stated:

> "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan* v. *Wisconsin*, 270 U.S. 295, 308 (1926). To like effect are *Vermont* v. *New Hampshire*, 289 U. S. 593, 613 (1933); *Maryland* v. *West Virginia*, 217 U. S. 1, 42-44 (1910); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53-54 (1906); *Virginia* v. *Tennessee*, 148 U. S. 503, 523 (1893); *Indiana* v. *Kentucky*, 136 U. S., at 509-510; *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1846).

That the doctrine exists seems beyond dispute. The remaining and more difficult question is

whether it applies here. In one respect this case may differ from *Ohio v. Kentucky*, *supra*. In paragraph 11 of Kentucky's complaint in this case it is alleged by Kentucky that the Commonwealth has claimed in the past, and now claims, that the boundary line between the States of Kentucky and Indiana is subject to change from time to time and is the low-water mark on the present northerly shore of the Ohio River rather than what Kentucky claims is the partially undeterminable 1792 northerly low-water mark. The material allegations of this paragraph are admitted by Indiana. An application has not been presented to the Special Master to relieve Indiana of this admission. It therefore stands, the allegation and the admission being unlimited as to time, that Kentucky has in the past made the claim that it now makes. The admission is contrary to other claims in Indiana's answer. In paragraph 6 of the first defense Indiana claims that the boundary has already been determined and that Kentucky has acquiesced in the decision for eighty years. In its second defense Indiana alleges in paragraph 1 the determination in *Indiana v. Kentucky, supra* that the boundary is the low-water mark on the northwest side of the Ohio River as of 1792, and in paragraph 3 alleges Kentucky's acquiescence in that determination and failure for eighty years to bring further proceedings to challenge it. In the third defense Indiana says that Kentucky's failure to establish a boundary other than the low-water mark of 1792 constitutes laches. The fourth defense specifically refers to the low-water mark of 1792 and in the fifth defense, after alleging the construction of low-rise dams and locks by the United States Corps of Engineers between 1910 and 1930 and of their replace-

ment by five high-rise dams and locks in the 1950's and 1960's which substantially raised the level of the Ohio River, the claim is made by Indiana that thereby the present low-water mark on the northerly side is much higher than the low-water mark of 1792. In its prayer, among other things, Indiana asks that the boundary line be reaffirmed as the low-water mark on the northwest side of the river as of 1792. The stipulation under which this matter is submitted refers to Indiana's position on the report of this Special Master in *Ohio v. Kentucky*, No. 27, Original, and Indiana's claim that he was correct in his recommendations as to the low-water mark in 1792, and then states Kentucky's contention as to the boundary being the low-water mark as it exists from time to time and that this question can be decided by the Special Master as a matter of law. Notwithstanding the admission it is clear from reading the answer that Indiana claims that Kentucky has for many years acquiesced in the boundary as it existed in 1792.

Your Special Master concludes, but not with the same feeling of confidence that he has on the issue of whether this Court has in the previous cases decided that the boundary is the low-water mark of 1792, that Indiana, notwithstanding its admission, should be permitted, if the facts warrant, to present the claim of acquiescence and prescription.

Your Special Master further recommends if this Court does not conclude as a matter of law, based upon the prior cases, that the boundary is the low-water mark on the north side of the Ohio River as it existed in 1792, or, if this Court does not conclude under the reasoning it applied in *Ohio v. Kentucky*, that Kentucky has also acquiesced in the adjudications of *Handly's Lessee* and of *Indi-*

*ana v. Kentucky*, and to the holding that the boundary is that existing in 1792, then, in that event, the matter should be referred back to the Special Master for hearing on the facts as they relate to acquiescence and prescription, and particularly any evidence available bearing upon the period in the past during which Kentucky has maintained its present position. Indiana should be permitted to introduce evidence, if it desires to do so, on whether the admission made by it of paragraph 11 of the complaint includes the distant past as well as the recent past and whether the admission applies to Kentucky's position prior to 1890 and prior to the litigation between the two states decided in the Supreme Court in that year. The Special Master should be directed to report thereon as the facts warrant.

## V. MATTERS PRESENTLY IRRELEVANT

The parties have discussed in their briefs certain matters which your Special Master feels are not before him at this time and under the stipulation should not be discussed.

There is considerable discussion concerning the proceedings before the Nuclear Regulatory Commission. Evidence as to those hearings has not been offered and I conclude, although rulings of the Commission are of vital importance to Indiana Public Service Company, Inc., that the effect of the Commission's determination, if any, as to the boundary line or the location of the discharge point of waters from the nuclear plant is not presently before your Special Master. 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.

The matter of laches is argued. Your Special Master concludes that except as it is found that laches, and the facts giving rise to it in *Ohio v. Kentucky, supra*, is identical with this case, that it is not presently before your Special Master under the stipulation. If a hearing is to be held later on the issue of prescription and acquiescence then evidence as to laches would be relevant.

The law of accretion and avulsion is not discussed in this report, so far as the historical facts of any avulsion or the effect of avulsion or accretion is concerned, because if the boundary is the low-water mark in 1792, under the cases which I have cited in this report, then it is unaffected by the action of the forces of nature on the course of

the river. Again, such a discussion is unnecessary if your Special Master is correct that this case is governed by the prior decisions of this Court which have been set forth herein.

There was discussed in the Special Master's report filed January 22, 1979 in *Ohio v. Kentucky*, No. 27, Original, certain reports of the Kentucky Legislative Commission Research. These had been presented to Judge Forman and were delivered to me as his successor Special Master after his death. It appeared from the notes that they were to be considered as evidence in the case. No such evidence has been introduced in this case, although they are referred to by Indiana. The effect of such reports I do not regard as an issue at this time. Likewise, the effect of admissions made by Kentucky in the *Ohio* case I do not regard as before your Special Master in this case. If the Court concludes to take judicial notice of the claimed admission of Kentucky in the *Ohio* case that the boundary line was the low-water mark as it existed in 1792, it can do so as it applies Mr. Justice Blackmun's opinion. Your Special Master, however, feels that he should report at this time only upon the issue raised by the stipulation and in this report should not consider admissions from pleadings in another case.

## VI. RECOMMENDATIONS

Your Special Master therefore recommends that:

1) This Court adjudge and determine that the boundary along the north side of the Ohio River between the Commonwealth of Kentucky and the State of Indiana is the low-water mark on the north side of the Ohio River as it existed in 1792, when Kentucky was admitted into the Union.

2) Kentucky and Indiana should be given the right and opportunity to determine by agreement the location of the boundary in 1792 and how, if at all, it shall be marked, subject to the approval of this Court; that in the absence of agreement within a reasonable time to be fixed by the Court, if it approves this report, that the Court direct the Special Master, after hearings and the taking of testimony, to make his recommendations as to the location of the boundary as it existed in 1792 as nearly as it can now be ascertained.

3) In event the parties are unable to agree within such reasonable time on the location, as nearly as it can now be ascertained, of said boundary in 1792 and its marking on the ground or any part thereof, that at the request of either party, the Special Master[4] be authorized without further or-

[4] On October 15, 1895, this Court, as reported in 159 U.S. 275, appointed three Commissioners to ascertain and run the boundary line as determined by Mr. Justice Field's opinion. One Commissioner was from Indiana, one was from Kentucky and third was a Colonel of the Engineer Corps of the U. S. Army. Indiana, on page 7 of its Brief in Opposition to Motion for Leave to File Complaint makes mention of the appointment of Commissioners. Your Special Master has suggested the holding of hearings by the Special Master because in more recent boundary dispute cases it would appear that the Court has followed the Special Master procedure rather than the Commissioner procedure. Commissioners, if appointed, should have the authority recommended for a Special Master.

der of this Court, to hold hearings and take testimony as to such location and marking, with all the powers and duties provided in the Court's order of May 14, 1979 appointing your Special Master in this case, including, but not limited to, arranging for a survey of all or any portion of the boundary line and the marking thereof, the employment of surveyors or other help, and the determination of their compensation and all other proper costs and expenses in connection therewith, the cost and estimated cost thereof until the further order of the Court, to be borne by plaintiff and defendant equally and paid as the Special Master directs.

4) If hearings by the Special Master are deemed necessary by the Supreme Court under the issues relating to acquiescence and prescription or any other issue raised by the pleadings that your Special Master be authorized to hold the same, with all the powers and duties provided in the order of this Court of May 14, 1979 above mentioned.

5) If either party fails to pay promptly any sum of money as directed by the Special Master hereunder that the Special Master is directed to forthwith report all relevant facts concerning such payments, or lack thereof, to this Court for its further order herein.

6) That the Court reserve until the conclusion of this litigation the final taxation of all costs herein and that no compensation be awarded to the Special Master.

Respectfully submitted,

ROBERT VAN PELT,

Special Master,
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Lincoln, Nebraska