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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 81 Original

COMMONWEALTH OF KENTUCKY,

Plaintiff,

v.

STATE OF INDIANA AND

THEODORE L. SENDAK, Attorney

General of the State of Indiana,

Defendants.

MOTION FOR SUMMARY ADOPTION OF THE SPECIAL MASTER'S REPORT AND REMAND TO THE SPECIAL MASTER

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Defendants.

**MOTION FOR SUMMARY ADOPTION
OF THE SPECIAL MASTER'S REPORT
AND REMAND TO THE SPECIAL MASTER**

The State of Indiana hereby moves for an order of this Court summarily adopting the Report of the Special Master and remanding this case to the Special Master for the preparation and submittal to the Court of an appropriate form of decree. The grounds for this motion are:

1. The issue is framed in identical terms by the Special Master in both this proceeding and in his Report in *Ohio v. Kentucky*, Orig. No. 27, and thus there can be no dispute that this Court's recent decision in *Ohio v. Kentucky* 100 S.Ct. —, 48 USLW 4092, (decided January 21, 1980), is determinative of the issue decided by the Special Master in his Report lodged with the Court on November 28, 1979.

2. Procedures governing the exercise of the Court's original jurisdiction have as their object to reach and argue the merits of the controversy as promptly as possible. By adopting this Motion, the Court will avoid needless delay in adjudication on the merits and minimize the expense that the litigants must bear.

3. Remand in this proceeding at this time is also consistent with notions of judicial economy. The Special Master is the same in both Orig. No. 27 and in this proceeding. The primary unresolved matter remaining in each proceeding, assuming the adoption of the Special Master's Report, herein, and in the absence of any subsequent agreement between the parties, is the presentation of evidence to actually locate the 1792 northerly low-water mark. By remanding this proceeding now the Special Master may permit both cases to proceed in tandem and avoid otherwise needless duplication of effort and expense.

Respectfully submitted,

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Defendants.

**BRIEF IN SUPPORT OF MOTION FOR
SUMMARY ADOPTION OF THE SPECIAL
MASTER'S REPORT AND REMAND TO
THE SPECIAL MASTER**

I. INTRODUCTION

On November 28, 1979, Judge Robert Van Pelt, the Special Master appointed in this case, submitted his Report to the Court. As of February 8, 1980 the Court had not officially received the Report nor had it been ordered filed.

On January 21, 1980 this Court announced its decision in *Ohio v. Kentucky*, Orig. No. 27, 48 USLW 4092. There has been no action taken to date by Kentucky in that proceeding to seek rehearing. In the absence of such a petition by Kentucky, the mandate will issue in Orig. No. 27 on February 15, 1980.

II. THIS COURT'S RECENT DECISION IN *OHIO V. KENTUCKY*, ORIG. NO. 27 CONTROLS THIS CASE.

The issue as framed by the Special Master¹ in both Orig. No. 27 and Orig. No. 81 is identical. In his Report in Orig. No. 27, he characterized the issue as

Whether the boundary line between Kentucky and Ohio is the low water mark on the northerly side of the Ohio River as it existed in the year 1792 or the low water mark on the northerly side of the river as it exists today? I agree with this statement of the issue and will confine this report to that issue only.
Report, at 5, *Ohio v. Kentucky*, Orig. No. 27.

In his Report in this proceeding he characterized the issue as

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.
Report, at 6.²

Indeed, even Kentucky has stipulated that Kentucky's sole contention at the present stage in this case is that

. . . 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

¹ The Special Master in both Orig. No. 27 and Orig. No. 81 is the Honorable Robert Van Pelt.

² Unless otherwise specified references to the Special Master's Report refer to the Report lodged with the Court on November 28, 1979 in this case.

the Special Master was in error in *Ohio v. Kentucky*, No. 27, Original.³

This sole legal question was to be decided by the Special Master. *Report*, page 2.

There can be no doubt that the sole legal question to be decided in this proceeding is the identical question only recently decided by the Court in *Ohio v. Kentucky, supra*, wherein the Special Master's Report was adopted and the Court held that

A river boundary situation, however, depending upon historical factors may well differ from that customary situation . . . And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different . . . the holding in *Indiana v. Kentucky* has pertinent application and is controlling precedent here . . . Kentucky's present contentions, and those of the dissent, were rejected by this Court 90 years ago.

In view of this Court's recent decision in *Ohio v. Kentucky, supra*, on the identical question now before the Court in *Kentucky v. Indiana*, Orig. No. 81, no good purpose would be served in permitting exceptions to be argued. The Court has already decided the sole legal question at issue at this stage of these proceedings and should, therefore, summarily adopt the Special Master's Report and remand this case for further proceedings.

This question has also been decided adversely to Kentucky in well-reasoned opinions by the Nuclear Regulatory Commission in *Public Service Company of Indiana, Inc.*, ALAB-459, 7 N.R.C. 179 (1978), Appeal pend. *sub nom Kentucky v. N.R.C.*, D.C. Cir. No. 78-1369, and ALAB-473, 8 N.R.C. 253 (1978).

³ Paragraph 5 of the stipulations between the parties signed in July, 1979, and filed with the Clerk of this Court.

III. SUMMARY ADOPTION OF THE SPECIAL MASTER'S REPORT IS PARTICULARLY APPROPRIATE IN LIGHT OF THE POLICY FAVORING PROMPT DISPOSITION OF ORIGINAL ACTIONS.

This case is not an ordinary case; rather it is one within the original and exclusive jurisdiction of the Court. Const., Art. III, Sec. 2; 28 U.S.C. Sec. 1251(a).

As this Court earlier observed in *Ohio v. Kentucky*, 410 U.S. 641, at 644:

... Procedures governing the exercise of our original jurisdiction are not invariably governed by common law precedent or by current rules of civil procedure . . . Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear.

Kentucky sought to have the Special Master decide a single, identical legal question in both this proceeding and in *Ohio v. Kentucky*, Orig. No. 27. The Special Master decided that question against Kentucky in both cases and this Court has already adopted his recommendation in *Ohio v. Kentucky*, *supra*.

The sole legal question on the merits raised by Kentucky has thus already been decided by this Court. The merits of any controversies which remain unresolved are uniformly matters which must first be dealt with by the Special Master. The most prompt way to reach the merits of the remaining issues is to adopt the Special Master's Report and remand this case to the Special Master for further proceedings so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree.

Moreover, by summarily adopting the Report this Court will dispose of an issue that would otherwise only serve to

delay adjudication on the merits and needlessly add to the expense that the litigants must bear. To require briefs and oral argument on the identity of the legal boundary, an issue so recently and conclusively decided by the Court, would indeed involve needless expense for the litigants. The resources of both states are better directed toward the location of the 1792 northerly low water mark and any other issues which are pending before the Special Master.

IV. REMAND OF THIS CASE NOW IS CONSISTENT WITH JUDICIAL ECONOMY

Unless Kentucky has earlier petitioned for reconsideration, on February 15, 1980 the mandate will issue in *Ohio v. Kentucky*, Orig. No. 27. Since the Special Master is the same in this case and in Orig. No. 27 remand of both matters at the same time would permit tandem or joint proceedings to be conducted with attendant efficiency and economy.

The parties in both proceedings could prepare and enter into a stipulation, with the Special Master's approval, that would outline the issues yet to be resolved and identify the means of locating the 1792 northerly low water mark boundary.

Any proceedings before the Special Master to present evidence on the 1792 northerly low water mark boundary could be conducted at one time with all of the parties represented. This procedure would eliminate the otherwise duplicative hearings that will result if this case is delayed through unnecessary briefing, oral argument and while awaiting a decision which can be expected to be the virtual twin of the decision only recently announced by the Court in *Ohio v. Kentucky, supra*.

V. CONCLUSION

In view of the identical legal issue at controversy in this case and in *Ohio v. Kentucky, supra*, and the Court's recently announced decision which adopted the Special Master's Report and remanded *Ohio v. Kentucky* to the Special Master for further proceedings, the Motion For Summary Adoption of the Special Master's Report and Remand to

the Special Master should be granted. Such an Order by the Court is consistent with its object in original actions that the merits be reached promptly thus avoiding delay and needless expense, and is also harmonious with other notions of judicial economy.

Respectfully submitted,
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