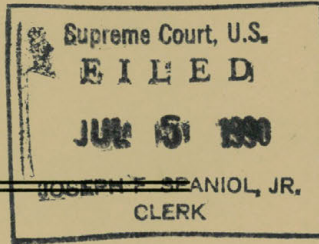


No. 106, Original



IN THE

Supreme Court of the United States

October Term, 1986

STATE OF ILLINOIS,

Plaintiff,

v.

COMMONWEALTH OF KENTUCKY,

Defendant.

REPORT OF SPECIAL MASTER

MATTHEW J. JASEN
2300 Empire Tower
Buffalo, New York 14202
Special Master

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IN THE
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October Term, 1986

No. 106, Original

STATE OF ILLINOIS,

Plaintiff,

v.

COMMONWEALTH OF KENTUCKY,

Defendant.

REPORT OF SPECIAL MASTER

I.

STATEMENT OF THE CASE

On July 24, 1986, the State of Illinois sought leave to file an original complaint against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Illinois asked this Court to enter an order and decree:

“1. Declaring the boundary line between the State of Illinois and the Commonwealth of Kentucky to be the low-water mark on the northerly shore of the Ohio River

as it existed in 1792," the date of Kentucky's admission to the Union;

"2. Perpetually enjoining the Defendant (Kentucky) from disturbing in any manner the State of Illinois or its citizens from the peaceful use, and enjoyment of all land, water and jurisdiction within the boundaries of Illinois as established by the Court."

On October 14, 1986 (107 S. Ct. 265) the Court granted Illinois' motion to file an original complaint and on December 15, 1986, Kentucky filed an answer denying that "the northern boundary of the Commonwealth of Kentucky, as established from the cession of Virginia, the Virginia-Kentucky Compact and decisions of this Court, is the low-water mark on the northerly shore of the Ohio River as it existed in 1792" and raised certain affirmative defenses that the equitable principles of acquiescence and laches operate to place its boundary with Illinois not at the 1792 low-water mark, but at the low-water mark as it exists from time to time.

Kentucky also raises by affirmative defense "the principles of riparian boundaries, including accretion, erosion and avulsion" to apply to its boundary with Illinois, as "the low-water mark on the northwestern side of the Ohio River as it exists from time to time."

On March 2, 1987, the Court appointed the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska as Special Master in this case.

By order, dated June 27, 1988, the Court appointed the undersigned, Matthew J. Jasen, to succeed Judge Van Pelt, who died April 27, 1988.

The parties spent approximately three years in discovery, which involved numerous depositions and extensive production of documents. The proceedings before the Special Master took place in January 1990 after which the parties were granted additional time to further develop the record on the affirmative defense issue of acquiescence raised by Kentucky. Additional depositions, exhibits and documents were filed in April, 1990 and considered by the Special Master in rendering this report.

II.**THE ISSUE PRESENTED**

WHETHER THE BOUNDARY LINE BETWEEN ILLINOIS AND KENTUCKY IS THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR OF 1792 WHEN KENTUCKY BECAME A STATE OR THE LOW-WATER MARK AS IT EXISTS FROM TIME TO TIME?

III.**FACTUAL FINDINGS AND
LEGAL ANALYSIS**

In order to determine the issue presented, the law and the facts bearing upon the following questions must be analyzed and answered:

A. ARE PRIOR DECISIONS OF THIS COURT ESTABLISHING THE BOUNDARY BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE STATES OF INDIANA AND OHIO, TO BE THE LOW-WATER MARK ON THE NORTHERLY SIDE OF THE OHIO RIVER AS IT EXISTED IN THE YEAR 1792, CONTROLLING PRECEDENTS ON THE QUESTION OF KENTUCKY'S BOUNDARY WITH ILLINOIS?

B. DOES THE RECORD SUPPORT KENTUCKY'S AFFIRMATIVE DEFENSES OF ACQUIESCENCE, LACHES, ACCRETION, EROSION AND AVULSION TO SUSTAIN KENTUCKY'S CLAIM THAT ITS OHIO RIVER BOUNDARY WITH ILLINOIS IS THE SHORE LINE ON THE ILLINOIS SIDE OF THE RIVER, AS IT EXISTS FROM TIME TO TIME RATHER THAN THE 1792 LOW-WATER MARK?

C. HAS THE CONSTRUCTION OF DAMS ON THE OHIO RIVER BETWEEN ILLINOIS AND KENTUCKY PERMANENTLY RAISED THE LEVEL OF THE RIVER ABOVE ITS LEVEL IN 1792, AND AS A RESULT, THE PRESENT LOW-WATER MARK ON THE ILLINOIS SIDE OF THE RIVER IS FARTHER NORTH THAN IT WAS IN 1792?

A.

Are prior decisions of this Court establishing the boundary between the Commonwealth of Kentucky and the states of Indiana and Ohio, to be the low-water mark on the northerly side of the Ohio River as it existed in the year 1792, controlling precedents on the question of Kentucky's boundary with Illinois?

"It is far too late in the day" (*Ohio v. Kentucky*, 444 U.S. 335 [1980]) for Kentucky to argue that the low-water mark on the northwest side of the Ohio River, as it exists from time to time, is its boundary with Illinois. Kentucky's Ohio River boundary with the States bordering it to the north has been before the Court several times (*Handly's Lessee v. Anthony, et al.*, 5 Wheat. 374 [1820]; *Indiana v. Kentucky*, 136 U.S. 479 [1890]; *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 [1899]; *Ohio v. Kentucky*, 444 U.S. 335 [1980]), and I am of the opinion that the Court's holdings in those cases are controlling precedents here.

More than one hundred years ago, Chief Justice Marshall writing for a unanimous court in *Handly's Lessee v. Anthony, supra*, recognized that Kentucky's Ohio River boundary was not to be resolved by the general rule that the territory of each state bordering a river extends to the middle of the stream. Instead, after reviewing Virginia's Cession to the United States of lands had to the territory northwest of the Ohio River, the Chief Justice concluded that:

"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream, but when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is the boundary". *Id.* at 377.

Clearly, the Court determined that the State of Virginia held title to land on both sides of the Ohio River prior to its cession to the United States of lands northwest of the Ohio River and retained the river as its boundary with the new territory ceded to the United States. Thus, when Kentucky entered into a compact with Virginia, it succeeded to Virginia's title to the land retained by Virginia along the Ohio River.

Seventy years after *Handly's Lessee* was decided, the Court, in *Indiana v. Kentucky*, 10 S. Ct. 1031, had an opportunity to pass on the question of whether Kentucky's Ohio River boundary with Indiana [part of the lands ceded to the United States by Virginia in 1783] was fixed at the time it was admitted into the Union to the low-water mark on the northwest side of the river or whether the boundary could be affected by any subsequent change of the Ohio River.

A unanimous Court held:

"[Kentucky] 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 water might so depart from its ancient channel as to the 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. *Mississippi 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.

* * * * *

"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 the 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." *Id.*, 10 S. Ct. 1053, 1057.

Thus, the Court rejected all of Indiana's arguments pertaining to the date for establishing the low-water mark boundary and adopted the date espoused by Kentucky—June 1, 1792, the date of Kentucky's admission to the Union.

It is of no legal consequence that *Indiana v. Kentucky* concerned a portion of the Ohio River relating to the Indiana-Kentucky boundary since the applicable principles are the same and should have pertinent application here. Subsequent to the decision in *Indiana v. Kentucky*, the Court had several times reiterated the position taken in that case.

In *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592 (1899), the issue there was the authority of the Kentucky Municipality of Henderson to tax a railroad bridge built across the Ohio River to the Indiana shore. In its recitation of relevant facts, the Court noted that City of Henderson's statutory boundary extended "to low-water mark on the Ohio River on the Indiana shore" and that it had the authority to tax the property within its jurisdiction. *Id.* at 594. Since both the grant of Henderson's boundary and the power to tax came directly from the State of Kentucky, the Court reasoned that the decisive question was whether the boundary of Kentucky itself extended to the low-water mark on the

Indiana shore. In deciding the question in favor of Kentucky and the City of Henderson, the Court cited its earlier decision in *Indiana v. Kentucky*:

“Referring to the channel of the Ohio River as it was when Kentucky was admitted to the Union, the 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.’ ” *Id.*, at 613.

The most recent decision of the Court pertaining to Kentucky’s Ohio River boundary is *Ohio v. Kentucky*, 444 U.S. 335 (1980). In that case, as in the present case, Kentucky repudiated the argument it put forth in *Indiana v. Kentucky* and contended that the low-water mark as it exists from time to time, not the low-water mark as it existed in 1792, was its northerly boundary with Ohio.

In overruling the exceptions of Kentucky to the report of the Special Master’s recommendation that the boundary between Ohio and Kentucky “is the low-water mark in the northerly side of the Ohio River as it existed in the year 1792”, the Court’s majority noted again the special historical nature of Kentucky’s boundary with the States to the north.

“It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, see, e.g. *Nebraska v. Iowa*, 143 U.S. 359 or the Mississippi River between Arkansas and Mississippi. See *Mississippi v. Arkansas*, 415 U.S. 289 and 415 U.S. 302. See also *Iowa v. Illinois*, 147 U.S. 1; *Missouri v. Nebraska*, 196 U.S. 23; *Minnesota v. Wisconsin*, 252 U.S. 273; *New Jersey v. Delaware*, 291 U.S. 361; *Arkansas v. Tennessee*, 310 U.S. 563. In these customary

situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

"A river boundary situation, however, depending upon historical factors, may well differ from the customary situation. See, for example, *Texas v. Louisiana*, 410 U.S. 702, where the Court was concerned with the Sabine River, Lake and Pass. And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different. Here the boundary is not the Ohio River just as a boundary river, but is the northerly edge, with originally Virginia and later Kentucky entitled to the river's expanse." 444 U.S. at 337.

In response to Kentucky's argument that it is entitled to the river's expanse and that its northern boundary with Ohio should be "the low-water mark on the northwestern side of the Ohio River as it exists from time to time", the majority of the Court noted that:

"... it is far too late in the day to equate Ohio with the Missouri, with the Mississippi, or with any other boundary river that does not have the historical antecedents possessed by the Ohio, antecedents that fix the boundary not as the river itself, but as its northerly bank [as it existed in 1792]". *Id.* at 590.

Once again it must be stated that although *Ohio v. Kentucky* involved a portion of the Ohio River relating to the Ohio-Kentucky boundary, it is of no legal consequence since the applicable principles are the same and should have pertinent application in this case.

I conclude that prior decisions of this Court control this case, and that the boundary between the State of Illinois 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 not the low-water mark on the northerly side as it exists from time to time.

B.

Does the record support Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the shore line on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark?

Kentucky's Second, Third and Fourth Defenses allege that the equitable principles of acquiescence and laches operate to place its boundary with Illinois not at the 1792 low-water mark, as may be required by prior controlling decisions of this Court, but at the low-water mark as it exists from time to time.

Under the doctrine of prescription and acquiescence, it may be proved that one party has recognized through its actions a riparian boundary claim by another party. See *Michigan v. Wisconsin*, 270 U.S. 295, 308. That question, however, is one of fact, and the burden of establishing the affirmative defense of acquiescence is upon the party asserting it. *E.g.*, *Maxwell Land Grant Co. v. Damson* (151 U.S. 586, 604).

Before beginning an examination of the facts and the evidence submitted, however, the basic requirements of the affirmative defense of acquiescence should be noted. It requires two things: (1) the long and continuous assertion of a claim of right on the one side, and (2) an acquiescence therein upon the other. See *e.g.*, *Oklahoma v. Texas*, 272 U.S. 21, 47. Thus, if Kentucky claims, as it does, the benefit of this defense, it must demonstrate, by a preponderance of the evidence, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, and that Illinois has acquiesced therein.

Examining the facts and evidence presented on the first requirement of establishing the defense of acquiescence, it seems abundantly clear that Kentucky has not demonstrated a continuous assertion of right in favor of the boundary it has claimed in this litigation. Since at least the time of *Indiana v. Kentucky*, [1890], there are documented, official statements from all three branches of the Kentucky government identifying Kentucky's Ohio River boundary as the northern low-water mark as it existed in 1792, the date of Kentucky's admission to the Union.

Evidence of Kentucky's official acknowledgment from its executive branch of government is opinion number OAG63-847 issued by the Kentucky Attorney General on September 13, 1963 (Filing No. 12(i)). In responding to a request from the Kentucky Department of Fish and Wildlife Resources seeking an opinion as to the location of the northern boundary on the Ohio River, the Kentucky Attorney General offered the opinion that:

"The law, of course is that the boundary line between the states of Indiana and Kentucky is the low-water on the north shore of the Ohio as it existed when Kentucky became a state in 1792. *State of Indiana v. Commonwealth of Kentucky*, 10 S. Ct. 1051, 136 U.S. 479, 34 L. Ed. 329 (1889)." OAG 63-847 at 1.

The Attorney General also acknowledged that locating the 1792 line would be difficult as the level of the river has been raised since the construction of dams in the river so that "the old low-water mark does not under present water level conditions extend right to the Indiana shore." *Id.* at 2. While this opinion letter was specifically addressed to an Indiana-Kentucky border incident, the rationale employed by the Kentucky Attorney General would be also applicable to all the states bordering Kentucky on the Ohio River.

Kentucky submits that the opinion rendered by its attorney general is only advisory in nature and cannot be considered as controlling authority in an original action regarding the location of a boundary between two states. While this opinion from the chief legal officer of Kentucky may not, in and of itself, be controlling authority on the issue of acquiescence, it is certainly evident that the Commonwealth of Kentucky has not continuously asserted its boundary with the States bordering on the Ohio River to be the low-water mark as it exists from time to time.

In addition to this evidence from Kentucky's executive branch of government, documents have been introduced from the legislative branch of government that plainly refute Kentucky's position in this case. The first such document is Informational Bulletin No. 81 of the Kentucky Legislative Research Commission, dated December 1969, which addresses the question of Kentucky's Ohio River boundary (Filing No. 12(b)). In the Forward to this document it states, the subcommittee on the Ohio River boundary was established in 1966 to study the facts of the boundary problem due to the recurrence, over a one hundred and fifty year period, of litigation over the location of Kentucky's northern Ohio River boundary. The Forward also acknowledges that the boundary matter will finally be resolved by the United States Supreme Court (*Id.* at page ii). It should be obvious that these references to recurring litigation over a one hundred and fifty year period and the role of the Supreme Court in finally deciding the northern Ohio River boundary issue are hardly consistent with Kentucky's contention in this case that it has continuously asserted the low-water mark as it exists from time to time as its boundary.

Moreover, Chapter II of Informational Bulletin No. 81 contains the Legislative Research Committee's summary of the litigation involving Kentucky's Ohio River boundary. In a preface to the text of the Court's decision in *Indiana v. Kentucky*, *supra*, the report states:

"In *Indiana v. Kentucky*, 136 U.S. 479 (1890) the Supreme Court was confronted with a dispute as to the ownership of Green River Island which at the time of the suit was located on the north side of the Ohio River. In finding that at the time when Kentucky became a state, the low-water mark of the river was north of the island, the Court determined that the boundary between states of Indiana and Kentucky was the low-water mark on the Ohio River *as the mark existed in the year of 1792.*" (Emphasis added). Informational Bulletin No. 81 at 18.

Certainly, the Kentucky Legislative Research Commission did not consider that decision as support for Kentucky's present claim of the low-water mark as it exists from time to time, but viewed it as the Court later did in *Ohio v. Kentucky*, *supra*, as authority for the proposition that Kentucky's northern Ohio River boundary is the low-water mark as it existed in 1792. Kentucky submits that the opinions expressed and the statements made by a service agency to the Kentucky legislature, do not and cannot represent the sovereign position of the Commonwealth nor be binding authority in this litigation. As stated before in reference to an opinion by the Kentucky Attorney General, the opinions expressed and the statements made by the Kentucky Legislative Research Commission, may not, in and of themselves, be binding authority in this litigation on the issue of acquiescence, but they certainly constitute evidence which the Court may consider as to whether there was continuous assertion by the Commonwealth of

Kentucky that its boundary with the States bordering on the Ohio River was the low-water mark as it exists from time to time.

In December, 1972, the Kentucky Legislative Research Commission issued another report pertaining to Kentucky's Ohio River boundary (Informational Bulletin No. 93, Filing No. 12(a)). It is interesting to note that beginning with the Forward to the report, the joint committee of Kentucky's General Assembly, acknowledges "the relevance of the Supreme Court's decision in *Indiana v. Kentucky*." In addition, Part II of Informational Bulletin 93, entitled "Legal Opinion" states:

"Kentucky's North and Western boundary, to-wit, the low-water mark on the North shore of the Ohio River *as of 1792* has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia." (Emphasis added). Informational Bulletin No. 93 at 3.

Following this statement, the report discusses the legal precedents supporting it, beginning with *Handly's Lessee v. Anthony* and ending with the Court's initial opinion in *Ohio v. Kentucky* (410 U.S. 646).

Interestingly, the report also responds to Ohio's claim in the proposed amendment to its complaint against Kentucky that its boundary with Kentucky was not the low-water mark on the northerly side of the Ohio River and that the Supreme Court's determination of the Indiana-Kentucky boundary in its decision in *Indiana v. Kentucky*, *supra*, was not binding on Ohio:

"... it would be hard to imagine that the boundary of Ohio would be in one location, and that of Indiana and Kentucky would be in another." Informational Bulletin No. 93 at 4.

At the hearing before the Special Master, Illinois argued that it is even harder to imagine that Kentucky's boundary on the Ohio River with both Indiana and Ohio would be in one location and its boundary with Illinois in another. Difficult to imagine as that may be, it is of course possible, but only if Kentucky establishes its affirmative defense of acquiescence as to Illinois.

Finally, it is significant to note that the report makes abundantly clear Kentucky's awareness of the consequences of its continued adherence to the 1792 low-water mark. At page 4 of the Informational Bulletin No. 93, it states:

"... and conceivably there could be places ... where a state on the north shore of the Ohio River may have a true boundary that extends as much as 100 yards or more into the stream. ..."

In its footnote 11 to this quote, the Kentucky Legislative Research Commission pointed out that one source for the conclusion was the series of quadrangular maps (quads) prepared under the auspices of the United States Geological Survey (U.S.G.S.). As noted in footnote 11, these maps contain the following language:

"The state boundary, as shown, represents the approximate position of the low-water line as determined from U.S. Corps of Engineers charts surveyed 1912 and supplementary information." Informational Bulletin No. 93 at 5.

Interestingly Kentucky eventually resolved its boundaries with Indiana and Ohio following the holding in *Ohio v. Kentucky*, 444 U.S. 335, by use of a series of maps prepared by the U.S. Geological Survey and based on the Corps of Engineers' survey of the northern low-water line of the Ohio River early in this century. (Filing No. 41, Exhibit 1, William E. Kreisle affidavit, par. 22-25).

The 22 U.S.G.S. quads portraying the Ohio River between Illinois and Kentucky do not support Kentucky's position in this case, as all but one of the series showing the Illinois-Kentucky boundary contain language virtually identical to that quoted above. Furthermore, even on that sheet, known as the Golconda quad, the boundary is shown some distance from the current Illinois shore, and it seems apparent that the boundary line shown there is also meant to reflect the 1792 low-water mark as determined from the Corps of Engineers survey conducted before the construction of the dams on the river. (See, Filing No. 41, Exhibit 1, William E. Kreisle affidavit, par. 22-29 and Filing No. 44, Exhibit 7).

In addition to these documents from the legislative and executive branches of Kentucky's government that fail to support the first requirement of establishing its affirmative defense of acquiescence, the decisions of the Kentucky courts likewise refute its assertion that the Ohio River boundary between Illinois and Kentucky is the low-water line as it exists from time to time.

From Illinois' point of view, the case of *Perks v. McCracken*, 169 Ky. 590 (1916) can be construed as being most favorable to it. In this case, the plaintiff, McCracken brought suit against the defendant, Perks and another, based upon his claim that he owned a towhead in the Ohio River near Mound City, Illinois, and that the defendants had unlawfully removed sand and gravel from the towhead. The Kentucky Supreme Court noted that the plaintiff traced his title to a patent issued in 1854 by Kentucky and stated that the case would be resolved on the question whether the towhead was part of Kentucky or the State of Illinois.

Citing *Indiana v. Kentucky*, *supra*, the court concluded that the decisive question was:

“... where was the low-water mark at the time Kentucky became a state, and does the island in question lie between the low-water mark as it then existed and the Kentucky shore? If so, it is part of Kentucky.” 169 Ky. at 591.

Although the evidence presented at trial did not extend back to 1792, the Court, nevertheless held, that the proof establishing that for a great many years the land in question was an island, it was sufficient to find that it was within Kentucky.

Though *Perks v. McCracken*, is the only case cited to me that defines Kentucky's Ohio River boundary specifically as being the 1792 low-water mark, there are a number of other Kentucky cases defining the Ohio River boundary only as the low-water mark, rather than in the terms asserted by Kentucky—as the low-water mark as it exists from time to time. *Commonwealth v. Henderson Co.*, 371 S.W. 2d 27 (1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W. 2d 119 (1954); *Shannon v. Streckfus Steamers*, 279 Ky. 649 (1939); *City of Covington v. State Tax Commission*, 231 Ky. 606, 21 S.W. 2d 1010 (1929); *Willis v. Boyd*, 224 Ky. 732, 7 S.W. 2d 216 (1928); *Bedford-Nugent Co. v. Herndon*, 196 Ky. 477 (1922); *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S.W. 724 (1916) Aff'd 248 U.S. 113 (1918); *Ware v. Hager*, 126 Ky. 324, 103 S.W. 283 (1907); *Commonwealth v. Louisville & E. Packet Co.*, 117 Ky. 936, 80 S.W. 154 (1904); *Meyler v. Wedding*, 107 Ky. 310, 53 S.W. 809 (1899); rev'd on other grounds, 192 U.S. 573 (1899); *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189, 5 Ky. L.R. 16 (1833); *Berry v. Snyder*, 66 Ky. (8 Bush.) 266 (1867); *Spaulding v. Simms*, 61 Ky. (4 Metc.) 285 (1863); *McFall*

v. Commonwealth of Kentucky, 59 Ky. (2 Metc.) 394 (1859); *McFarland v. McKnight*, 45 Ky. (G.B. Mon.) 500 (1846); *Church v. Chambers*, 33 Ky. (3 Dana) 274 (1835); *Fleming v. Kenny*, 27 Ky. (4 J.J. Marsh) 155 (1830).

Nevertheless, Kentucky argues that the northerly low-water referred to in these decisions necessarily means the prevailing low-water mark under the universally accepted principle that the boundary follows the stream in its original channel and cites in support of this interpretation *Arkansas v. Tennessee*, 246 U.S. 158, 647, 648 (1919); *Nebraska v. Iowa*, 143 U.S. 359, 361-62 (1892); and *Berry v. Snyder*, 66 Ky. (3 Bush.) 266, 279 (1867).

The Supreme Court cases cited do not support Kentucky's view as the principle espoused by the Court in those cases does not apply to this case. The *Arkansas* case involves two states bounded by the Mississippi River and the *Nebraska* case involves two states bounded by the Missouri River. In both of these cases, the legal definition of river boundary is the same—the middle of the navigable river, or the Thalweg. (See *Iowa v. Illinois*, 147 U.S. 1 (1893)). The Ohio River is another matter. The Court in *Ohio v. Kentucky* made it abundantly clear that the Thalweg doctrine, and the attendant rules regarding accretion and avulsion, are not applicable in any case involving Kentucky's Ohio River boundary.

"It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska—see e.g. *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892), or the Mississippi River between Arkansas and Mississippi. See *Mississippi v. Arkansas*, 415

U.S. 289, 94 S. Ct. 1046, 39 L. Ed.2d 333 (1974), and 415 U.S. 302, 94 S. Ct. 1052, 39 L. Ed.2d 342 (1974). See also *Iowa v. Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55 (1893); *Missouri v. Nebraska*, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372 (1904); *Minnesota v. Wisconsin*, 252 U.S. 273, 40 S. Ct. 313, 64 L. Ed. 558 (1920); *New Jersey v. Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847 (1934); *Arkansas v. Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362 (1940). In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

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." 444 U.S. at 337.¹

This rejection in *Ohio v. Kentucky* of the Thalweg doctrine and the attendant rules regarding accretion and avulsion to any case involving Kentucky's Ohio River boundary should make it absolutely clear that Kentucky's reliance upon *Arkansas v. Tennessee* and *Nebraska v. Iowa* is misplaced.

Kentucky also offered proof on the first prong of its affirmative defense, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, the testimony of four law enforcement officers, two coroners and two Coast Guard officers concerning a number of incidents on the Ohio River.

¹ Although the Court's 1918 opinion in *Arkansas v. Tennessee* is not cited in the above excerpt, the Court does cite *Iowa v. Illinois*, and the opinion in *Arkansas v. Tennessee* makes it clear that the result there is controlled by *Iowa v. Illinois*.

The first of these witnesses to be deposed was Charles Claude Storms, a retired Kentucky Water Patrolman. (Filing No. 23(a)). Mr. Storms testified that he was a water patrolman "off and on 16 years" (Filing No. 23(a) at p. 4) and was assigned to duty on the Ohio River opposite the State of Illinois for approximately eight years. Regarding the issuance of citations on the Ohio River, he stated he would issue a citation anywhere on the river but would not issue one to a boat in the river tied to the Illinois shore. Mr. Storms' understanding of the location of the Ohio River boundary was uncertain, as he testified that it was "the waterline, high-water mark or low-water mark of each adjoining state" and in reply to a question on direct examination testified:

"Q. 26 ... If the river were high, and if the river level changed, was it your understanding that the boundary changed?

A. It never changed the boundary as far as I know."

The second Kentucky law enforcement officer, David Loveless, a Captain in the Division of Law Enforcement with the Department of Fish and Wildlife, stated that his understanding of the Kentucky and Illinois boundary was "the normal standing pool of the Ohio River" which he equated with the low-water mark. (Filing No. 23(c) pp. 4-8).

The third witness, Steven Owens, a Kentucky Water Patrolman since 1976, testified that his understanding of the boundary between Illinois and Kentucky "was the water edge of the northern shore." (Filing No. 23(d) pp. 5-6). When asked if his understanding of the location of the boundary was recorded anywhere in Water Patrol Department's rules and procedures, he replied:

"I'm not exactly sure. It's just—it's always been the policy that was handed down to me, and I understand that that's the way Constitution read."
At p. 6.

Contrary to the testimony of fellow Water Patrol Officer Storms, Mr. Owens stated he would include in his jurisdiction a boat tied to the Illinois shore. (At pp. 6-7).

The final law enforcement officer deposed, David Donan Jenkins, had been with the Kentucky Department of Fish and Wildlife, Law Enforcement Division for 31 years and had been a captain in the division since 1985. When asked where he understood the Illinois-Kentucky boundary to be, he replied that it was the point where the river touched the bank. While Jenkins stated he was unaware of any Departmental instructions regarding the boundary location, he testified:

"You know, prior to me, everybody knows that the Ohio River is Kentucky." At p. 6.

Kentucky takes the position that this remark, as well as other similar statements made by the other deposed law enforcement officers, establishes its continuous assertion that the boundary with Illinois is the low-water mark on the northerly side of the Ohio River as it exists from time to time. It is difficult to accept this conclusion in view of Kentucky's prior repeated official statements claiming the low-water mark as it existed in 1792 when Kentucky became a state, to be its boundary. Starting with its position in *Indiana v. Kentucky*, *supra*, and including an opinion of its attorney general, a court decision in *Perks v. McCracken*, *supra*, and a Legal Opinion contained in Informational Bulletin No. 93 issued by the Kentucky Legislative Research Commission, Kentucky has consistently claimed its northern border on the Ohio River to be the 1792 low-water mark, and not the low-water mark as it exists from time to time.

Depositions from two coroners were also presented by Kentucky on the acquiescence issue. The first, Jerry Beyer, coroner of McCracken County since 1980, and deputy coroner from 1972 to 1980, stated that the crucial factor in determining whether an accident or drowning victim comes within his jurisdiction was not the place of death but the place where the body was recovered. (Filing No. 29, p. 13). He testified as to four incidents on the Ohio River. None of the incidents support Kentucky's defense of acquiescence. In the first drowning incident, Mr. Beyer was unable to recall how far from the Illinois shore the body was recovered. (Filing No. 29, p. 4). In the second drowning, the body was recovered "in the center of the river, hung up on the dam wickets." (Filing No. 19, p. 7). The third drowning, the body was recovered approximately 50 yards from the Illinois bank. In the last drowning testified to by Mr. Beyer, involving a person named Dennis Crane, the body was recovered near the Ballard County community of Oscar on the Kentucky side of the Ohio.

The second coroner, Harry Van Smith, coroner of Livingston County, Kentucky for eleven years, testified that there were an average of one or two deaths per year on the Ohio River in his area and that in his experience those deaths were always handled by him rather than the Illinois coroner.

In order for Kentucky to establish support for its position of acquiescence on the part of Illinois, it must be shown that the bodies recovered by Kentucky coroners from the Ohio River were north of the 1792 low-water line, as Illinois acknowledges Kentucky's jurisdiction south of that line. The evidence does not establish that the bodies handled by the two Kentucky coroners took place on the Illinois side of the 1792 low-

water mark. Even if this evidence regarding the few deaths handled by Coroners Beyer and Smith was accepted as some support for Kentucky's claims of continuous assertion that its boundary with Illinois was the low-water water as it exists from time to time, it is of little weight when considered with the evidence offered by Illinois that for more than eighty years, Illinois coroners have handled at least 214 bodies recovered in the Ohio River (Filing No. 31, Illinois Supplemental Response to Kentucky's First Set of Interrogatories).

While there is evidence in the record that the current Illinois coroners differ as to their practice regarding bodies found on the Ohio River and their opinions as to where they believe the boundary between Illinois and Kentucky to be, some of the coroners have worked out informal practical accommodations with their counterpart coroners in Kentucky in exercising jurisdiction over drowning victims, such as for example, "if it was somebody from Illinois, the Illinois coroner would handle the situation, and if it was somebody from Kentucky, the Kentucky coroner would handle it." (Filings Nos. 46, 34).

Such informal practical accommodations, do not, in my opinion, constitute acquiescence since they are not based on any concession of right by either side, but rather, brought about by uncertainty on both sides as to the location of the actual boundary. Like the Kentucky law enforcement officers and coroners, the Illinois coroners were unaware of their state's position as to the Illinois-Kentucky boundary, and as a result their opinions on its location were as varied as those of the Kentucky witnesses.

In addition to the law enforcement officers and coroners whose testimony has been reviewed, the record contains depositions of two U.S. Coast Guard Officers, Commander John L. Bailey (Filing No. 23(b)) and Captain Thomas H. Robinson (Filing No. 25). Both testified as to a strike incident at a cement plant near Joppa, Illinois and Captain Robinson also testified as to two accidents on the Ohio River. I find that their testimony, as a whole, provides very little support for Kentucky's claim of acquiescence, as it reflects the sort of uncertainty and confusion that are incompatible with a finding of acquiescence.

In reviewing all the evidence produced by Kentucky on the first requirement of establishing the affirmative defense of acquiescence—that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time—I find that the record does not support such a finding.

In view of the above finding, it would not be necessary to discuss Kentucky's second requirement of establishing its affirmative defense of acquiescence—that Illinois acquiesced through its actions, to the low-water mark of the Ohio River as it exists from time to time as its boundary with Kentucky. However, in carrying out my principal function—the development of an evidentiary record—I have chosen to make factual findings on the entire range of issues that the parties have presented for resolution for the Court to consider in making its final determination.

Examining the facts and evidence presented on the second requirement of the doctrine of acquiescence, I will first consider the documents and incidents relied upon by Kentucky, and following that I will pass on evidence

submitted by Illinois in opposition to Kentucky's claim that it had exercised sole jurisdiction over the entire breadth of the Ohio River.

The first documents relied upon by Kentucky consist of two letters dated September 28, 1954 from H.E. Diers, Assistant Engineer of Maintenance of the Illinois Department of Public Works and Buildings. These letters purport to discuss marking the Illinois-Kentucky boundary with a sign at the location of the Ohio River bridge near Cairo, Ohio. In the letter, addressed to William D. MacLeod, District Engineer, the author says of the boundary language contained in the 1870 Illinois Constitution that, "This I believe can be interpreted to mean the shoreline at the mean, normal, water elevation along the Illinois shore." (Filing No. 12(m)). Similarly, in the second letter addressed to W.J. Crouse, Director of Maintenance, Kentucky Department of Highways, Mr. Diers states that "[i]t is possible" that the boundary can be fixed as he suggests and that it "can probably be determined by examination of the gauge readings in the U.S. Engineers' Office at Cairo." (Filing No. 12(l)). Diers' choice of words, such as "This I believe can be *interpreted*", "[i]t is *possible* that the boundary can be fixed" and that it "can *probably* be determined" hardly reflect certainty. This conclusion is reinforced by the final paragraph of the second letter in which Diers asks the Director of Maintenance, Kentucky Department of Highways, whether he "concur[s] in this method or if you will be kind enough to make a suggestion in regard to the establishment of this state line." In any event, it is my opinion that the purpose of the Dier correspondence was not to locate the state boundary precisely but simply to place a sign on the bridge somewhere near the approximate state line to alert motorists that they were entering or leaving Kentucky or Illinois.

In addition to the Dier correspondence, Kentucky also offers evidence regarding four bridges which connect Kentucky with Illinois, as evidence of acquiescence on the part of Illinois (Filing No. 61, Exhibits 53, 61, 64, 66a). Illinois' position in regard to this evidence is that these documents are equivocal at best and do not support Kentucky's claim of acquiescence. In support of this conclusion, Illinois cites the response of Special Master Judge Van Pelt in his report No. 27, Original, *Ohio v. Kentucky*, January 3, 1979, to similar evidence regarding bridge agreements which Kentucky offered in that earlier case. In rejecting Kentucky's offer of this documentation, Judge Van Pelt said at pp. 13-14:

"Your Special Master concludes that it would not be a benefit to take evidence involving the bridge contracts, and undoubtedly an agreement as to the boundary was made merely to expedite and facilitate the construction of the bridges. At approximately the same time as these contracts were being executed, there were Kentucky legal opinions above mentioned recognizing the 1792 boundary. Your Special Master prefers to rely on the previous cases in this Court rather than bridge agreements."

The other exhibits (54-60, 62, 63, 65-69) offered by Kentucky pertaining to bridges do not support Kentucky's claim of acquiescence on the part of Illinois.

In support of its defense of acquiescence, Kentucky also relies upon the boundary descriptions contained in the Illinois Constitutions of 1818, 1848 and 1870, which describe Illinois' boundaries as follows:

"Beginning at the mouth of the Wabash river; thence up the same, and with the line of Indiana, to the northwest corner of said state; thence east, with the line of the same state, to the middle of Lake Michigan, thence north, along the middle of said lake, to north latitude 42° and 30' thence west to

the middle of the Mississippi river, and thence up the latter river, *along its northwestern shore*, to the place of beginning." Illinois Constitution of 1818, Articles Introduction; Illinois Constitution of 1848, Art. 1; and Illinois Constitution of 1870, Art. 1. (Emphasis added).

The boundary language incorporated by the framers of Illinois' 1818 Constitution, and thereafter copied in the Constitutions of 1848 and 1870, is clearly a verbatim recitation of the language used by Congress to describe the newly created State of Illinois' boundaries in its Enabling Act of April 18, 1818 (Filing No. 41, Exhibit 14). What Congress intended to be the southern boundary of Illinois, was the same southern boundary granted the states of Ohio and Indiana when they were formed. As Kentucky acknowledges in its Answer, Illinois, like Ohio and Indiana, was created from the territory ceded by Virginia to the United States "situate, lying and being, northwest of the river Ohio." I find nothing in the legislation creating the Northwest Territory (Ordinance of 1787. U.S. Rev. Stats. 2d Ed. 1878, p. 13; Filing No. 41, Exhibit 15), the Indiana Territory (Act of Congress, May 7, 1800. 2 U.S. St. at Large, 58; Filing No. 41, Exhibit 16) or the Illinois Territory (Act of Congress, Feb. 3, 1809. 2 U.S. St. at Large, 514; Filing No. 41, Exhibit 17) which would suggest that the United States meant to convey a different southern boundary to Illinois than was conveyed to Ohio and Indiana, to wit, the low-water mark as it existed in 1792.

Kentucky also relies upon the *Geography of Illinois*, written by Douglas C. Ridgley and published in 1921 by the University of Chicago Press as documentary evidence of Illinois' acquiescence to a boundary other than the 1792 low-water mark. I agree with Illinois'

position that this privately published book does not constitute evidence of acquiescence on its part. As a work of private scholarship, it represents only the opinions of the author and those opinions should not be attributable to the State of Illinois.

Finally, Kentucky argues that the document entitled "Report of the Joint Select Committee Appointed to Investigate the Nature and Extent of the Jurisdiction of Illinois Over the Ohio River" is evidence of acquiescence on the part of Illinois. This report (Filing No. 12(h)) was submitted by the Committee to the Illinois Legislature on January 25, 1849. The substantive portion of the report begins with the following statement:

"It is conceded that the Ohio River, to low-water mark, is included within the limits of the State of Kentucky." Report of Joint Select Committee at 1.

Illinois concedes that in 1849, prior to the construction of dams on the Ohio River, the boundary between Illinois and Kentucky was the low-water mark, the same as it was in 1792 when Kentucky became a state. However, subsequent to the construction of dams on the river, the low-water mark moved farther north. Thus, even if this document is assumed to be evidence of acquiescence to the low-water mark as it existed in 1849, it certainly does not constitute acquiescence to the low-water mark as subsequently altered by the construction of the dams.

There is nothing in the second page of the report, dealing with the history of Virginia's cession of territory to the United States and the conditions set forth regarding the formation of states from that territory, which can be said to show acquiescence by Illinois.

The remainder of the report is concerned with a subject not at issue in this case—the right of Illinois and the other states bordering Kentucky along the Ohio

River to concurrent jurisdiction with Kentucky over the entire breadth of the river. The existence of concurrent jurisdiction over the Ohio River can be traced to a Virginia statute passed in 1789 which proposed making the district of Kentucky a separate state. Section eleven of the legislative enactment, known as the Virginia Compact, provides as follows:

"Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of the commonwealth and the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of said river." 13 Henings Stat. 17. (Emphasis added).

Concurrent jurisdiction has nothing to do with the location of the boundary on the Ohio River, but rather refers to a shared jurisdiction granted the states on both sides of the river. (*Wedding v. Meyler*, 192 U.S. 573 [1904]; see also *Nicoulin v. O'Brien*, 248 U.S. 113 [1918] and *Nielsen v. Oregon*, 212 U.S. 315 [1909]).

Passing on to the evidence submitted by Illinois in opposition to Kentucky's claim that it had exercised sole jurisdiction over the entire breadth of the Ohio River and that Illinois had acquiesced therein, Illinois points out that there is no Kentucky case cited that asserts Kentucky's boundary with Illinois, or any other bordering state on the northwest side of the Ohio River, to be the low-water mark "as it exists from time to time." Likewise, there is no Illinois case acknowledging that to be Illinois' southern boundary.

In *Ensminger v. People*, 47 Ill. 384 [1868], decided before the construction of dams on the Ohio River, the Illinois-Kentucky boundary is placed at the low-water mark on the Illinois shore. This decision does not support Kentucky's claim of acquiescence to the low-water mark as subsequently changed by the construction of dams, it merely speaks of the low-water mark as it existed in 1869.

The Court in *Union Bridge Co. v. Industrial Com.*, 287 Ill. 396 [1919] ruled that since the facts established that the accident occurred 1185 feet south of the low-water mark, it was outside the jurisdiction of Illinois. How the court determined the location of the low-water mark to measure the 1185 feet is not stated and therefore, like *Ensminger*, does not support Kentucky's claim of acquiescence on the part of Illinois to a low-water "as it exists from time to time."

Joyce-Watkins Co. v. Industrial Com., 325 Ill. 378 [1927], like *Union-Bridge, supra*, involved the question of the Illinois Industrial Commission's jurisdiction over an accident that took place on or over the Ohio River. The injury took place on tracks extended from the Illinois shore out into the river, roughly 8-10 feet from the river's edge. The employer, Joyce-Watkins Co., argued that since the injury took place beyond the water's edge, it occurred outside the State of Illinois.

In rejecting this and several related arguments made by the plaintiff, the court began by citing *Indiana v. Kentucky, supra*, for the proposition that Illinois' boundary with Kentucky was the low-water mark on the northwest shore of the Ohio River. It then noted that no commission had ever been appointed to determine the location of that line and further noted that it was not necessary or appropriate to ascertain the actual

boundary in the case before it, since the phrase "low-water mark", by definition, meant "the point to which the water receded at its lowest stage." *Id.* at p. 381. Thus, in order to rule on the case before it, the court did not need to ascertain the precise location of the boundary as it existed on the day of the accident, but had only to determine if the low-water mark at the point in question had ever been south of the place of injury. The court, therefore concluded that since there was evidence presented that a low-water mark had at one time existed approximately 250 feet south of the place of injury, it had occurred within the State of Illinois.

Although the Illinois Supreme Court in the *Joyce-Watkins* case misapplied the holding in *Indiana v. Kentucky*, it is abundantly clear that the court's decision directly contradicts Kentucky's claim that Illinois had acquiesced in a low-water mark as it exists from time to time. Certainly, the *Joyce-Watkins* rule called for a moving boundary, but the movement contemplated by the court would be exclusively in favor of Illinois as each record drought would move the boundary further southward.

The continued adherence by the Illinois Courts to the *Joyce-Watkins* rule as late as 1973 (see *People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3rd 944), clearly indicates that Illinois has not acquiesced to Kentucky's boundary claim of a low-water mark as it exists from time to time.

Evidence of assertions of jurisdiction by Illinois local governments over a portion of the Ohio River by the enactment of ordinances is found in Filing No. 55 (Exhibits 34-55). Several of these ordinances, while not addressing the boundary specifically, involve assertions of jurisdiction over portions of the Ohio River since they

prohibit certain conduct on the waters of that river. Exhibit 50, for example, prohibits keeping a boat or watercraft for the purpose of prostitution on the Ohio River within the jurisdiction of the Village of Joppa, Illinois. Exhibits 54 and 55 involve ordinances of the cities Cairo and Mound City, Illinois, which describe the boundaries of these cities as extending to the middle of the main channel of the Ohio River.

Additional evidence of Illinois' assertion of jurisdiction over the Ohio River is found in permits issued by the Illinois Department of Transportation, and its predecessor, the Department of Public Works and Buildings. The permits issued are generally grouped into five categories: (1) construction of docks, mooring anchors, access ramps and other similar structures built in, on or over the river, (2) sand and gravel dredging, (3) bridge construction, (4) bank protection and (5) sewage outlets or water inlets. In presenting this evidence, Illinois does not claim that these permits specifically reflect an assertion of jurisdiction to the 1792 low-water mark, but instead claims that the requirement of obtaining a permit to build structures located in the river adjacent to the Illinois shore constitutes an assertion by it that some portion of the waters of the Ohio River are within its boundaries pursuant to "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois" (Ill. Rev. Statutes, 1987, Ch. 19, par 52, *et seq.*). Section 18 of the Act (Ill. Rev. Statutes, Ch. 19, par 65)² provides that:

"It is unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description or build or commence the

² This statute, including the permit requirement, was first enacted June 10, 1911 and was effective July 1, 1911 (Laws of Illinois 1911, p. 115).

building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, causeway, harbor, or mooring facilities for watercraft, or build or commence the building of any other structure, or do any work of any kind whatsoever in any of the *public bodies of water within the State of Illinois*, without first submitting the plans, profiles, and specifications therefor, and such other data and information as may be required, to the Department of Transportation of the State and receiving a permit therefor signed by the Secretary of the Department and authenticated by the seal thereof." (Emphasis added).

While approximately 70 Ohio River permits were issued by the State of Illinois between April 10, 1922 and September 15, 1988 (See Filings 42(a)-42(d), 32, 55 [Exhibits 29-33]), it will suffice to discuss several of these permits as representative of Illinois' assertion of jurisdiction over a portion of the river.

Permit No. 11440, issued to Peabody Coal Co. on the 24th of September 1967, involved a structure built past the normal pool elevation of the Ohio River at Shawneetown, as it existed on July 11, 1967. The entire structure extends approximately 160 feet into the river from the normal pool line. (Filing No. 55, Vol. 1, Exhibit 29).

Permit No. 4814, issued to Yourtee-Roberts Sand Co. on February 5, 1941 "to dredge sand and gravel *in that part of the Ohio River within the State of Illinois* between the mouth of the river and Metropolis in Massac County, Illinois," (Emphasis added). (Filing 42(a), Exhibit 20, Vol. 1, p. 171).

A similar exercise of jurisdiction by the State of Illinois is shown in the issuance of Permit No. 17757 to the Ohio Power Company on November 22, 1983 for

dredging approximately 300,000 cubic yards of material from the river entrance to the Cook Terminal. The diagram attached to the permit shows the area to be dredged to be a distance south of the existing shoreline (Filing No. 42(d), Exhibit 20, Vol. 4, p. 2055).

Permit No. 13870, issued to Indiana Franklin Realty, Inc. on October 9, 1974 for construction of a coal loading and dock facility in the Ohio River, described the dock to be built as extending "approximately 300' from shoreline at normal pool elevation." (Filing No. 42(d), Exhibit 20, Vol. 3, p. 1201).

Permit No. 14049, issued to Bunge Corporation on July 4, 1975, for the construction of a facility extending 215 feet into the Ohio River (Filing No. 55, Vol. 1, Exhibit 31).

Additionally, pursuant to Section 12 of the Illinois Environmental Protection Act and the Federal Clean Water Act, the Illinois Environmental Protection Agency requires an Illinois permit for the construction or installation of any sewer outlet discharging contaminants "into the waters of this State".

This continued and long-standing assertion of jurisdiction by Illinois over an undefined portion of the Ohio River is certainly incompatible with Kentucky's claim to have exercised exclusive jurisdiction over the entire breadth of the river and its claim that Illinois has acquiesced to Kentucky's exclusive assertion of authority.

As stated before in this report (p. 2), in the STATEMENT OF THE CASE, following oral argument on the parties' cross-motions for summary judgment on January 4, 1990, I was of the opinion that there may be

further evidence available on the issue of acquiescence which both parties should endeavor to discover and submit for consideration.

Both parties submitted such additional documents and evidence in support of their respective positions. Illinois' submission included six major categories—Criminal Prosecutions, Additional Permits Issued by the Illinois Department of Transportation, Assertions of Jurisdiction by Illinois Local Governments, Illinois Environmental Protection Agency Permits, Boat Licensing Under Illinois Law and Taxation. (Filing Nos. 53-59).

Kentucky's supplemental submission covered eight categories, including—Bridges, Taxation, Mineral Leases, Fishing and Musseling Licenses, Waterfowl, Boats and Boating, Dams and Historical Evidence. (Filings Nos. 60-65).

In response to Kentucky's supplemental submission, Illinois submits that very little of what Kentucky has presented is of any relevance to the resolution of the dispute here and does not divest Illinois of the jurisdiction it is rightfully entitled to under *Ohio v. Kentucky*, 444 U.S. 435 [1980] and *Indiana v. Kentucky*, 136 U.S. 479 [1890].

In Kentucky's response to Illinois' supplemental material, the Commonwealth submits that the material offers no evidence to refute Kentucky's affirmative defense of acquiescence and laches. Rather, Kentucky argues, much of the supplemental material supports Kentucky's position that Illinois has always recognized and acquiesced to Kentucky's assertion of jurisdiction and dominion over the Ohio River in its entirety, before and after the construction of the dams.

In examining and evaluating all of the supplemental material submitted by the parties, I am impressed by the evidence submitted concerning the taxation or, more accurately, the lack of taxation of the vast majority of structures and buildings extending from the Illinois shoreline into the Ohio River. Fifteen such structures were identified (See Filing No. 61). One such structure, the Electric Energy power plant near Joppa, Illinois, has been taxed, *i.e.* at least a portion of that part of the plant that extends south of the Illinois Shoreline.

In addition, Kentucky submitted a tax bill to Bulk Services of Mound City, Illinois in 1984, which the taxpayer paid under protest, claiming that the property in question is within the State of Illinois and not Kentucky. It is interesting to note that the Bunge plant, one of the 15 structures identified, located in Cairo, Illinois which extends 170 feet south of the Illinois shore into the Ohio River, was taxed by both states. The first 70 feet of the structure extending south of the Illinois shore was taxed by Illinois and the remaining 100 feet was agreed to be subject to Kentucky taxes (See Filing No. 56, Exhibit 64). Of the remaining 12 structures extending southward into the Ohio River, no tax has been imposed by Kentucky.

This evidence hardly demonstrates that Kentucky has continuously asserted exclusive jurisdiction over the entire breadth of the Ohio River. Rather, it shows that there is uncertainty in both states as to the exact location of the boundary.

In support of its claim of exclusive jurisdiction over the Ohio River, Kentucky also relies upon evidence that it imposed *ad valorem* taxes on barges and other watercraft traveling on the Ohio River, including a

number of Illinois owned barge companies. This tax was based on a ratio of the number of miles traveled on the Ohio River in Kentucky over total miles traveled.

Illinois submits that this information is irrelevant to the present controversy, as Illinois acknowledges that most of the Ohio River is within the boundary and jurisdiction of Kentucky, as set out in the affidavit of William Kreisle (Filing No. 41, Exhibit 1). Although the distance from Illinois shore of the 1792 low-water mark, as reflected in the U.S. Corps of Engineers' survey line varies, in many instances it is only 100 feet from the Illinois shore. Illinois has attached to Filing No. 63, Appendix 1, to show the location of the sailing line of the Ohio River, as prepared by the Corps of Engineers, relative to the shoreline, which discloses that for the majority of the length of the river between Illinois and Kentucky, the sailing line is either close to the center of the river or near the Kentucky shore. Only rarely does it approach to within even 250-300 feet of the Illinois shoreline. Thus, the evidence of the imposition of *ad valorem* taxes on barges and other watercraft traveling on the Ohio River within the acknowledged jurisdiction of Kentucky, does not support Kentucky's claim of exclusive jurisdiction of the entire breadth of the river.

The submission of old newspaper articles by Kentucky (Filing No. 61, Exhibits 83-85), containing a statement relative to Kentucky's boundary as being "the low-water mark on the far side," was objected to by Illinois on the ground of relevancy and for containing hearsay and improper opinion testimony. I would agree. (See Fed. Rules of Evidence 801). The same ruling would apply to all newspaper articles submitted by Kentucky which purport to discuss the location of Kentucky's Ohio River boundary.

Evidence of taxation of ferries (Filing No. 61, Exhibits 94-101), railroad bridges (Filing No. 61, Exhibits 102-104), fuel (Filing No. 61, Exhibits 105-106), taxation of food and pleasure/commercial vessels (Filing No. 61, Exhibits 107-110) and Corporate Income Tax (Filing No. 61, Exhibits 111-113) are all irrelevant to the present controversy.

The evidence presented by Kentucky in mineral leases granted by three Kentucky counties to private companies or individuals to dredge the river bottom adds nothing to the determination of the location of the Ohio River boundary of those counties, as the leases in question were necessarily limited to the territory "within the boundaries" of the lessor counties. (See Filing No. 61, Exhibits 117, 118, 119).

The majority of the exhibits submitted by Kentucky pertaining to fishing and musseling licenses (Filing No. 61, Exhibits 122-139) deal with special licenses issued by Kentucky for sport and commercial fishing on the Ohio River only and not general licenses which would have been good for any waters of the Commonwealth of Kentucky. While Illinois does not dispute the existence of these licenses or the fact that they have been purchased by Illinois residents, as well as residents of Indiana and Ohio, Illinois denies that the existence of these licenses generally denotes an exercise of exclusive jurisdiction over the Ohio River by Kentucky. In support of this position Illinois once again points out that it does not claim the entire Ohio River to be within its jurisdiction, but on the contrary, acknowledges that the majority of the river is within the Commonwealth of Kentucky. Thus, no matter where the 1792 low-water mark is located at any point on the river, the area south of that mark is within the boundary of Kentucky and a

fishing license would be required for fishing south of that line. Thus, Illinois argues, given the current absence of a clear understanding of the exact location of the boundary, a prudent resident of Illinois would acquire a Kentucky Ohio River license along with his own State's license in order to be sure he was licensed to fish the entire breadth of the river. I would agree that this evidence does not support Kentucky's claim of exclusive exercise of jurisdiction over the Ohio River.

Filing 61, Exhibits 140-148, relate to a policy suggested by Kentucky officials that water fowl shot from a place in the State of Ohio north of the Ohio River low-water mark could be retrieved from the waters of the river south of the low-water mark in Kentucky. This policy was objected to by a U.S. game agent in a 1954 memo, containing a number of hearsay statements concerning the location of Kentucky's river boundary with the State of Ohio. Since the boundary has since been determined by the U.S. Supreme Court in a manner contrary to the game agent's suggestion, the relevance of this document is certainly questionable and hardly applicable to the State of Illinois.

The next category of exhibits (Filing No. 61, Exhibits 149-155) submitted by Kentucky concerns boats and boating. These exhibits (149-153) list various provisions of Kentucky's statutes authorizing it to regulate and license various aspects of boating on the waters of the Commonwealth, but provide exceptions for watercraft licensed in another state, such as Illinois, provided the boat does not remain within Kentucky for a period in excess of 60 consecutive days. In view of the fact that Illinois has a comparable statutory provision, (See Filing No. 55, Exhibit 60), affecting Kentucky boaters, this

evidence does not provide further evidence of Kentucky's exercise of jurisdiction and control over the entire Ohio River.

Exhibit 154 is a copy of a decision of the Kentucky Court of Appeals (*Robertson v. Commonwealth*, 101 Ky. 285 [1987]) involving a statute for licensing shanty boats, which is comparable to an Illinois statute (Filing No. 55, Exhibit 22) and prosecutions thereunder (Exhibits 23-28). Since the prosecution in the *Robertson* case involved a shanty boat tied to the Kentucky shore of the river, and Illinois makes no claim of jurisdiction to that part of the Ohio River, this evidence offers no support for Kentucky's claim of jurisdiction over the entire river. The same would hold true of Exhibit 155 consisting of two Kentucky boating accident reports, since the reports do not disclose where the accidents took place in relation to the Illinois shore.

Based on all the evidence presented, I conclude that Kentucky has failed to carry its burden of proof to demonstrate, by a preponderance of the evidence, that it has continuously asserted its boundary with Illinois to be the low-water mark on the northerly side of the Ohio River as it exists from time to time, and that Illinois has acquiesced therein.

Kentucky has also asserted laches as a separate defense in its answer filed herein. The Court has recognized for more than 150 years that a boundary dispute between two states is essentially a dispute between two sovereigns, and as such, the doctrine of laches is inapplicable. (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 464 [1838]; see also, *United States v. Summerlin*, 310 U.S. 414, 416 [1940]). In none of the many boundary cases it has considered through the years, has the Supreme Court based its decision on a

finding of laches. Instead, it has addressed the equitable considerations inherent in the defense of laches in terms of acquiescence or prescription. (See *Indiana v. Kentucky*, 136 U.S. 479 [1890]).

Kentucky's Fifth Defense seeks to establish its boundary with Illinois based on "the principles of riparian boundaries, including accretion, erosion and avulsion." The principles of erosion, accretion and avulsion are totally inapplicable to Kentucky's Ohio River boundary. This claim by Kentucky was previously raised in *Ohio v. Kentucky*, 444 U.S. 335 (1980) and rejected by the Court, where the Court stated that:

"It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, (citations omitted) or the Mississippi River between Arkansas and Mississippi. (Citations omitted.) In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

A river boundary situation, however, depending on historical factors, may well differ from the customary situation. *** And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different." 444 U.S. at 337.

The Court's rejection of Kentucky's argument for the application of accretion, erosion and avulsion in *Ohio v. Kentucky* should be equally applicable here.

C.

Has the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and, as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792?

In its complaint, Illinois alleged that the construction of dams on the Ohio River between Illinois and Kentucky has permanently raised the level of the river above its level in 1792 and as a result the present low-water mark on the Illinois side of the river is farther north than it was in 1792 (Illinois Complaint, paragraphs XII and XIII). Kentucky, in its Answer, denied both paragraphs of the Complaint. In its brief and in its oral argument before the Special Master on January 5, 1990, Kentucky concedes that the effect of the dams was to raise the level of the water and that some changes may have occurred in the shoreline. However, Kentucky does not know what specific changes occurred on the Illinois shoreline of the Ohio River and argues that this matter "will have to be factually determined if need be, at a later date on the basis of the law found to be applicable to this case." (pp. 39-40, Kentucky's Brief).

In its reply brief, Illinois agrees that Kentucky "must be given ample opportunity to examine Mr. Kreisle's work (Filing No. 41 Exhibits 1 and 2 to Illinois' Motion for Summary Judgment) in order to ascertain its accuracy and adherence to the earlier model" but submits that the task of locating the boundary in a surveying or cartographic sense, "should not be undertaken from scratch in this case, as if nothing had gone before. Just as equity requires a finding that Kentucky's boundary with Illinois should be legally defined in the same manner as the former's boundaries

with Indiana and Ohio, it also requires that the same technical methods be used to actually plot that boundary on a map." (p. 22 Illinois' Reply Brief).

In Kentucky's supplemental submission (Filing No. 61, Exhibit 156), made in April 1990, Kentucky filed an affidavit from Dr. Albert Petersen, Jr., a Professor of Geography and Geology at Western Kentucky University in which he states, that after examining historical documents, he concluded that the most accurate depiction of the northern shoreline of the Ohio River was presented by the 1911-14 charts produced by the United States Army Corps of Engineers. He also acknowledges in paragraph 9 of the affidavit that he recognizes the same source as containing the most accurate depiction of the 1792 low-water mark. Dr. Petersen also states that he compared the 1911-14 Corps of Engineers' charts with the northern shoreline of the Ohio River as shown on the United States Geological Survey 7.5 minute quadrangular maps depicting the Ohio River between Kentucky and Illinois, and concludes that his comparison disclosed that "very little shore line change resulted with the construction of the four high locks and dams (Nos. 50, 51, 52 and 53) of the 1920's and 1930's."

In response to this affidavit, Illinois argues that although Dr. Petersen describes his methodology and conclusions, he does not offer his comparative data for examination. For example, page 7 of his affidavit lists an appendix containing the U.S.G.S. quads which are discussed in paragraph 14 of his affidavit, but does not provide copies of those quads, to show the results of Dr. Petersen's comparison, making it impossible to evaluate his conclusion in paragraph 15 that "very little shore line change" has resulted.

Perhaps more importantly, Illinois argues, Dr. Petersen's affidavit seemingly ignores the data represented on the quad sheets themselves. Referring to its submission on this issue (Filing No. 41, Exhibit 1, Affidavit of William E. Kreisle), Illinois maintains that the 22 U.S.G.S. quad sheets showing the Illinois/Kentucky boundary, with one exception, explicitly states that the boundary depicted on those sheets is a representation of the low-water mark as depicted on the 1911-14 Corps of Engineers' charts adopted by Dr. Petersen in his affidavit. The distance from the existing shoreline, as shown on the U.S.G.S. quads to the low-water mark as depicted on the 1911-14 charts is, according to Illinois, quite striking on a number of the examples discussed by Dr. Petersen. In paragraph 14(a) of his affidavit, Dr. Petersen discusses the Repton Ky-Ill quad. This map was submitted by Illinois as Filing No. 44, Exhibit 7, Map 6. The lower, left-hand portion of this map states specifically that the boundary depicted is based on the low-water line taken from the Corps of Engineers' 1911-14 series. As the river enters the upper edge of the map, the low-water mark as depicted is significantly closer, Illinois urges, to the Kentucky shoreline than the Illinois shoreline, and is, in fact, approximately 3000 feet from the Illinois shore.

Similarly, on the Paducah quad, (Filing 44, Exhibit 7, Map 14), the shoreline near Owens Island varies from 1000 feet to approximately 1500 feet from the Illinois shore. Likewise, Illinois contends, there are places on the Joppa quad sheet (Filing 44, Exhibit 7, Map 17) and the Olmstead quad (Filing 44, Exhibit 7, Map 19) where the low-water mark is 1000 feet or more from the Illinois shoreline. Thus, Illinois claims, that no matter what Dr. Petersen's conclusion is regarding the horizontal expansion of the river resulting from the building of

dams, the very maps he uses show graphically the distance from the present shoreline to the 1792 low-water mark as reflected by the 1911-14 Corps of Engineers data.

One final point is raised by Illinois regarding Dr. Petersen's discussion of the effect of the construction of the dams. In paragraph 13 of his affidavit, he discussed his assignment as plotting the shoreline as it existed before the construction of a series of "modern" high lift dams during the post World War II period. In paragraph 15, in stating his conclusion, Dr. Petersen once again discusses the "four high locks and dams", identified as 50, 51, 52 and 53. In fact, Illinois points out, materials submitted by it (Filing No. 41) show dams 50, 51, 52 and 53 not to be high lift dams, as they are examples of the original series of low dams constructed in the 1920's and 1930's. The high dams were, as Dr. Petersen's affidavit suggests, constructed following World War II, and the Smithland lock and dam is one of such modern dams. It has replaced dams 50 and 51, which are no longer in existence. (See Filing No. 41, Exhibit 5, pp. 16-17, and Exhibit 6, pp. 23-46.) Thus, it would seem that Dr. Petersen, in reaching his conclusion that there has been "very little shore line change" as a result of dam construction along that part of the Ohio River bordering Illinois and Kentucky, has not taken into account the fact that the Smithland high dam has replaced low dams 50 and 51.

It is the recommendation of the Special Master that if this matter need be determined at a later date on the basis of the law found by the Court to be applicable, that such boundary "as nearly as it can now be ascertained" be determined either:

- (a) by agreement of the parties, or
 - (b) by joint survey agreed upon by both parties, or,
 - (c) in the absence of such an agreement or survey,
- after hearings conducted by the Special Master and the submission by him to the Court of proposed findings and conclusions. (*Ohio v. Kentucky*, 444 U.S. at 589).

IV.

RECOMMENDATIONS

Based upon the foregoing factual findings and legal analysis, the Special Master recommends:

(1) That the Supreme Court of the United States determine that the boundary between the State of Illinois 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 such boundary is not the low-water mark on the northerly side of the Ohio River as it exists from time to time.

(2) That the Court determine that the record and the law do not support the Commonwealth of Kentucky's affirmative defenses of acquiescence, laches, accretion, erosion and avulsion to sustain Kentucky's claim that its Ohio River boundary with Illinois is the shore line on the Illinois side of the river, as it exists from time to time rather than the 1792 low-water mark.

(3) That the Court determine that the construction of dams on the Ohio River between Illinois and Kentucky permanently raised the level of the river above its level in 1792, and as a result, the present low-water mark on the Illinois side of the river is farther north than it was in 1792.

(4) That such boundary, as nearly as it can now be ascertained, be determined, either

(a) by agreement of the parties,

(b) by joint survey agreed upon by both parties,

or

(c) in the absence of such an agreement or survey, after hearings conducted by the Special Master and the submission by him to the Court of proposed findings and conclusions.

Respectfully submitted,

MATTHEW J. JASEN
Special Master

June 29, 1990

