FILE COPY

No. 27 Original

IN THE SUPREME COURT

OF THE UNITED STATES

THE STATE OF OHIO,

Plaintiff,

vs.

COMMONWEALTH OF KENTUCKY,

Defendant.

No. 81 Original

IN THE SUPREME COURT

OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

Plaintiff,

vs.

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

Defendants.

MOTION TO INTERVENE

OF DOROTHY COLE, ET AL.

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Defendants.

MOTION TO INTERVENE

OF DOROTHY COLE, ET AL.

Come the following by counsel and move to Intervene in these combined causes

under Supreme Court Rule 24 (a) (2): Dorothy Cole, David A. Alexander, David Allen, Donald Allen, Eva Allen, Earl C. Barks, John C. Bell, Nancy B. Bell, Clyde Benner, Mary Benner, Richard E. Blake, Boone County--State of Kentucky, Marvin E. Bruington, Jesse E. Bullock, Jr., Mary Stephenson Buetcher, Henriella Bynon, John Campbell, Gilbert Cannon, Sharon Cannon, Malcolm Carraco, Joan Chamblee, Richard Chamblee, Cheryl Chouinard, James Chouinard, Harry H. Cline Estate (Minnie Cline, Executirx), Harry H. Cline, Jr., Rosemary Cline, Bayward J. Cole, Mary Ann Cole, Elmer Cooper, City of Covington, Kentucky, Ralph Cox, Estelle M. Crowe, John W. Crowe, Jr., Kathleen K. Crowe, Beuford Cunningham, Harold Cunningham, Julia Cunningham, Harry R. DeVore, Jr., Chester Eaton, Hazel Edgerton, George E. Egger, Clara E. Elder, Warren Fisher, Robert Fried,

William Gerdon, Billy C. Glenn, Edward A. Goss, Helene L. Goss, Bernard Griffith, Francis P. Hagman, Edwin A. Hart, Edith S. Haynes, Hendry Acres, Inc., Louis N. Hermer, Phyllis M. Hermer, Margarete Nielsen Heron, Ruth Hollis, Walter Hollis, Diana M. Johnson, Gary B. Johnson, Elmer Lee Jones, Charles E. Keller, Jr., Nettie G. King, M.D., Chester Klinestiver, Ed Knear, Lillian Knear, Mackey Knear, Mary Jane Knear, Arthur Kruger, Dorothy A. Stephensen Krutz, Douglas Leatherbury, Earl Loesch, Bruce K. Lorch, Charles Lutgring, Payl Lutgring, Earl Mangin, Wallace Mangin, Howard B. Marrs, Claek E. Marshall, Frances Mathis, Kathy S. McGee, Raiborn D. McGee, E. Davis McGehee, E. Marie McGehee, Frances Evelyn McGehee, John H. McGehee, Donald R. McNelly, Mary McNelly, Gilbert Moore, Helen Moore, Loretta Myers, Raymond A. Myers, Joseph A. Nelson, Charmaine Nien-

aber, George L. Nienaber, Phyllis M. Owens, Brig. Gen. Thurman Owens, USMC (Ret), Clarence Pannett, Benjamin L. Perchik, Helen Perchik, Pike Heirs, Michael E. Popham, N. A. Popham, Elizabeth Poston, Eugene Poston, Margaret Purcell, Nicholas Purcell, Helen H. Rayburn, Robert Rayburn, Ben A. Reid, M.D., Lorenda S. Richardson, Charles L. Rice, Ethel Rice, Jean Rice, River Ridge Park, Inc., John H. Rolsen, Loretta Rolsen, Helen Jean Rudd, Henry L. Rudd, Jacob Schwab, Josephine Schwab, Caroline Schrader, William D. Schrader, Ora C. Shacklette, Alvin E. Shearn, Johnnie L. Shelton, Charlotte Simonson, G. K. Smart, Maurice C. Smith, Mary F. Smith Roy C. Sonner, Southern Indiana Rural Electric Coop., Inc., Carl E. Stauth, John B. Taylor, Jr., John B. Taylor, Sr., Nancy Keith Taylor, Sally C. Taylor, Taylor Properties, Inc., Emmett Terry, Mildred Terry, Letha M. Tolliver (Administratrix

of the Estate of Alfred Tolliver, (Deceased), George R. Wagner, City of West Point, Kentucky, Gerald Williams, Herman T. Williams, Dorothy Winkler, Martin Winkler, Anna B. Wood, C. H. Withers, Julia K. Withers.*

JURISDICTIONAL STATEMENT

Petitioners-Intervenors allege:

(a) that they have an interest relating to the property or transaction involved in the action;

(b) that disposition of these actions may impair their ability to protect their interest "as a practical matter"; and

(c) that their interest is not adequately represented by the present parties.

The Facts

Petitioners are owners of real estate adjacent to the Ohio River, extending under the waters to the Low Water Mark.

*No subsiderary or parent corporations.

Petitioners are advised that the Plaintiffs and Defendants have agreed to enter into a stipulation as to the Boundry line between the State(s) on the north and the Commonwealth of Kentucky on the South. Said stipulation to be presented to Special Master appointed by the Supreme Court has not been reduced to writing but is reported to deviate from the actual physical determination of the 1792 Low Water Mark by certain concessions between the parties Plaintiffs and Defendants.

The reported concessions are based upon socio-politic-economic considerations of certain agencies of the States without regard to the property rights of the Petitioners-Intervenors.

The Supreme Court has already held that the Boundry Line has not changed from that of 1792 because any variation therefrom would adversely and unjustly deprive property owners of certain rights, title and

interest in their property and without justification confer certain rights, title and interest therein upon others not so entitled.

Thus, the Supreme Court ruled that the Special Master should determine the location of that line as it was in 1792. This Petition is timely under the just disclosed circumstances.

Oridinarily, parties to a dispute should be permitted to settle their dispute between themselves by stipulation; however, when the litigation has reached a stage where others with an interest learn of conduct which may impair their ability to protect their interest in this or another forum "as a practical matter", they acquire an absolute right to intervene herein.

Petitioners-Intervenors' rights are not adequately represented by the States' agreement to modify or gerrymander the

boundary line to accommodate modern day social-political-economic pressures of special interest groups, with complete and total disregard to interests of the property owners.

Argument

In the State of Indiana, the Attorney General's office was created by the Legislature, and he is not a Constitutional Officer. He is charged with representing the interest of the Agency of State government that requests his services. He has denied any duty, obligation or authority to represent or protect the property right interests of owners of Indiana real property. The Seventh Circuit Court of Appeals has sustained that position in Cole v. The United States, The State of Indiana, and Soil Systems of Indiana, Inc., presently docketed United States Supreme Court, on Petition

October 21, 1981, Louisville Courier-Journal article with similar reports.

The case of *Texas v. Louisiana* 93 S. Ct. 1215 (1973) and 96 S. Ct. 2155 (1976) is to be distinguished to the extent that *The Submerged Lands Act* 43 USC §1301 et seq. an expression of Congress in 1953 does not apply to the bed of the Ohio River, by virtue of sub-paragraph (f) to wit:

> "(f) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person." (Emphasis added)

The 1911-14 Survey of the Ohio River was conducted by the United States Corps of Engineers under the Authority of the Congress of the United States being the

River and Harbors Act of 1909. The maps of that survey portray in specific detail every point of reference to establish by grid survey foreverafter every dimension of the Ohio River as it existed in its then natural state.

Whether or not and to what extent, if any, the 1911-14 Survey is materially different from that which would have been established by one performed in 1792 must be calculated to establish the legal boundary between the states.

A similar calculation is necessary to project the Ordinary High Water Mark of the North Shore the the Ordinary High Water Mark of the South Shore to that date when the Ohio River ceased for all time to be a Natural River.

Thus the issue is formed whether or not the Ohio River ceased to be a Natural River before or after the 1911-14 Survey.

Congress in the *Submerged Lands Act*

used a double negative xxx "does not include xxx if not meandered xxx in the public survey xxx". In other words lands specifically laid out by grid survey and mean sea level elevations and "heretofore xxx conveyed xxx to any person" are not subject to the act.

Potential-Intervenors are precisely within the doctrine of *Scott v. Lattig* 227 U.S. 229, 242, 243, 33 S. Ct. 242, 243, 244, 57 L. Ed. 490 (1913). Under the *Northwest Ordinance of 1787*, title to the islands and fast lands located within the waters of the Ohio River were granted along with the stream bed to the respective States who thereafter granted to individuals. Such is the express holding herein to date. Potential-Intervenors claim title descending from a specific State grant.

Ownership and jurisdiction of the Ohio River has always been additionally burdened

with the Navigable Servitude. The Navigable Servitude has since Old English Common Law adopted in the Virginia Territory and recognized by the United States since 1776 to date, been defined as lying between the two Ordinary High Water Marks on the river banks in its natural state.

Significance of the Natural State is paramount in that the Marks are identified by water dominance over air oriented flora and fauna. By legal definition, Man can not by alteration of the flow, in any dimension, relocate these boundaries of the Navigable Servitude.

See *Simon Zunamon and Chicago Mill and Lumber Co. v. The United States.**

Tampering with the Ohio River as outlined by the Corps of Engineers in *House Document 306, 74th Congress, 1st Session 1935* by building flood control reservoirs in the tributaries of Fourteen (14) States, coupled with High Lift Dams on the main

*Ct. CL. No. 80-78, July 1979, Appendix C.

stem would allow a deeper channel, a wider channel without dredging through stimulation of erosion. That plan has been executed without Congressional authorization. See *Environmental Defense Fund v. Marsh,* Fifth Cir. No. 80-3915, Slip Opinion, July 13, 1981, ___F.2d___.

These consolidated causes in their present posture present real controversies between citizens of one State against another State. Kentucky citizens i.e. Lorch and Reid own land in Indiana being eroded by the United States. Other Kentucky citizens object to the erosion by the United States and now by encroachment by Indiana and/or Ohio and *vice versa.* This Court can and is the only forum which can decide all of the issues under *Art. III § 2 of the Constitution.* See *North Dakota v. Minnesota,* 263 U.S. 365 (1923) a suit to enjoin changes in drainage increasing flow of water in interstate stream, and

see *Georgia v. Pennsylvania R. Co.* 324 U.S. 439.

This Court has recognized a State's standing in *parens patriae* and decided the merits of a State's claim that Congress had exceeded its powers under the *Fifth Amendment.* See *South Carolina v. Katzenbach* 383 U.S. 301 (1966) and *Oregon v. Mitchell* 400 U.S. 112 (1970).

Standing in the sense to challenge non-constitutional Governmental Act has a constitutional content to the degree that *Article III* requires a "case" or "controversy", necessitating a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution."

None of the Original Parties to these Actions has taken any measures to protect the interest of the property owners from

the unlawful taking without Just Compensation. In fact, the State of Indiana has played a contrary role and disavowed any interest or obligation.

Potential-Intervenors do not seek herein money damages but to preserve their historically recorded property rights.

Though *The Constitution* does not extend the judicial power to all controversies between States, yet it does not exclude any. See *Rhode Island v. Massachusetts*, 12 Pet. (37 U.S.) 657, 721 (1838).

A boundary dispute is a justiciable and not a political question (Id., 736-737) and a prescribed rule of decision is unnecessary in such cases. On the last point, Justice Baldwin stated:

> "The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject matter, the source and nature of the claims of

> the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurispondence, as the case requires." See *Rhode Island, supra.*

In *Texas v. New Jersey* 397 U.S. 674 (1965) the Supreme Court emphasized that the States could not constitutionally provide a rule of settlement and that no federal statute governed the matter. So the Court evaluated the possible rules and chose the easiest to apply and least likely to lead to continuing disputes. See also *Pennsylvania v. New York,* 406 U.S. 206 (1972).

It has been held that:

> "At least where, as here, an involuntary taking is involved, appellants are entitled, in the absence of an actual survey on the ground, to have their lands measured by the map or plat according to which they were conveyed

to them, as that plat constructively becomes a part of the conveyance. If the sections conveyed to appellants actually contained 800 acres on the ground -- a fact not seriously disputed -- the United States can not, years later, by merely preparing another map and having it adopted by the Trustees, arbitrarily deprive appellants of a substantial portion of their property without just compensation, which is what has here occurred.

The Trustees conveyed to the railway company by the Trustees' own "official" map then in use, which was a mere projection -- not an actual survey -- and which as to the lands here under consideration scaled 800 acres to the Section. Appellant, Paradise Prairie Land Company, acquired the lands from William W. Dewhurst, according to a plat "recorded in the Public Records of Dade County, Florida, in plat Book No. 2, page 94." That is the Dooley map, which has been in use for 36 years as a basis for reconveying the lands conveyed to the railway company by the Trustrees by the deed dated December 14, 1912.

It would be both a denial of due process, and of just compensation, to now permit the Trustees, at the instance of the United States, to adopt a new map assembled by compilation -- not by a survey on the ground, and of no greater dignity than the earlier maps so long in use -- and employ it as a means of depriving appellants of a substantial part of their acreage. There is no objection to the Base Map prepared by the Land Acquisition Office becoming

> the official map of Everglades National Park, but for the purpose of awarding appellants compensation, the Dooley map should have been used as a basis for measuring their acreage. The finding to the contrary is clearly erroneous.
>
> It was said, however, in Hardee v. Horton, 90 Fla. 452, 108 So. 189, 199: 'The mere fact that the map, known by the parties to represent no survey, was adopted by the trustees and designated and referred to in deeds executed by them as their official map, cannot bestow upon it evidentiary value which it does not possess. * * * The only method provided by law for an accurate identification of unsurveyed land, when described according to the rectangular method * * *, is *by a survey* according to the rules established by law. * * * ' (Emphasis supplied.) See also Hall v. Florida State Drainage Land Co., 93 Fla. 116, 113 So. 676; 11 C.J.A. Boundaries, § 24, p. 560." (Emphasis added) *Paradise Prairie Land Co. et al. v. United States* 212 F.2d 170 (5th Circ. 1954).

The Supreme Court has always recognized the justiciable issue in the apportionment of waters of an interstate river where demands of the users exceeds the supply.

See *Kansas v. Colorado*, 206 U.S. 47 (1907) and *New Jersey v. New York*, 283 U.S. 336 (1931) and *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

In the instant cases there is a Constitutional limitation and a Constitutional rule which the Court has to follow:

Article III Section 2. provides in part:

> "Section 2. The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to Controversies between two or more States; - between a State and Citizens of another State;- between Citizens of different States;- between citizens of the same State claiming Land under Grants of different States xx". (Emphasis Added)

The genesis of this last clause was in the report of the Committee on Detail which vested the power to resolve such land disputes in the Senate. See *2M. Farrand, The Records of the Federal Convention of 1787* (New Haven, rev. ed. 1937), 162, 171, 184. This proposal was defeated

in the Convention. (Id. 400-401) which then added this clause to the jurisdiction of the federal judiciary without reported debate (Id. 431.)

The Court is asked to Judicially Notice the recorded history, to wit:

> "The motivation for this clause was the existence of boundary disputes affecting ten States at the time the Convention met. With the adoption of the Northwest Ordinance of 1787, the ultimate settlement of the boundary disputes, and the passing of land grants by the States, this clause, never productive of many cases, became obsolete. See *Paivlet v. Clark*, 9 Cr.(13 U.S.) 292 (1815). cf. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923)." *The Constitution of the United States of America*, Analysis and Interpretation. *Senate Document No. 92-82, 92d Congress 2d Session*, U.S. Government Printing Office, Washington 1973 Stock Number 5271-00308 p 744.

The reopening of boundary dispute litigation in the instant cases requires the application of what has remained the original and exclusive jurisdiction of the Supreme Court. The Potential-Intervenors can not be protected except that the rule

of law followed by the Special Master consider the issue in the apportionment of waters of an interstate river where the supply exceeds the demands of the users and encroaches upon their property, without Congressional authorization and for the benefit of Citizens of other States not a party to this litigation.

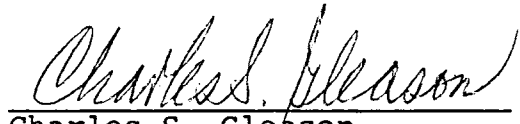
SUMMARY

There can be no social-economic-political stipulated settlement of the boundary location, no relocation thereof from 1792, no alteration or relocation of any Ordinary Low Water Marks, no alteration or relocation of any Ordinary High Water Marks, from their legally determined location historically evidenced by the 1911-14 Survey Maps, modified to the time when the Ohio ceased to be a natural river.

Potential-Intervenors have a vested interest in being heard, to object to consideration of irrelevent, immaterial and/

or contrived evidence, in the final phase of these consolidated cases. The announced posture of the Original Parties gives standing for these Potential-Intervenors to participate as interested and necessary parties.

Respectfully submitted



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APPENDIX A

The Indianapolis Star
Wednesday, October 21, 1981
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Indiana's New Piece of the Ohio River Could Add Tax Revenue

Indiana's new found river ownership should clear the way to develop ports and other industries along the Ohio River.

Attorney General Linley E. Pearson announced Tuesday that Indiana and Kentucky negotiated a settlement in the 200-year old boundary dispute over control of the Ohio River.

He said the agreement should bring millions of dollars of tax revenue into the Hoosier treasury and allow development of the Indiana shore without interference from Kentucky.

According to Pearson, the settlement grants Indiana ownership of at least 100 feet of water along the 350-mile

section of the river which forms its southern boundary with Kentucky.

THE PRECISE location of the boundary line will be plotted by computers, Pearson said.

He told reporters at a Statehouse news conference the agreement reached Friday gives Indiana sufficient room to build both the Clark Maritime Center near Jeffersonville and the Marble Hill nuclear power plant near Madison completely within the state's borders.

Kentucky officials and environmental groups had sought to block the projects by contending they used land and water owned by Kentucky.

"It seems like a long tradition of fighting over this case has come to an end in the attorney general's office," observed Arthur T. Perry. Perry aided William E. Daily, chief counsel to Pearson, in preparing Indiana's case.

Nature, technology and extensive legal and scientific research combined to give Hoosiers their claim to the river.

A SPECIAL master of the U.S. Supreme Court Senior Judge Robert Van Pelt of Nebraska, ruled last year that Kentucky's northern boundary was defined by the Ohio River's low water mark of 1792. Time and the addition of a series of dams along the Ohio and its tributaries, however, has changed the course of the river. Indiana contended the present shoreline is further north that it was in 1792.

Friday's settlement, which mostly adopts a line computed by experts based on a United States Geological Survey map drawn in the wake of a 1911 Corps of Engineer's survey, supported that contention. In spots such as Warrick County, the Indiana line extends as far as 2,000 feet into the river.

Engineers and hydrologists contributed to Indiana's research, which even used a

working model of the river constructed by Purdue University researchers to substantiate its case.

PEARSON CALLED the time and money invested by Indiana in pursuing the border case, "Not a bad investment when you consider the millions and millions of dollars in property taxes that will come to Indiana."

A spokesman for the Kentucky attorney general's office refused to discuss details of the settlement, but said, "The settlement is greatly to the advantage of Kentucky."

He described Pearson's claims of victory as "jockeying for position by those who have stuck their necks out politically on this case."

Although the boundary dispute had been simmering for years, Pearson and Perry conceded the arguments over building the port and Marble Hill brought the battle to a head.

In response to the numerous suits filed by Kentucky against Indiana port projects, Gov. Robert D. Orr and other state officials challenged the development of a port facility southwest of Louisville on the Kentucky shore.

PEARSON SAID those objections will be withdrawn as part of the settlement.

Except for agreeing to the creation of Kentucky's port facility, Pearson maintains that Indiana gave up little or nothing in return for its piece of the river. He described Indiana's concessions as "some islands and sandbars in the river which have paid Kentucky taxes for years and will continue to be in Kentucky."

"Our evidence was just overwhelming," Pearson said. "We even got a better deal that the actual line would have given us at Clark Maritime."

The settlement guarantees the port water rights at least to the middle of the channel at Six-Mile Island and for

200 feet into the river for one-half mile above the island. The agreement submitted to Van Pelt Tuesday morning also provides for 300 feet of river at the Southwind Port near Mount Vernon.

DESPITE THE negotiated settlement to the boundary dispute, Ralph B. Joseph, executive director of the Indiana Port Commission, said it will be at least late summer of 1982 before construction can begin at the Jeffersonville port site. "We need to finish the archaeological evaluation of the area," he said.

Altough Dailey has said it is unclear who will own rights to the river bottom within Indiana jurisdiction. Pearson said the state will exercise control over it unless a private land owner files an official claim.

Appendix B

The Louisville Courier-Journal
October 21, 1981
Page 1

Kentucky Agrees to Fork Over A Slice of the Ohio River

CINCINNATI - Kentucky ended a 15-year-old border dispute with Indiana and Ohio yesterday by conceding at least 100 feet of the Ohio River to its northern neighbors.

In an out-of-court agreement announced before a federal judge, Kentucky agreed to let Indiana and Ohio have sovereignty over the part of the river nearest their shores.

The two northern states expect the change to bring them more revenue in taxes and licensing fees.

And Kentucky will lose money accordingly.

Nobody is sure exactly what the gains and losses will be, but Ohio estimates

that it will pick up $1 million a year in revenues from taxes and from the sale of boating, fishing and liquor licenses.

Indiana officials are predicting an annual revenue increase of "hundreds of thousands of dollars."

Kentucky officials aren't guessing what the agreement will cost.

A spokesman for Ohio said the change will make "life easier for Ohioans who work and play along the shoreline," and an Indiana representative talked about a new spirit of cooperation.

"Now, instead of throwing rocks across the river, we can work to develop the river," said William Daily of the Indiana attorney general's office.

At a 9:30 a.m. meeting in the federal couthouse, in Cincinnati, Donald H. Balleisen, a Louisville attorney representing Kentucky, announced the compromise before Robert Van Pelt, a senior U.S. district

judge.

Van Pelt had come from Nebraska prepared to hear expert witnesses and ultimately to determine where the low-water mark on the river's north bank was on June 1, 1792, the day Kentucky became a state.

The U.S. Supreme Court had ruled in 1980 that the 1792 mark was the correct boundary - not the current northern shoreline, as Kentucky had contended.

By reaching agreement on their own, the three states avoided the complex and costly court investigation that was expected to begin yesterday and to last at least three weeks.

The compromise was hammered out in meetings that were still going on as late as Monday.

Here are the major features of the agreement, which won't become final until it is approved by the U.S. Supreme Court, probably sometime next year:

The boundary, with some exceptions, will follow a topographic map line based on surveys by the Army Corps of Engineers between 1895 and 1914.

Ohio and Indiana have argued that those surveys provide the best approximation of the 1792 low-water mark.

The line on the map was drawn in the 1960s by the U.S. Interior Department Geological Survey. At any point where the line gets too close to the Ohio or Indiana shore, it will not be used; Ohio and Indiana will have at least 100 feet of the river at every point.

No land will move from one state to the other. Regardless of the topographic line, no cities or islands will change hands.

For instance, Towhead Island, Six Mile Island and Twelve Mile Island will remain Kentucky possessions.

Before the compromise was reached,

Kentucky had lined up experts who were ready to testify that Evansville and Clarksville, Ind., and Portsmouth, Ohio, are south of the 1792 low water mark and rightly belong to Kentucky.

Indiana Attorney General Linley Pearson opened a press conference in Indianapolis yesterday by saying:

"I am happy to be able to announce today that there is not now, nor will be in the future, an Evansville, Ky."

(Ellis Park racetrack has never been at issue in the case. In 1896 the U.S. Supreme Court ruled that the track's Green River Island site is part of Kentucky, because the land was an island in 1792. By the time the case was decided, the river channel between the island and the Indiana shore had disappeared.)

The boundary will range from 100 to 2,000 feet south of Indiana's shoreline, giving Indiana more than half of the

river at some points. The place where Indiana will get as much as 2,000 feet is opposite Warrick County. The boundary line will range from 100 to 500 feet from Ohio's shoreline.

Under the agreement, Indiana will get more than the minimum 100 feet at port sites.

Indiana will extend its reach about 300 feet into the river at Mount Vernon, the location of Southwind Maritime Center.

Indiana will also get plenty of room to build the Clark Maritime Center at Jeffersonville. Daily said the line would be drawn so that Indiana's boundary extends to the middle of the channel between Six Mile Island and the Indiana Shore.

And the agreement will give Indiana a 200-foot reach from shore starting at the head of Six Mile Island and continu-

ing half a mile upstream.

Indiana will also extend about 150 feet into the river at the Marble Hill Nuclear Power Plant near Madison.

Daily said that's more than enough, because the plant needs less than 60 feet of clearance for its operation.

Ohio, meanwhile, will get more breathing room in the vicinity of the Zimmer Nuclear Power Station at Moscow.

Interior Department surveyors will soon begin drawing the new boundary on 75 maps covering the 525 miles of the Ohio River bordering Indiana and Ohio.

That work should be completed by early next year. Attorneys for the three states will examine the maps, as will Van Pelt. Within two months he will send a report to the U.S. Supreme Court, and the high court will issue a final decree in the case.

Van Pelt, who has helped resolve other

boundary disputes, including one between Texas and Louisiana, said yesterday that he wants signed copies of the new maps to be kept not only at the Interior Department in Washington but also in each of the three states.

Another step yet to be taken is the development of reciprocal agreements between Kentucky and its neighbors.

The agreements will cover such matters as the enforcement of fishing-license regulations. Because it would be difficult for a river patrol to determine where a boat is in relation to the new boundary line, the states may agree to honor each other's licenses.

Pearson said yesterday that as far as Indiana is concerned, its residents can begin to fish, hunt and boat in the Indiana portion of the river with Indiana licenses, if they wish.

Shawn Denney, chief of opinions for

the Illinois attorney general, said yesterday that he isn't sure whether Illinois will try to win similar concessions from Kentucky along the Ohio River between the two states.

"There's a little bit of indifference," he said. "There are no large towns or ports in Illinois along the Ohio."

Illinois has never been involved in a boundary dispute with Kentucky.

The dispute between Ohio and Kentucky began in 1966, when Ohio sued Kentucky in the U.S. Supreme Court, alleging that Kentucky illegally claimed the entire river.

The argument started over fishing rights.

Ohio later tried to amend its lawsuit to argue that the boundary should be the middle of the river. The Supreme Court said Ohio had waited about 200 years too long to present that argument.

In 1978 Kentucky sued Indiana, claiming that the entire river up to the current low-water mark belonged to Kentucky. Indiana argued that dams along the river had changed the low water mark, but that the boundary was fixed at the 1792 low-water mark.

The Supreme Court ruled 6-3 in the Ohio vs. Kentucky case last year that the rightful boundary is the low-water mark of 1792.

Indiana moved for a similar judgment, and got it. The Supreme Court combined the cases and appointed Van Pelt to convene a hearing to determine the boundary.

Yesterday representatives of the three states did the job for him.

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 80-78

SIMON ZUNAMON and CHICAGO MILL AND LUMBER COMPANY	Eminent Domain; flowage easement;
v.	determination of navigability
THE UNITED STATES	of river; location of river bed.

William D. Brown, attorney of record for plaintiffs. Brown, Wicker & Lee, of counsel.

Hubert M. Crean, with whom was Assistant Attorney General James W. Moorman, for defendant. Charlotte R. Bell, of counsel.

Before DAVIS, Judge, Presiding, NICHOLS and SMITH, Judges.

O R D E R

This case is before us on defendant's motion for summary judgment. Since we

determine that there are material fact issues requiring trial, the motion must be denied.

The individual plaintiff is the owner of 226 acres in Franklin Parish, Louisiana, called Little Hog Glade, and the company plaintiff owns the timber situated thereon. The suit is to recover for taking of a flowage easement. The Glade is situated on the north side of the Tensas River where it broadens to a lake, so called, at a point where it flows roughly east to west. The Glade was itself a former stream bed, and was before 1972 intermittently flooded from December to June, and dry the rest of the year. It grew trees harvested at intervals of time by the company and was the resort of cattle and hogs for grazing in the dry season only. Defendant in 1972 completed a lock and dam at Jonesville, downstream, and since then flooding has been more

extensive, and throughout the year, causing the trees to die and making the land unavailable for cattle.

Defendant's motion is supported by official maps, records, and affidavits of officials, and also one by a botany expert. Its syllogism is composed of the following elements: (1) the Tensas River is navigable, (2) the ordinary high water mark(OHWM) at plaintiffs' premises is 43 feet above mean sea level (msl), (3) the Jonesville lock and dam creates a pool only 34 feet above msl, and has no influence on water levels at Little Hog Glade above 37 feet, (4) since the navigation servitude extends to OHWM on both sides, 43 feet, the Jonesville lock and dam causes no flooding that is compensable. Q.E.D.

Plaintiffs say the navigability of the Tensas River is in issue and must be proved, but they do not expressly deny

the fact. Defendant relies on its own official maps showing the river as navigable to a point upstream of the involved land,on official reports calling the stream navigable, and on records. We are inclined to believe this is sufficient, in light of Rule 201 of the Federal Rules of Evidence, allowing us to accept as true what is generally known and capable of accurate verification if notice is given, as defendant did in its brief. If plaintiffs in their opposition had included any evidence the river was nonnavigable, a different case would be presented. As it is, they appear to want to put defendant to needless proof of a fact they do not deny.

As to the position of the OHWM, we believe we can make no finding on summary judgment. Plaintiffs say this is the other fact issue. The parties talk past one another. Defendant relies on the opinion of its botanist, who made his survey in 1978,

and he relied on a clear demarcation between hydric (aquatic) and terrestrial (upland) plants in the Glade which he then observed. Plaintiffs rely on affidavits showing how much the flooding has worsened since 1972, and how it has killed or damaged the trees. Defendant points out that it can concede the truth of these affidavits, since any increase of flooding is not compensable so long as it is on a navigable stream and all below OHWM.

Defendant's entire case, however, depends on the accuracy of its identification of the OHWM. We do not think that so vital a point can be treated as not a triable issue, where the conclusion rests on expert opinion testimony, even if the latter is not directly controverted. On trial, plaintiffs would not have to rebut this evidence with an expert of their own. They could cross-examine the opposing expert and possibly

show his opinion was not based on facts. Correspondingly, it does not appear a court can conclude, in such a case as this, that no triable fact issue exists, simply because no rebuttal opinion testimony is offered. Another difficulty is that the expert saw the property in 1978, six years after the lock and dam commenced to operate. It would seem, to the extent the line of plant demarcation establishes the OHWM it would be that line that existed when the river was in its natural state, a condition that ended in 1972. That the line was moved upwards is strongly suggested by defendant's own concession that, before its expert's survey, it had determined that OHWM was at 41.5 feet above msl.

Moreover, the natural condition of the property, before 1972, as plaintiffs' affidavits describe it, was strikingly similar to the property involved in Goose

Creek Hunting Club, Inc. v. United States, 207 Ct. Cl. 323, 518 F 2d 579 (1975). There was the same suitablity for cattle grazing, in the dry season, and the same growths of bitter pecan, willow, and overcup oak trees. The Good Creek Hunting Club property is in the same part of the world as the property here involved, and was flooded by the same Jonesville lock and dam project. We held that property was not in the bed of any stream whether navigable or other, from which it might follow that Little Hog Glade was not there either.

While the bed of a navigable stream normally extends from side to side of the stream at OHWM, there are peculiarities in the configuration of the Glade that might suggest a different reading there. Specifically, defendant's detail map shows a peninsula or cape, elevation 50 feet, and all above OHWM as demarked by defendant, that interposes between most of the Glade

and the main channel or bed of the Tensas River. Sloughs, creeks, etc., that connect with navigable streams are not thereby made navigable themselves if not themselves used as highways of commerce, and the navigation servitude does not help defendant if it backs water up into them. Goose Creek; supra; Wisconsin Bridge Co.v. United States, 114 Ct. Cl. 464, 84 F. Supp. 852 (1949), cert. denied, 339 U.S. 982 (1950). If the property is not in the Tensas stream bed, its elevation relative to OHWM would apparently not be conclusive. The Goose Creek opinion, moreover, suggests several ways of determining the location of OHWM that may, if used here, possibly lead to different results than the plant demarcation method used by defendant's expert herein.

We make no finding ourselves. We merely hold that there is a triable issue of fact as to whether the Glade is or was

in the bed of the navigable Tensas River, and as to the 1972 elevation of OHWM. We strongly suggest that a view by the trier of the locus, even in its present altered state, might be more enlightening than many thousand pages of testimony.

Upon the motion and response, the briefs of the parties, the affidavits, maps, and documents submitted by them, but without oral argument, the defendant's motion for summary judgment is denied, and the cause is remanded to the trial division for further proceedings.

BY THE COURT

July 27, 1979

OSCAR H. DAVIS
Judge, Presiding