IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 81, Original

COMMONWEALTH OF KENTUCKY - - Plaintiff

versus

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

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

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I. INTRODUCTION

The Commonwealth of Kentucky opposes summary adoption of the Special Master's Report and remand to the Special Master. This opposition is based upon important factors present in this case which were not given consideration by the Special Master and this Court in *Ohio* v. *Kentucky,* —— U. S. ——, 48 L.W. 4092 (Decided 1/21/80). These factors compel that this case be given full review so that the lack of a firm foundation for the opinion in *Ohio* v. *Kentucky, supra,* may be examined and the "bizarre consequences" that it may cause may be averted.

II. FACTORS IN THIS CASE NOT CONSIDERED IN *OHIO* v. *KENTUCKY* JUSTIFY A FULL HEARING ON THE MERITS.

Kentucky does not dispute the assertion at pages 4-5 of Brief in Support of Motion for Summary Adoption of the Special Master's Report that the issue framed by the Special Master in this case is similar to that framed by him in *Ohio* v. *Kentucky,* Original No. 27. However, the factors discussed below show with great force that the parties to this case, who are identical to those in *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), have never accepted the interpretation placed on that opinion by this Court in *Ohio* v. *Kentucky,* —— U. S. ——, 48 L.W. 4092 (1980). These matters have not been previously explored and cast great doubt upon the wisdom of the majority opinion in *Ohio* v. *Kentucky, supra.*

A. The 1942 Compact.

The opinion in *Ohio* v. *Kentucky,* —— U. S. ——, 48 L.W. 4092, rests entirely on a misreading of *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), that the parties to that case have never accepted in their continuing contacts over the past ninety years. In 1943, fifty years after the decision that now is said to have definitively resolved the boundary question, Kentucky and Indiana entered into a compact to fix the boundary at the relatively small point involved in that case (1942 Ky. Acts 116, 1943 Ind. Acts, Chapter 2).

The preamble to that compact points out:

WHEREAS, by decree of the Supreme Court of the United States in the case of Indiana v. Kentucky, decided May 18, 1896, and reported in 163 U.S. Reports *the boundary line between the State of Indiana and the Commonwealth of Kentucky between certain terminal points therein described was fixed and established,* and

WHEREAS, *neither of said terminal points reached the low water mark of the right side of the Ohio River, forming the remainder of the boundary line between said States,* and

WHEREAS, owing to the facts recited in the preceding literary paragraph hereof a dispute has arisen as to the boundary line connecting said terminal points with said low water mark, and (Emphasis supplied.)

Section 1 of the Compact states:

[t]he boundary line between the State of Indiana and the Commonwealth of Kentucky shall be as follows, that is to say:

Commencing at a point on the line between Sections 15 and 14, Township 7 South, Range 10 West, and 67.25 chains South of the Northeast corner of Section 15, the same being the beginning point in the description of the part of the boundary line as fixed by the Supreme Court of the United States in Indiana v. Kentucky, decided May 18, 1896, and reported in 163 U.S. Reports thence south 0°, 53′15″ West to the low water mark on the right side of the Ohio River and *thence upstream* at low water mark on the right side of said River. Also beginning at the same beginning point to-wit: The beginning point in the description of the part

> of the boundary line between the State of Indiana and the Commonwealth of Kentucky as fixed by the Supreme Court in the cases above recited and following that line to the end of so much of said boundary line as was fixed by said decree; thence due West to the low water mark on the right side of the Ohio River and *thence downstream* with said low water mark on the right side of said River.[1] (Emphasis supplied.)

The above-quoted language is clear and unequivocal. *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) decided nothing more than the boundary in the area of Green River Island and as we shall see below Indiana has concurred in this view. As to the remainder of the boundary, which had not abandoned its channel, it was to remain as it had been in the past, the low-water mark on the northerly side of the Ohio River as it is at any given time. Thus, the Compact which in its body specifically refers to and relies upon the opinion in *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) adopts a construction of that opinion that is diametrically opposite to that expressed by this Court in *Ohio* v. *Kentucky,* —— U. S. ——, 48 L.W. 4092.

B. The Opinion of the Attorney General of Indiana.

In 1971 the Attorney General of Indiana pursuant to a request for an opinion from a state senator "regarding the Indiana-Kentucky border dispute as it relates to the Southwest Maritime Center . . ." sub-

[1]This language reflects the acceptance of a natural boundary subject to accretion and erosion. See *Oklahoma* v. *Texas,* 268 U. S. 255, 256 (1925).

mitted his opinion that the boundary between the states was the 1942 low-water mark on the Indiana side of the Ohio River, 1971 O.A.G. Ind. No. 23, pp. 61-3. The opinion of the Attorney General of Indiana made it clear that *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), dealt only with a small segment of the boundary and involved a change in the channel around an island. On this point the opinion states:

> In 1896, the United States Supreme Court, in Indiana v. Kentucky (1896), 163 U. S. 520, *fixed the Indiana-Kentucky boundary for approximately 3.6 miles* in Vanderburgh County. This "Green River Island" dispute, *caused by a change in the channel of the Ohio River,* was settled by a survey under the authority of C. C. Genung for the Commissioners appointed by the United States Supreme Court. It is important to note that the entire boundary was not determined in this case, but only the area in dispute. (Emphasis supplied.)

The Indiana Attorney General also declared that the prior decision of this Court, including *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 347 (1820) and the 1943 Compact made the Indiana-Kentucky dispute factually different from the dispute involving Ohio and Kentucky. He specifically advised against Indiana intervening in Original No. 27 because of these factual differences. The Attorney General of Indiana who today moves for Summary Adoption of the Special Master's Report is the same person who was in office at the time the above-quoted opinion was given.

The opinion of the Attorney General of Indiana is unclear as to the basis of the assertion that the 1942

low-water mark applies other than apparent reliance upon the Compact of 1942. It cannot be disputed, however, that the Attorney General did not consider the 1792 low-water mark to be the boundary. In the above quotation, he also conceded without reservation that *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) concerned itself only with the Green River Island dispute and involved nothing more.

C. The Courts of Both Indiana and Kentucky Have On Numerous Occasions Declared the Location of the Boundary Between the Two States to Be Ever-Changing.

Over the years the highest courts of Indiana and Kentucky have had occasion to consider the boundary between the two states. Absent a fact situation involving an avulsion, or a shift of channel, no opinion of these courts has adopted the 1792 mark. Two opinions of the highest court of Indiana, one before 1890 and the other shortly thereafter, make no mention of the 1792 low-water mark as being the boundary. *Gentile* v. *The State,* 29 Ind. 409 (1868) decided the boundary issue in the following terms:

> The southern boundary of Indiana only extends to the Ohio River at low water mark. Stinson v. Butler, 4 Blackf. 285; Handly's Lessee v. Anthony, 5 Wheat. 374; Cowden v. Kerr, 6 Blackf. 280. *That river is not therefore within the territorial limits of this State,* and the exception excluding it from the provisions of the act could not render the law a local one. (Emphasis supplied.)
>
> 29 Ind. at 411.

Five years after the opinion in *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) similar language is found in *Memphis & C. Packet Co.* v. *Pikey,* 142 Ind. 304, 40 N. E. 527 (1895), where the court said:

> It is settled that low-water mark on this side of the Ohio River is the boundary line between this state and Kentucky. Handley's Lessee v. Anthony, 5 Wheat. 374; Indiana v. Kentucky, 136 U. S. 479, 10 Sup. Ct. 1051; Carlisle v. State, 32 Ind. 55; McFall v. Com., 59 Ky. (2 Met.) 394, 1859.
>
> 40 N. E. at 529.

The highest court of Kentucky has also repeatedly held that the boundary between it and Indiana is the low-water mark on the northern bank of the Ohio River without reference to the 1792 line. A thorough review of the case law is set forth in *Commonwealth of Kentucky* v. *Henderson County,* Ky., 371 S. W. 2d 27 (1963), a case that upheld the right of a county to grant oil and gas leases below the bed of the Ohio River. In the course of its opinion the court declared:

> The historical incidents underlying the establishment of the north or northwest low watermark of the Ohio River as to the boundary of Kentucky are set out in great detail in two decisions of the United States Supreme Court. Handly's Lessee v. Anthony, 5 Wheat. 374, 18 U. S. 374, 5 L. Ed. 113, decided at the February term, 1820, with opinion by Chief Justice Marshall, and State of Indiana v. State of Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329, decided at the October term, 1889, with opinion by Mr. Justice Field. It is pointed

out in those cases that even prior to the adoption of the United States Constitution, the Virginia Legislature authorized its congressional delegation to cede to the central government what was then referred to as the Northwest Territory and that such a cession was actually made by formal deed of March 1, 1784. It is further shown by those decisions that the cession of the Northwest Territory to the central government left all of the Ohio River to its northern or northwestern low watermark within the territorial confines of that part of Virginia which later became Kentucky through the admission of this Commonwealth into the Union in 1792.

Furthermore, it has been established that an individual Kentucky landowner whose lands border on the Ohio River owns only to the thread of the river, while the ownership of the Commonwealth of Kentucky in its sovereign capacity extends to the low watermark on the northern or northwestern side of the river. Berry v. Snyder, 66 Ky. (3 Bush) 266; Miller v. Hepburn, 71 Ky. 326; Louisville Bridge Company v. City of Louisville, 81 Ky. 189; Ware v. Hager, 126 Ky. 324, 103 S. W. 283; Bedford-Nugent Company v. Herndon, 196 Ky. 477, 244 S. W. 908; McGill v. Thrasher, 221 Ky. 789, 299 S. W. 955; City of Covington v. State Tax Commission, 231 Ky. 606, 21 S. W. 2d 1010; Louisville Sand & Gravel Company v. Ralston, Ky., 266 S. W. 2d 119; Handly's Lessee v. Anthony, 5 Wheat. 374, 18 U. S. 374, 5 L. Ed. 113; State of Indiana v. State of Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329.

371 S. W. 2d 29-30.

It is significant that the three opinions speak in terms of the then-existing low-water mark and in no way refer to the 1792 low-water mark.

It is obvious that no person, public or private, up to the commencement of the current Ohio River litigation, has initiated any action claiming the low-water mark of 1792 as the boundary between the two states. All who have acted have done so upon the basis that the low-water mark at the time of their acts was the boundary or in the case of the Attorney General of Indiana, for reasons not clearly enunciated, it was the 1942 low-water mark.

The above-described factors demonstrate that this case involves a factual pattern not considered in *Ohio* v. *Kentucky,* —— U. S. ——, 48 L.W. 4092. These facts when taken into account give great weight to the concern expressed in the dissent of Mr. Justice Powell in *Ohio* v. *Kentucky, supra,* and to the interpretation of *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) argued by Kentucky in Original No. 27 and require that this case be given a full hearing on exceptions to the report of the Special Master.

III. THE DECISION IN *OHIO* v. *KENTUCKY* IS CONTRARY TO LAW AND HISTORY.

We have already shown that there are factors which differentiate this case from *Ohio* v. *Kentucky,* —— U. S. ——, 48 L.W. 4092. These factors relate primarily to the proper interpretation of *Indiana* v. *Kentucky,* 136 U. S. 479 (1890). When given due consideration they remove the foundation upon which

the majority opinion in *Ohio* v. *Kentucky, supra,* rests. In addition, the historical development of the Indiana-Kentucky boundary lends further support to the position of Kentucky on the need for a full hearing in this case.

A. The History of the Creation of Kentucky.

The Commonwealth of Kentucky was carved out of what was the original Commonwealth of Virginia. At the time of the Revolutionary War, Virginia owned or claimed all of the land which comprises Kentucky as well as the land northwest of the Ohio River, including what is now Indiana. In 1784 Virginia executed a deed of cession, known as the Virginia Cession, which ceded to the United States all of its lands northwest of the Ohio River. 1 *The Laws of the U. S.,* 472 (1784). It is agreed that Virginia retained all of the Ohio River through its northerly low-water mark as well as all of what now is Kentucky. On December 18, 1789, the General Assembly of Virginia voted to transform the then District of Kentucky into an independent state. 1 *Laws of the U. S.,* 673 (1789). Congress thereupon admitted Kentucky to the Union by an act adopted February 4, 1791. 1 Stat. 189 (1791). That act set the boundaries of Kenucky as follows:

> §1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, and it is hereby enacted and declared, That the Congress doth consent that the said District of Kentucky, within the juris-

> diction of the Commonwealth of Virginia, and according to its actual boundaries on the eighteenth day of December, one thousand seven hundred and eighty-nine, shall, upon the first day of June, one thousand seven hundred and ninety-two, be formed into a new State, separate from and independent of the said Commonwealth of Virginia.

Thus, the boundaries of Kentucky were fixed as they existed on December 18, 1789 thereby extending Kentucky at its admission to the Union to be the low-water mark on the northerly side of the Ohio River on that date. There is no mention of 1792 in any document in the Kentucky chain of title relating to its boundary. Exactly how the 1792 date was determined in *Ohio* v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092 to constitute the boundary is obscure. Apparently between 1789 and 1792 the well-accepted doctrine of accretion and erosion is applicable. There is no reason why that long-standing doctrine should be abandoned in determining the boundary after 1792.

B. History Establishes an Ever-Changing Boundary.

The starting point in determining the method to fix the boundary in this case is *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820) which involved the question of whether a tract of land was located in Kentucky or Indiana. The court ruled that because the land was outside or north of the low-water mark of the river itself it was in Indiana. In the course of his opinion, Chief Justice Marshall reviewed in great

detail the history of the establishment of the states of Kentucky and Indiana as well as the law of river boundaries. The boundary was declared to be the northern low-water mark of the Ohio River. This intent of Virginia when it granted the lands was expressed in the following terms:

> It was intended then by Virginia, when she made this cession to the United States, and most probably when she opened her land-office, that the great river Ohio should constitute a boundary between the states which might be formed on its opposite banks. *This intention ought never to be disregarded in construing this cession.* (Emphasis supplied).

Further support for this position was set forth as follows:

> "In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."
>
> "If," says the author, "the country which borders on a river has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion."
>
> Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between

> land thus formed and land formed by the receding of the water.
> 18 U. S. at 378-9.

Chief Justice Marshall unequivocally thus held that the boundary changed with accretion and erosion.

The work relied on by Chief Justice Marshall, M. Vattel, *The Law of Nations,* 1st American Ed. (1796) further states:

> The one loses, 'tis true, while the other gains; but nature alone produces this change: it destroys the land of the one, while it forms the land for the other. This can be no otherwise determined, since they have taken the river alone for their limits.
> Vattel at p. 183.

Chief Justice Marshall adopted this view when he stated "These states are to have *the* [*Ohio*] *River itself, wherever that may be, for their boundary.*" 18 U. S. at 379 (Emphasis supplied). He then went on to declare that this was the adoption of the rule of convenience intended by Virginia.

The statement at page 4 of the Slip Opinion in *Ohio* v. *Kentucky,* ___ U. S. ___, 48 L.W. 4092 that the historical antecedents of the Ohio fixed the boundary "not as the river itself, but at its northerly bank" is clearly in error. Mr. Justice Marshall in *Handly's Lessee* stated:

> In pursing this inquiry, we must recollect that it is not the bank of the river, *but the river itself, at which the cession of Virginia commences.* (Emphasis supplied.)
> 18 U. S. at 379.

The Virginia Cession, itself, contains no express language as to how the boundary should be determined in future years. Its obvious intent was that the general rule of law then in effect would govern. The statements of Vattel, accepted by this Court in 1820, compel that the boundary be determined by forces of accretion and erosion and not by the line in existence on an arbitrary date, which line is now obscure. This ensures ease and certainty in the determination of the boundary over the years and thus the convenience desired by Virginia.

The history of the Ohio River boundary of Kentucky has recently received thorough treatment in Thomas D. Clark's, *Historic Maps of Kentucky,* (Univ. of Ky. Press, 1979). Professor Clark at the end of his study states:

> In 1820, when John Marshall defined the boundary as the "low water" mark *he obviously referred to the ebb and flow of the natural stream.* (Emphasis supplied).
>
> Clark at page 23.

That the channel of the Ohio River may have changed as a result of the activities of man in the recent past (as claimed by Indiana, Report of Special Master p. 17) does not alter the applicable law for whether an avulsion or change of channel has occurred is an issue of fact not presently before this Court. That issue can only be decided upon the presentation of proof.

C. Other States Have Rivers as Boundaries Subject to Accretion and Erosion.

The river itself serving as a boundary is not unique to the Ohio. The boundary between Vermont and New Hampshire is the low-water mark on the Vermont side of the Connecticut River. *Vermont* v. *New Hampshire,* 289 U. S. 593 (1933) and 290 U. S. 579 (1934) (Decree). The south bank of the Red River serves as the boundary between Texas and Oklahoma, *Oklahoma* v. *Texas,* 260 U. S. 606 (1923) and 268 U. S. 252 (1925). In both of these cases the boundaries were held to be subject to the natural forces of accretion and erosion. The law assumed that a boundary on one side of the river would be subject to accretion and erosion at the time *Handly's Lessee* was decided as shown by the following quotation from Vattel:

> As soon as it is established that a river seperates [sic.] two territories, whether it remains common to the inhabitants on each of its banks, or whether each share half of it; *or* whether, *in short, it belongs entirely to one of them;* their rights with respect to the river are no ways changed by the alluvion. If it happens then that by a natural effect of the current, one of the two territories, receives an increase, while the river gains by little and little on the opposite bank; the river remains the natural boundary of the two territories, and each preserves the same rights upon it notwithstanding its gradually changing its bed; so that, for instance, if it be divided in the middle, between the persons on each bank, that middle,

> though it changes its place, will continue to be the line of separation between the two neighbours. (Emphasis supplied) Vattel, p. 183.

A determination of the method or standard to be employed in fixing the boundary between Kentucky and Indiana is an exercise in history and the application of the intent of the Virginia Cession. This history conclusively establishes that from 1784 forward the boundary has been an everchanging one subject to the natural forces of accretion and erosion as is claimed by Kentucky.

D. *Indiana* v. *Kentucky* Is Not Controlling.

The majority opinion in *Ohio* v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092, is based entirely on the opinion in *Indiana* v. *Kentucky,* 136 U. S. 479 (1890). That case has no application to this matter. That case involved land which had originally been an island within the main channel of the Ohio River. The river gradually changed its course so that it flowed only to the south of the island and the north side became attached to what had been the shoreline and thus a part of the mainland of Indiana. This court held that since what took place was an abandonment of the boundary channel of the river, a boundary change did not occur. Since the channel shifted after Kentucky was admitted to the Union, the land remained within Kentucky. That is all that case involved. The language of the court in *Indiana* v. *Kentucky, supra,* quoted at page 4 of the Slip Opinion in *Ohio* v. *Kentucky,* ____ U. S.

____, 48 L.W. 4092 must be read as referring only to the vicinity of Green River Island. To read it otherwise would be contrary to *Handly's Lessee* v. *Anthony, supra,* which the Court in *Indiana* v. *Kentucky, supra,* quoted with approval. That the opinion of Mr. Justice Field was only an application of the island rule is conclusively demonstrated by the Court's statement that it was applying the rule of *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1870) for its holding.[2] *Missouri* v. *Kentucky* involved a dispute over Wolf Island and held that if the island was in Kentucky when the state was admitted to the Union it remained in Kentucky even though the channel had changed. Both *Indiana* v. *Kentucky, supra.,* and *Missouri* v. *Kentucky, supra.,* are island cases and neither justifies abandoning the recognition in *Handly's Lessee* that river boundaries are to be determined by accretion and erosion principles.

As we pointed out earlier, the Attorney General of Indiana has specifically stated that *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) involved a change in the channel for a distance of 3.6 miles and did not deter-

[2]The island rule is a well-recognized exception to the rule of accretion. It is similar to the avulsion rule in that it applies to a perceptible change of channel around land not destroyed by the change. It differs from the avulsion rule in that the change takes place over time rather than suddenly. For examples of the island rule and its application see: *Omaha Indian Tribe* v. *Wilson,* 575 F. 2d 620 (8th Cir. 1978) vacated on other grounds, ____ U. S. ____, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979) and ____ U. S. ____, 99 S. Ct. 3092, 61 L. Ed. 2d 870 (1979); *Hogue* v. *Stickler Land and Timber Co.,* 69 F. 2d 167 (5th Cir. 1934), cert. denied, 293 U. S. 591, 55 S. Ct. 106, 79 L. Ed. 686, reh. denied, 70 F. 2d 722 (5th Cir. 1934); *Randolph* v. *Hinck,* 277 Ill. 11, 115 N. E. 182 (1917); *State* v. *Muncie Pulp Co.,* 119 Tenn. 47, 104 S. W. 437 (1907).

mine the entire boundary. He also denied that the 1792 low-water mark was applicable to the remainder of the boundary between the two states. It is fair to assert that the Attorney General of Indiana did not believe that the opinion in *Indiana* v. *Kentucky, supra,* governed the present-day boundary.

When *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) is analyzed and the actions of those affected by it are considered, it can stand only for one proposition: The portion of the boundary it reviewed, which was limited to the area of Green River Island, was unaffected by a change in the channel. Because of the application of the island rule, the general rule of an ever-changing boundary did not apply. That case stands for nothing more.

E. Adoption of the Position of Indiana Will Cause Illogical and Uncertain Results.

The low-water mark of the river as it varies from year to year is easy to ascertain and those whose lands border on it may, if it is the boundary, make their decisions with certainty. However, the position taken by Indiana requires the location of the low-water mark as it existed in 1792 from the mouth of the Big Sandy River on the east to the point where the Ohio River flows into the Mississippi near Cairo, Illinois on the west. This is a length of approximatetly six hundred sixty-four miles. To attempt to determine the low-water mark as it existed almost 200 years ago over such a distance would be monumental and expensive, not to

mention impossible. The statement at page 5 of the Slip Opinion in *Ohio* v. *Kentucky*, —— U. S. ——, 48 L.W. 4092 that knowledgeable surveyors have the ability to accurately determine the 1792 low-water mark is contradicted by an article appearing in the *Cincinnati Enquirer* (Ky.Sec.) Feb. 3, 1980 § B, p. 1. An experienced civil engineer and land surveyor is quoted in that article as stating that it will be all but impossible to locate the 1792 low-water mark on the north side of the Ohio River with any degree of accuracy.

We have no evidence that accurate maps or even approximations exist setting out the 1792 low-water mark over the entire distance involved or any portion. An examination of Historic Maps 2-7 and the accompanying text at pp. 67-75 of Clark's *Historic Maps of Kentucky* (1979) shows that settlement along the Ohio River in the area involved was sparse through at least the 1830's. This was especially so on the north side of the river. What will have to be done is that a lengthy, painstaking, and expensive undertaking will be required to determine the low-water mark of 1792 with any degree of accuracy.

The effects that accretion and erosion have had on the low-water mark on the north side of the Ohio River since 1792 are not known with precision and their future effects are, of course, unknown. Both the past and future consequences of the natural action of the river may well be substantial. The Ohio has been described in the following terms:

> This river has been a constantly forming one, washing down from its headwaters millions of tons

> of sedimentary materials, depositing them one year and removing them the next. With recurring annual floods the stream has lain uneasily in its bed.
>
> Clark, *Historic Maps of Kentucky* (1979), p. 37.

For centuries the boundary between Indiana and Kentucky has been accepted as the low-water mark on the northern side of the Ohio River as it may from time to time be. If the position of Indiana is accepted, it is possible that segments of Indiana that have been formed by accretion will be permanently transferred to Kentucky or that portions of the flowing river will now be located in Indiana and the boundary will no longer be "the river Ohio." These consequences are directly contrary to the intent of Virginia ". . . that the great river Ohio should constitute a boundary between the states which might be formed on its opposite banks." *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 at 377. That is the intention that Mr. Chief Justice Marshall said ought never to be disregarded. There is no way that the view of Indiana can be squared with history and precedent. The position of Indiana is also incapable of ensuring the rule of convenience that was also the desire of the grantor of the Virginia Cession.

This case arose because of numerous specific areas of dispute as to the precise location of the boundary between the two states. These include taxation of riverfront property, regulation of utilities and the development of port facilities (Complaint, ¶12; Reply Brief in Support of Motion for Leave to File Com-

plaint, pp. 4-5; and Brief of Indiana in Opposition to Leave to File Complaint, p. 5). These are matters of great import and affect the lives and property of a large number of persons. They require prompt and precise determinations. By following the intent of Virginia expressed in the Virginia Cession and utilizing the low-water mark as it exists from time to time the need for a quick and certain result will be assured. That result will be in accord with history and law.

F. Other Comments On *Ohio* v. *Kentucky.*

The opinion of the court in *Ohio* v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092, asserts that Kentucky sources have indicated that the 1792 line may in fact be the correct boundary between the two states (Slip Opinion, p. 6). The sources relied on are not binding on Kentucky. The report of the Kentucky Legislative Research Commission was never enacted into law. The purpose of the Legislative Research Commission is to aid the Legislature in its duties. *KRS 7.100, 7.120.* A report of the Commission that does not mature into law cannot bind the Commonwealth, especially where there has been a statute on the books for 170 years that places the boundary of each county which borders the Ohio River on the northwest side of that river and includes the bed of the river and the islands located in it in each such county. *Vol. 1, Stat. of Kentucky,* p. 268. *See Ohio* v. *Kentucky,* 410 U. S. 641, 650 (1973).

The attempt to bind Kentucky as a result of the Opinion of its Attorney General also fails because in

Kentucky, as in most other states, such opinions are purely advisory. O.A.G. (Ky. 78-192). While the cited Kentucky Opinion O.A.G. 63-847 was purely advisory in nature, the opinion of the Indiana Attorney General discussed above served as the basis of the refusal of Indiana to intervene in the *Ohio* case and also admitted that the holding of a case to which Indiana was a party, *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), was limited in nature. *Perks* v. *McCracken,* 169 Ky. 590, 184 S. W. 891 (1916) on its facts clearly involved the island rule. It in no way was involved with the ever-changing boundary. The law of Kentucky was clearly set out in *Commonwealth of Kentucky* v. *Henderson County,* Ky., 371 S. W. 2d 27 (1963) discussed above, which showed consistent adherence with the rule that the boundary between Kentucky and Indiana was the low-water mark on the northern side of the Ohio River as it might from time to time be.

The Commonwealth of Kentucky has moved for rehearing in *Ohio.* v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092 and until that Petition is disposed of a decision granting this motion will be premature.

A denial of the pending motion and the entry of an order to provide for the filing of exceptions to the Report of the Special Master will allow opportunity for a thorough reassessement of *Ohio* v. *Kentucky,* ____ U.S. ____, 48 L.W. 4092 in light of the important factors discussed herein. This court has on numerous occasions reconsidered its position where needed. Recently in *Continental T.V., Inc.* v. *GTE Sylvania,* 433 U. S. 36 (1977) it followed that course and in the face

of a claim that it should adhere to the doctrine of *stare decisis* it abandoned the position on territorial restrictions under the antitrust laws that it adopted ten years previously. It returned to a rule of reason approach in effect prior to 1967 that had been abandoned for a *per se* approach. That is exactly the path to follow in this case. *Ohio* v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092 should be reconsidered and a return to the doctrine of *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820) be decreed.

IV. CONCLUSION

Several key factors in this case were not considered in *Ohio* v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092 (1979). These factors are the Compact of 1942, the 1971 opinion of the Attorney General of Indiana and the decisions of the highest courts of Indiana and Kentucky. They establish that the 1792 low-water mark decreed in *Ohio* v. *Kentucky, supra,* has never been accepted by the parties to this case. Indiana through its Attorney General has conceded that *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), the sole authority for the opinion in *Ohio* v. *Kentucky, supra,* involved a change in channel and in no way was concerned with the entire boundary between the two states.

Ohio v. *Kentucky,* ____ U. S. ____, 48 L.W. 4092, if applied here will cause unforeseen and unfortunate results. These results can be avoided if this Court will allow exceptions to the Report of the Special Master to be filed so that it may have the opportunity

of returning to the rule intended by the Virginia Cession and adopted in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820) that the boundary between Indiana and Kentucky is the low-water mark on the north side of the Ohio River where it may be from time to time.

For the reasons stated herein, the motion for summary adoption of the Special Master's Report and remand to the Special Master should in all respects be denied and an Order should be entered directing that exceptions to the Report of the Special Master be filed and oral argument scheduled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on behalf of the Plaintiff herein that on the 26th day of February, 1980 he caused three copies each of "Response and Opposition to Motion for Summary Adoption of the Special Master's Report and Remand of the Special Master" to be served by United States mail, first class, postage prepaid, addressed to Hon. Robert Van Pelt, Special Master, 556 Federal Building, Lincoln, Nebraska 68508; Hon. Theodore L. Sendak, Attorney General of Indiana, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204; William E. Daily, Chief Counsel, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204; Hon. Otis Bowen, Governor of Indiana, State Capitol, Indianapolis, Indiana 46204; Michael F. McBride, Harry H. Voigt, LeBoeuf, Lamb, Leiby & MacRae, 1757 N Street, N.W., Washington, D.C. 20036; Charles W. Campbell, Senior Vice President and General Counsel, Public Service Company of Indiana, Inc., 1000 East Main Street, Plainfield, Indiana 46168.

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