

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ILLINOIS, Plaintiff V. Kentucky

CASE NO: 106 Orig.

PLACE: Washington, D.C.

DATE: March 18, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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ILLINOIS, :
Plaintiff :
v. : No. 106 Orig.
KENTUCKY :
- - - - - X

Washington, D.C.
Monday, March 18, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
12:59 p.m.

APPEARANCES:

RICKIE LEON PEARSON, ESQ., Assistant Attorney General of
Kentucky, Frankfort, Kentucky; on behalf of the
Defendant.

JOHN BRUNSMAN, ESQ., Assistant Attorney General of
Illinois, Springfield, Illinois; on behalf of the
Plaintiff.

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1 P R O C E E D I N G S

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 106 Original, the State of Illinois v. the
5 State of Kentucky. Mr. Pearson.

6 ORAL ARGUMENT OF RICKIE LEON PEARSON

7 ON BEHALF OF THE DEFENDANT KENTUCKY

8 MR. PEARSON: Mr. Chief Justice, and may it
9 please the Court:

10 In 1986 Illinois filed a complaint against the
11 Commonwealth of Kentucky in this original action. In the
12 complaint Illinois alleged that Kentucky had directly
13 infringed upon its sovereignty by exercising its boating
14 and fishing laws north of the 1792 low-water mark on the
15 northwestern side of the Ohio River. Prior to this
16 litigation the 1792 low-water mark with respect to
17 Illinois had never been plotted, designated, or otherwise
18 marked. And prior to that action there had never been any
19 boundary dispute between Illinois and Kentucky or any
20 recurring litigation.

21 In the answer Kentucky denied that it had
22 directly infringed upon Illinois' sovereignty. Instead,
23 Kentucky asserted that its boundary on the Ohio River is
24 the low-water mark on the northwestern side of the river
25 as it exists from time to time. In other words, the

1 current low-water mark. Also in the answer Kentucky
2 raised two affirmative defenses, one affirmative defense
3 being that of acquiescence, the second affirmative defense
4 being that of latches.

5 Kentucky raised the defense of acquiescence
6 because it wanted to invoke and employ the basic teachings
7 of Georgia v. South Carolina, and that is Kentucky wanted
8 to maintain, and to this day wants to maintain, the status
9 quo on the river. Kentucky submits that the boundary
10 between the two States, as it has been for 168 years, is
11 the low-water mark on the northwestern side of the river.

12 By bringing the complaint, Illinois in essence
13 seeks to change this boundary and make it the 1792 low-
14 water mark. Kentucky submits that there are many
15 practical considerations with respect to utilizing the
16 low-water mark on the north side of the river as the
17 boundary between the two States.

18 QUESTION: Now, when you say low-water mark you
19 have to tell us low-water mark at what time.

20 MR. PEARSON: As it exists from time to time, or
21 currently.

22 QUESTION: The changing low-water mark, not the
23 1792 low-water mark.

24 MR. PEARSON: That's correct. Not the 1792 low-
25 water mark, but the prevailing, current low-water mark.

1 QUESTION: Mr. Pearson, are you asking us to
2 overrule Ohio v. Kentucky? I mean, you do not accept that
3 Ohio v. Kentucky sets forth the proper rule, even without
4 all the acquiescence? You --

5 MR. PEARSON: Your Honor, we're not asking this
6 Court to overrule Ohio v. Kentucky. We think that the
7 case before this Court can be determined independently of
8 that particular situation.

9 QUESTION: And must be for you to win.

10 MR. PEARSON: That's affirmative. That's
11 correct.

12 If you look at Ohio v. --

13 QUESTION: Would you object if we were to
14 overrule that area case?

15 MR. PEARSON: No, sir. We would not object if
16 you were to overrule that case.

17 QUESTION: Well, there was a dissent in that
18 case, wasn't there?

19 MR. PEARSON: There was a dissent in that case.
20 And might I add, it appeared to favor Kentucky with
21 respect to its argument here today. But there are some
22 historical antecedents and factors that go into why
23 Kentucky has recognized the ever-changing low-water mark
24 on the Ohio River for 168 years.

25 It all starts back in 1818 when you look at the

1 Illinois Enabling Act, the 1818 constitution of Illinois,
2 the 1848 constitution of Illinois, and the 1870
3 constitution of Illinois. All these documents, when
4 viewed, conclude that the boundary between Illinois and
5 Kentucky is the low-water mark, as those documents put it,
6 along the northwestern shore, meaning the bank.

7 Perhaps maybe the most important notification
8 that Kentucky had with respect to the low-water mark on
9 the northwestern side of the river came from an 1849
10 report of the Illinois Joint Select Committee to
11 investigate Illinois' boundary on the Ohio River. That
12 legislative body concluded that the boundary between
13 Illinois and Kentucky is the low-water mark on the
14 northwestern side of the river.

15 Kentucky submits that the conclusion of the
16 Joint Select Committee from Illinois is in keeping with
17 the 1820 case of Handly's Lessee v. Anthony. In the
18 Anthony case the court was called upon for the first time
19 to construe the 1784 Virginia Deed of Cession which gave
20 lands to the United States of America, and thereby created
21 Kentucky, Illinois, Indiana, and Ohio.

22 In construing the 1784 cession, the court in
23 Anthony's Lessee concluded that the boundary for Kentucky
24 on the Ohio River is the low-water mark on the northern
25 side of the river, or to put it in another term used by

1 the court, the water's edge.

2 But there were many factors why the court
3 reached this conclusion, one of them being that it would
4 be convenient for future population, because at that time
5 the United States was growing. Secondly, it was an
6 identifiable boundary mark between the States.

7 With that in mind, Kentucky submits that by
8 using the low-water mark on the northwestern side of the
9 river as it exists from time to time, or currently, or as
10 it prevails, is the most practical approach to resolving
11 the boundary dispute. After all --

12 QUESTION: Mr. Pearson, if you're not asking the
13 Court to overrule Ohio against Kentucky, then your
14 argument has to be based on acquiescence, does it not?

15 MR. PEARSON: It does, Your Honor.

16 QUESTION: And how much of a part does the
17 practicalities of the thing play in acquiescence? I mean,
18 don't you have to show that Illinois consented to this
19 boundary, basically?

20 MR. PEARSON: You do. You have to show that
21 they acquiesced in this particular boundary. You sure do.

22 QUESTION: And if they acquiesced, what
23 difference does it make whether it's a practical boundary?
24 And if they didn't acquiesce, what difference does it make
25 whether it's a practical boundary?

1 MR. PEARSON: Your Honor, I think it's -- it's
2 very important that it's a practical boundary for the
3 simple fact that it would best serve the public
4 convenience.

5 QUESTION: But what has that got to do with
6 acquiescence? Acquiescence is a state of mind exhibiting
7 your willingness to abide by a particular thing.

8 MR. PEARSON: Yes, Your Honor. I think if you
9 look back at Vermont v. New Hampshire, which was decided
10 in 1933, the court in Vermont v. New Hampshire looked at
11 the practical considerations for the public convenience.
12 They looked to see, first of all --

13 QUESTION: Did that -- did that case turn on
14 acquiescence?

15 MR. PEARSON: Yes, it did, Your Honor. And it
16 had to do with the location of the boundary between
17 Vermont and New Hampshire on the western -- the western
18 low-water mark on the Vermont side of the Connecticut
19 River. It turned on acquiescence. The court there looked
20 at the conduct of the inhabitants and the issue of
21 acquiescence. And acquiescence, with respect to whether
22 or not to use the largely identifiable western low-water
23 mark on the Vermont side of the Connecticut River, looked
24 at the practicalities of it.

25 Kentucky would submit that looking at the

1 practicalities in this situation, likewise, is very
2 important. I think if we look at some of the
3 practicalities and how they have impacted upon the
4 interaction between officials from both Kentucky and
5 Illinois, then I think we can bring home closer the
6 doctrine of acquiescence.

7 QUESTION: Well, at least it makes it more
8 sensible to argue acquiescence if it's -- if acquiescing
9 was in the public interest or if it was practical to do
10 so.

11 MR. PEARSON: I would agree, Your Honor. That's
12 precisely our point. For instance, if we look at the
13 bridges that cross the Ohio River between Illinois and
14 Kentucky, there are four of them. Basically a bridge that
15 was constructed in 1929, the Brookport bridge, 1938 the
16 Cairo bridge, which, that's what they call it in Illinois,
17 they don't call it Cairo, the 1956 Shinytown bridge, and
18 the 1974 Interstate 24 bridge.

19 With respect to the Interstate 24 bridge, in
20 1971 a construction agreement was entered between Illinois
21 and Kentucky, and with respect to that agreement it was
22 concluded that the boundary between the two States would
23 be the north normal pool line, loosely translated the low-
24 water mark. It did not say, it did not specify 1792.
25 Kentucky submits that it's talking about the prevailing or

1 current normal pool line on the river.

2 Likewise, we see the same kind of situation with
3 respect to Illinois and Kentucky entering into a
4 maintenance agreement regarding the Cairo bridge, which
5 was constructed in 1938. In 1954 Kentucky and Illinois
6 officials corresponded regarding where to place the sign
7 on the bridge indicating when you are going to be entering
8 Illinois or leaving Kentucky. And between this
9 correspondence one of the district engineers for Illinois
10 concluded, after looking at the 1936 construction plan,
11 that the area located on that construction plan was about
12 as close enough to the theoretical line as it could be.

13 Kentucky had that 1936 plan analyzed by one of
14 its bridge engineers and of course that plan indicated
15 that the boundary was at Pier B, Station 20 plus 10.
16 Notwithstanding the fact that that's construction talk,
17 the bottom is when you look at it it's the same as the
18 low-water mark on the northern side of the river.

19 Consequently Illinois has been on notice for
20 quite some time, especially with respect to the 1849
21 agreement, a Joint Select Committee conclusion that the
22 low-water mark on the northwestern side of the river is
23 indeed the boundary.

24 Likewise there was other situations which have
25 come into play to show that Kentucky is exercising its

1 jurisdiction and its dominion to the north low-water mark
2 on the Ohio River. For instance, Kentucky counties that
3 bound -- that border on the river have the right in the
4 authority under Kentucky's 1810 statute, and the case law
5 that has interpreted it, to lease the river bed to the
6 thread or the middle of the stream.

7 As a result of that subsequent decisions by the
8 Supreme Court of Kentucky, or the highest court in
9 Kentucky at that time, concluded that the State of
10 Kentucky likewise has the authority to lease the bed of
11 the river from the middle of the stream to the low-water
12 mark on the northwestern side of the river.

13 And that's exactly what Kentucky has done.
14 Before the Special Master there is evidence that Kentucky
15 has entered into agreements with private companies for the
16 leasing of the river bed for dredging of sand and gravel.

17 QUESTION: Mr. Pearson, I guess Kentucky has
18 boundaries along the Ohio River with Ohio and --

19 MR. PEARSON: Indiana.

20 QUESTION: -- Indiana as well.

21 MR. PEARSON: That's correct.

22 QUESTION: And so I assume if somehow we were to
23 agree with you that there has been acquiescence here for
24 the Illinois boundary, that would mean the boundary is
25 someplace else with respect to Indiana and Ohio?

1 MR. PEARSON: That's correct. In other words,
2 if I understand your question, it would create an
3 inconsistent boundary.

4 QUESTION: Yes, quite.

5 MR. PEARSON: With respect to that conclusion --
6 which it would. It would create an inconsistent boundary.
7 But there are some factors to be concerned. Maybe perhaps
8 the bright-line principle that would allow Kentucky to
9 fashion the boundary as it argues today, which has been
10 recognized for 168 years, is California v. Nevada. I
11 think the bright-line principle in that case is that there
12 is no particular relationship between the origins of a
13 boundary and the legal consequences of acquiescence in
14 that boundary.

15 In other words, for 168 years it has been no
16 problem between Illinois and Kentucky. Even as I speak
17 today, the boundary on the river which the parties or the
18 people who work on that river recognize, is the low-water
19 mark. We haven't had any problems with it for 168 years,
20 even though it has been different than the 1792 low-water
21 mark.

22 I think the -- at present the Kentucky
23 legislature, with respect to promulgating in its revised
24 statutes the description of the boundary now, talks in
25 terms of allowing the low-water mark on the north side of

1 the river to intersect with the present 1792 low-water
2 mark as we know it from Ohio v. Kentucky, and of course
3 Kentucky v. Indiana. Merely, the point being is that
4 there has been no problem up until this lawsuit was filed
5 regarding the boundary between the two States.

6 At present Kentucky enforces its boating and
7 fishing laws on the entire river to the northwestern side
8 of the river at the low-water mark. For instance, with
9 respect to fishing licenses, the testimony before the
10 Special Master showed that if an individual is fishing in
11 the Ohio River, then Kentucky officials will check that
12 person for his or her license. But if that person is
13 fishing from the bank the Kentucky officials will not.

14 Moreover the officials from Kentucky testified
15 that there are no Illinois water patrol or Fish and
16 Wildlife personnel on the river. Only Kentucky is the
17 State that patrols that river and enforces the fishing and
18 boating laws on that river.

19 QUESTION: Mr. Pearson, isn't it possible that
20 the boundary is actually on the land north of where the
21 water is, under Illinois' theory?

22 MR. PEARSON: No, Your Honor.

23 QUESTION: I mean, maybe -- isn't it possible
24 the river has moved to the south rather than to the north?

25 MR. PEARSON: I think, Your Honor, I think

1 you're speaking with respect to a survey that was done by
2 Illinois with respect to that. We don't -- we cannot
3 concede that that is possible or that is the case. We
4 don't -- we don't know the impact with respect to what
5 dams have done to the river and perhaps that issue might
6 be premature and be appropriate if this Court concludes
7 that Kentucky does not prevail.

8 QUESTION: No, my point is that all this
9 activity rely on -- say Illinois allowed all the policing
10 and what went on on the water itself. Maybe they assumed
11 that was part of Kentucky because they don't really know
12 exactly where the 1792 boundary is.

13 MR. PEARSON: That may well be true, Your Honor,
14 but in the complaint they allege that it was the 1792 low-
15 water mark. I have to take them --

16 QUESTION: Right, but I'm just saying if you
17 don't know where it is, conceivably -- I don't know, I
18 don't know anything about the geography. But conceivably
19 the 1792, the river was 10 miles north of Cairo.

20 MR. PEARSON: It could have been. And I think
21 you're talking about basically the principles of accretion
22 and erosion.

23 QUESTION: Yeah.

24 MR. PEARSON: Kentucky submits, just as it has
25 with respect to Illinois recognizing the low-water mark on

1 the northwestern side of the river, because it has waited
2 168 years in which to bring this action, that it has in
3 essence acquiesced likewise to the application of the
4 principles of accretion and erosion. In other --

5 QUESTION: If I didn't know where the 1792 low-
6 water mark was, I guess I would just operate on the
7 assumption that it was where it is now, and therefore my
8 operating on that assumption would not demonstrate any
9 acquiescence whatever. It would demonstrate only a
10 mistake of fact, perhaps. I mean, you have to demonstrate
11 an acquiescence in the legal principle, right, not just in
12 a fact, but in the legal principle.

13 MR. PEARSON: And I think we have with respect
14 to inaction for a long period of time.

15 QUESTION: Well, how does --

16 MR. PEARSON: That's one of the considerations.

17 QUESTION: How would it hurt Kentucky? You just
18 don't know how it would hurt you, Kentucky, if Illinois
19 won?

20 MR. PEARSON: I think it could hurt us in many
21 regards.

22 QUESTION: Okay, but you don't know how?

23 MR. PEARSON: I think I do. If Illinois were to
24 prevail, is that your question?

25 QUESTION: Yeah.

1 MR. PEARSON: I think I would. First of all --

2 QUESTION: Tell us.

3 MR. PEARSON: First of all it would be with
4 respect to the issuance and the selling of fishing
5 licenses. Number one, which --

6 QUESTION: Well, how do you know?

7 MR. PEARSON: Well, if the boundary -- let's
8 predicate on the assumption. If the boundary is the 1792
9 low-water mark as Illinois alleges in its brief, which
10 means that the boundary is no longer the shoreline but
11 moves out into the waterway, then obviously because of the
12 geographical location of that boundary which Illinois says
13 is the boundary between the two States, we're going to
14 give up some of the river. And consequently fishing --

15 QUESTION: For purposes of fishing jurisdiction?

16 MR. PEARSON: Fishing jurisdiction. Maybe for
17 that fact dredging with respect to sand and gravel, if
18 they want to dredge along the northern -- northwestern
19 shore.

20 QUESTION: But you don't know, though, you just
21 don't know. You just have to surmise that --

22 MR. PEARSON: That would appear to be, based
23 upon the historical facts on the river that that's a high
24 probability. So, yeah. I don't know, but --

25 QUESTION: Of course there might be a high

1 probability that the boundary, that the river has moved
2 south, in which event you wouldn't lose anything in the
3 river.

4 MR. PEARSON: That's true. Of course there's a
5 probability that it could have moved north. And if it has
6 then we probably lose a lot more. But the movement of the
7 river, I think at this point in time with respect to
8 trying to say that it's the 1792 low-water mark or that
9 it's the low-water mark on the northwestern side of the
10 river, perhaps is a little premature and would definitely
11 be a vast and important consideration when trying to
12 geodetically plot where we think it is if Kentucky does
13 not prevail. I think that's where it has its most
14 important function.

15 QUESTION: But isn't it correct that we -- the
16 record does not yet tell us which direction, if either,
17 the river has moved?

18 MR. PEARSON: That is correct.

19 QUESTION: So isn't -- it seems to me it's a 50-
20 50 proposition. They want a certain line, but you don't
21 know whether that -- it doesn't seem to me you can really
22 tell whether that line will hurt one State or the other.

23 MR. PEARSON: Well, if -- that's, that's true,
24 but I think that there is a certain line, and that's the
25 line that Kentucky and both Illinois have recognized for

1 168 years.

2 QUESTION: Well, but you're saying the certain
3 line is a line that changes from time to time, and
4 wherever it is at a particular time, that governs.

5 MR. PEARSON: That's correct.

6 QUESTION: And they are arguing for a permanent
7 line. And we don't know whether the permanent line is
8 more favorable to one State or the other.

9 MR. PEARSON: Surely we know if it does move
10 more northward --

11 QUESTION: Well, if it moves north it's more
12 favorable to your side, if it moves south it's more
13 favorable to the other side. But --

14 MR. PEARSON: That's correct.

15 QUESTION: Has the boundary line been
16 established, to your knowledge, between Ohio and Kentucky?

17 MR. PEARSON: It has, Your Honor.

18 QUESTION: And how did that work out?

19 MR. PEARSON: That worked out as the result of a
20 stipulation --

21 QUESTION: And the river was moved south some
22 places and north in other places, is that it?

23 MR. PEARSON: That's correct, Your Honor. I
24 think what we have --

25 QUESTION: And the same with Indiana?

1 MR. PEARSON: Same with Indiana, Your Honor. I
2 think --

3 QUESTION: It may be the same in your place.

4 MR. PEARSON: I think what we have right now --

5 QUESTION: You may gain something. You may gain
6 some ground.

7 MR. PEARSON: Well, the way the parties --

8 QUESTION: Actual ground.

9 MR. PEARSON: The way the parties stipulated was
10 that when it gets too close to ground they move it 100
11 feet out. That's not to Kentucky's benefit. Right now
12 the boundary with respect to Ohio and Kentucky, as it has
13 been agreed between the parties, takes a zig-zagging
14 course. No one knows exactly still where it is. And when
15 it gets too close to land the parties by agreement
16 stipulated that it would move out 100 feet.

17 QUESTION: I know, but that --

18 MR. PEARSON: We didn't pick up --

19 QUESTION: That doesn't follow the 18 -- the --

20 MR. PEARSON: Handly's Lessee in 1820?

21 QUESTION: Yeah. That doesn't --

22 MR. PEARSON: It does not, Your Honor.

23 QUESTION: Because if you -- I would think that
24 if the river moved a certain direction and the boundary
25 line is that old low-water mark, it would be up on the

1 land and you would be having some land.

2 MR. PEARSON: I think perhaps the boundary as we
3 know it based upon the 7 -- the 1792 low-water mark with
4 respect to Ohio and Kentucky has resulted purely from
5 stipulation and agreement between the States. And so they
6 tried to do as best they could with what they could find,
7 even with regard to speculation by knowledgeable surveyors
8 as to where they think the boundary is. Kentucky didn't
9 pick up anything as a result of that.

10 QUESTION: Mr. Pearson, if we don't know where
11 the 1792 -- I mean, it's not in the record. You don't
12 know. We don't know. I suppose the fellow who put up the
13 sign on the bridges didn't know either. Any of these acts
14 of acquiescence that you're alleging, does any of them
15 involve a situation where somebody knows where the 1792
16 line was, but nonetheless allows -- allows jurisdiction
17 beyond it?

18 MR. PEARSON: No, Your Honor.

19 QUESTION: Not a single one?

20 MR. PEARSON: It does not.

21 QUESTION: So as far as appears, it has just
22 been the operating assumption of Illinois that the
23 boundary -- the boundary is -- was where it is --

24 MR. PEARSON: No, Your Honor --

25 QUESTION: -- which is a fair enough operating

1 assumption. It may have gone in either way.

2 MR. PEARSON: I don't think it's been an
3 operating assumption, Your Honor, especially if you look
4 at the 1849 Illinois Joint Select Committee and what they
5 did. That was their job to make a determination where the
6 boundary is. They concluded it's the low-water mark on
7 the northwestern side of the river. They had an ample
8 opportunity at that time to say, oh, it's the 1792 low-
9 water mark. They did not find such. Consequently, I
10 think Kentucky has correctly utilized the low-water mark
11 and Illinois has acquiesced to it being the 17 -- not --
12 being the low-water mark on the northwestern side of the
13 river.

14 That's true, locating it would probably be
15 extremely difficult. The parties in the two prior actions
16 stipulated where they thought maybe it would be.

17 With respect to the -- Illinois' complaint I
18 think also points it out. Illinois in its complaint
19 alleges that Kentucky directly infringed upon its
20 sovereignty by exercising its jurisdiction or dominion to
21 the shoreline. Once again, I think that is indicative of
22 the fact that it has always been that. It's identifiable.
23 It's concrete. There is no guessing for people who work
24 and live on that river everyday. There is nothing about
25 maybe geodetically plotted the river runs, the boundary

1 runs this way or meanders that way. It's identifiable.
2 When a person is on the riverbank fishing or a person puts
3 that pole in the water, they know where it is.

4 To give you another example as to how Kentucky
5 has exercised dominion and control over the river, from
6 1946 to 1988 Kentucky had a special license called the
7 Ohio River Commercial and Sport Fishing license. This
8 license was purchased exclusively and available only for
9 residents of Illinois, Ohio, and Indiana. We sold it
10 exclusively to them so they could fish the Ohio River.

11 In 1988 the regulations were amended such that
12 Kentucky would then have a new license called a
13 nonresident fishing license, meaning that Illinois
14 residents could purchase the license, just like any other
15 resident of a -- from a State other than Kentucky. And,
16 but in either case Kentucky was selling those licenses
17 particularly to Illinois official -- Illinois individuals
18 or inhabitants so they could fish on the river.

19 This once again shows you what has been going on
20 for quite some time on the river in terms of exercising
21 jurisdiction over the river to the low-water mark.

22 To show you one other example, Kentucky's
23 fishing laws allows that it be --

24 QUESTION: Well, even in that -- even on that
25 example, if any portion of the river in which they

1 intended to fish was south of the boundary, they'd need a
2 Kentucky license. Wouldn't they?

3 MR. PEARSON: If it's south of the low-water
4 mark.

5 QUESTION: Right.

6 MR. PEARSON: That's correct. That's correct.

7 QUESTION: So I would think most fish -- I don't
8 know where the, where you get the most fish out of this
9 river, but I would think --

10 MR. PEARSON: I don't either.

11 QUESTION: -- most people would need a Kentucky
12 license, no matter -- unless the boundary had moved, you
13 know, the whole breadth of the river.

14 Another question occurs to me --

15 QUESTION: And especially since they don't know
16 where the boundary is any more than you do.

17 (Laughter.)

18 QUESTION: They know there are a lot of Kentucky
19 game wardens out there and they want to --

20 MR. PEARSON: Of course if they fish north of
21 the low-water mark, one would have to assume they would
22 have to get an Illinois license, but right now we're
23 selling those licenses with respect to having
24 accessibility to the Ohio River. And --

25 QUESTION: What would happen under your view of

1 the case if Kentucky decided to fill out to the middle of
2 the river and cause the river to bend farther to the
3 north? Would they acquire territory by doing that?

4 MR. PEARSON: I think we have to first classify
5 what that conduct would be by Kentucky as to whether or
6 not it's some kind of accretion or whether or not it's
7 evulsive in nature. Because if it's evulsive in nature,
8 and is sudden, which usually is in terms of an earthquake,
9 then of course because the river would shift, the shift of
10 the river would not divest the States that had certain
11 properties --

12 QUESTION: So your view isn't that the proper
13 line is as it exists from time to time. It's as it exists
14 from time to time, excluding all examples of evulsion.
15 That's your theory?

16 MR. PEARSON: That is.

17 QUESTION: So you -- even under your theory
18 you've got to go back 100 years and find out how many
19 evulsive changes took place, don't you?

20 MR. PEARSON: Well, we have -- we have an
21 affidavit indicating from our surveyor that the river has
22 not changed very much at all.

23 QUESTION: Very much. But if there are any
24 evulsive changes, in order to find the boundary you would
25 have to know what they were.

1 MR. PEARSON: Of course finding some of that
2 evidence is one of the problems we have because of the
3 inaction on the part of Illinois in bringing suit 168
4 years later. It has a deleterious effect upon the quality
5 of evidence presented. I think that's another practical
6 consideration with respect to whether or not acquiescence
7 has been shown.

8 Finally, I think I'd like to conclude by
9 indicating that when a person drowns in the Ohio River, if
10 that body is located in the river the Kentucky coroners
11 will exercise jurisdiction over it. However, Illinois
12 coroners will not. If the body is brought to the bank on
13 the Illinois side they will exercise jurisdiction over it.
14 Sometimes the Illinois coroners will seek the permission
15 of the Kentucky coroners to exercise jurisdiction over a
16 body.

17 QUESTION: What else would you expect them to
18 do? I mean, if it -- if the 1792 boundary were the line,
19 how would you expect them to behave differently? It would
20 seem to me if I were a coroner I would say, yeah, I know
21 it's the 1792 line, but nobody knows where the 1792 line
22 is, even Mr. Pearson. He's been working with this case
23 for a long time. He doesn't know -- I'll just assume that
24 it is now where it was then. Isn't that the way you'd
25 operate? I would.

1 MR. PEARSON: Well, I think, Your Honor, the
2 answer to that question is the practical choice of all,
3 the low-water mark on the northwestern side. Then you
4 don't have to guess at all. Just like with -- in -- with
5 the Connecticut River. There would be no guessing. There
6 would have to be no assumptions.

7 With that in mind, Your Honor, if there are any
8 more questions --

9 Thank you.

10 QUESTION: Thank you, Mr. Pearson.

11 Mr. Brunzman, we'll hear now from you.

12 ORAL ARGUMENT OF JOHN BRUNSMAN

13 ON BEHALF OF THE PLAINTIFF ILLINOIS

14 MR. BRUNSMAN: Mr. Chief Justice, and may it
15 please the Court:

16 I'd like to begin this afternoon by talking a
17 little bit about the 1792 low-water line, whether anyone
18 knows where it is or not. I think that the record does
19 show that Indiana, Ohio, and Kentucky all resolved their
20 boundary dispute following this Court's 1980 decision by
21 using a line depicted on a series of U.S. geological
22 Survey maps showing the 1792 low-water mark, and that line
23 was based on surveys done by the Corps of Engineers about
24 the time of 1896 to 1906. They did those surveys before
25 they built the dams on the river that have raised the

1 level of the river that have really caused the problem
2 that we have here today, and the parties agreed that was
3 the best existing representation of the 1792 line.

4 QUESTION: How did the 1896 surveys deduce the
5 1792 low-water line?

6 MR. BRUNSMAN: It's obviously, Your Honor, it's
7 not exactly. They just -- the parties determined that's
8 the best approximation they could ever come up with.

9 QUESTION: Well, so what you're saying is that
10 the 1896 survey didn't purport to show the 1792 low-water
11 mark; it showed the 1896 low-water mark?

12 MR. BRUNSMAN: It showed -- it used an average
13 of gauge readings on various parts of the river going back
14 a number of years before that, up to 50 years before that.
15 What it did was get a mean low-water mark over a period of
16 years, and --

17 QUESTION: 50 years preceding 1896?

18 MR. BRUNSMAN: Exactly. And the 22 U.S.
19 Geological Survey maps showing the Illinois-Kentucky
20 section of the boundary are part of the record in this
21 case. They are filing No. 44. Like the maps between
22 Kentucky and Indiana and Ohio, they all show the boundary
23 as the low-water mark some distance south of the
24 contemporary northern shoreline. It varies anywhere from
25 100 feet to some places past the middle of the river.

1 There are three exceptions to that. There are
2 three places where there were former islands in the river
3 that have now become attached to Illinois. Illinois
4 concedes those are part of Kentucky because they were
5 islands originally, so that 1792 low-water mark would have
6 been north of them.

7 I submit that these maps have been in existence,
8 many of them have been in existence since the 1950's, that
9 Kentucky had some notice, some idea of where the 1792 low-
10 water mark was, just as Illinois was put on notice by
11 those maps.

12 QUESTION: If you use a changing low-water mark
13 as the boundary, what's the law if a dam is built or the
14 low-water mark is changed by an act of one of the States?

15 MR. BRUNSMAN: I believe that there are cases
16 that indicate that you can have in effect an evulsive
17 change created by manmade intervention. In fact Illinois
18 resolved a dispute informally with the State of Missouri
19 using just that principle. The Corps of Engineers had
20 built a dam there --

21 QUESTION: Well, what about the low-water mark?
22 Suppose the low-water mark is always much higher after a
23 dam? If the normal rule applies, is there now a new low-
24 water mark, even though it's manmade?

25 MR. BRUNSMAN: Assuming that we had a case other

1 than Ohio v. Kentucky?

2 QUESTION: Yes.

3 MR. BRUNSMAN: I would assume that would be a
4 new low-water mark, because that's -- a low-water mark
5 would be the point the river recedes in its lowest stage
6 under existing circumstances. That would be one
7 definition.

8 QUESTION: Well, if you knew where the 1792 --
9 I'm sorry, you did know where it was. You should have
10 been more careful about where you put your bridge signs
11 and things of that sort.

12 MR. BRUNSMAN: Well, Your Honor, I don't think
13 that a bridge sign is the sort of thing that you use to
14 deprive a State of what would otherwise be its legal
15 jurisdiction. I think the letter that Mr. Pearson talked
16 about, the author said well, this is close enough to the
17 theoretical State line for our purposes. He was putting
18 up a sign that said you're leaving Kentucky and entering
19 Illinois. I am sure he would have been quite surprised to
20 consider that he might be determining a State boundary for
21 all time by writing that letter. I don't think that's the
22 sort of situation or the sort of fact you would rely on in
23 establishing acquiescence.

24 And in discussing the facts in this record I'd
25 like to turn at this point to the various Kentucky

1 authorities since 1890 that have recognized the 1792 low-
2 water mark to be Kentucky's boundary. In fact, starting
3 in 1890 that was Kentucky's position when it came to this
4 Court and argued the Indiana v. Kentucky case. In that
5 case Indiana suggested that it was the contemporary low-
6 water mark. This Court disagreed, siding with Kentucky,
7 and said the decisive question is really the line as it
8 existed in 1792, and that it was fixed at that point and
9 wouldn't change thereafter. So beginning as early as 100
10 years ago Kentucky authorities themselves have
11 acknowledged the 1792 line.

12 Following that decision there have been a number
13 of Kentucky authorities, the earliest is a 1916 Kentucky
14 case where the question was whether or not a small island
15 in the river was within the northern boundary of Kentucky.
16 That Kentucky court cited Indiana v. Kentucky and said the
17 boundary is defined as the low-water mark as it existed
18 when Kentucky became a State. And that case, I would
19 submit, is of significance to the present controversy
20 since the island was located in the river near Mound City,
21 Illinois. So in that Perks v. McCracken decision we have
22 explicit recognition by Kentucky that the 1792 line
23 applies to that part of the river between Illinois and
24 Kentucky.

25 Subsequent --

1 QUESTION: Mr. Brunzman, did something occur
2 that promoted Illinois to file the suit that it did after
3 all these years?

4 MR. BRUNSMAN: I think it was the resolution --
5 the resolution of the earlier cases in 1980, and then I
6 believe the actual maps weren't completed showing a line
7 until 1985. I think that's fair to say was the --

8 QUESTION: (Inaudible) your statement probably
9 benefit the results of those other cases when they finally
10 drew the line?

11 MR. BRUNSMAN: Well, the line that's on the
12 U.S.G.S. map shows that some part of the river for the
13 most part is in Illinois. So to that extent we would
14 benefit. I think at the time we filed the suit, I'm not
15 even sure -- I wasn't aware of those maps. I'm not
16 certain if anyone -- if we were, but they -- just the
17 certainty of knowing where it is was the benefit we sought
18 to obtain by filing a lawsuit at that time, knowing that
19 the court had just resolved it with regard to the other
20 three States on the river, and that it seemed like the
21 opportune time to do so as far as Illinois was concerned.

22 QUESTION: Wouldn't there be some chance that if
23 the boundaries, the low-water mark as it was back in 1792,
24 that the river has changed so that that low-water mark of
25 1792 would be on dry land on the Illinois side?

1 MR. BRUNSMAN: I think that's -- it's
2 conceivable, and in fact that is the situation --

3 QUESTION: Well, I would think it would be just
4 as conceivable as if the river moved the other way.

5 MR. BRUNSMAN: Well, but I think that -- this is
6 based on a premise that misconstrues the change in the
7 river. The river hasn't moved. The dams have raised the
8 level of the river so in effect it has spread out both
9 ways. It's deeper behind the dams than it was naturally.
10 That's why the original pre-dam --

11 QUESTION: You don't think then, you don't think
12 the Ohio is as much of a meandering river as the
13 Mississippi, for example? It goes downhill faster, so it
14 doesn't --

15 MR. BRUNSMAN: I think that is exactly what I
16 have read, that that's the case. Also, the Corps of
17 Engineers, the Government has spent many millions of
18 dollars putting these dams and docks there. They are not
19 likely to let it gradually move around those dams and
20 docks so that --

21 QUESTION: But if it's deeper above the dams,
22 one would think it would be shallower below the dams,
23 because the same amount of rainfall is falling on that
24 watershed as fell in 1792.

25 MR. BRUNSMAN: If you look at the level of the

1 dams, and in one of the filings, I think it's filing No.
2 41 in Exhibit 3 or 4, some Corps of Engineers documents,
3 they show the level of the pool behind each dam. And it's
4 above the existing low-water mark because each dam was
5 built to guarantee a minimum 9-foot navigation pass. And
6 to do that --

7 QUESTION: Then where is the additional water
8 coming from? I mean, if it's wider on both sides in some
9 places, it seems logical it must be narrower on both sides
10 in other places.

11 MR. BRUNSMAN: Well, I -- to tell you the truth,
12 I can't answer that. I do know that when you look at the
13 line based on the pre-map, or the pre-dam survey of the
14 Corps of Engineers, you'll see that all along the
15 shoreline of not just Illinois, but Indiana and Ohio, that
16 pre-dam low-water mark is for the most part south of the
17 shore.

18 Another source that -- another Kentucky source
19 recognizing the 1792 line was the 1963 attorney general's
20 opinion where the Kentucky Attorney General not only
21 recognized the existence, or the accuracy of the 1792 low-
22 water mark as Kentucky's boundary, he also recognized that
23 because of the dams it would be south of the contemporary
24 northern shoreline due to the general raising of the
25 river.

1 The final two Kentucky sources that contain
2 statements incompatible with Kentucky's position here are
3 their two bulletins issued in 1969 and 1972 by the Special
4 Ohio River Boundary Subcommittee of the Kentucky
5 Legislative Research Commission. The introduction or
6 forward to the first of those bulletins, Bulletin 81,
7 tells us that this special subcommittee was created
8 specifically to study Kentucky's Ohio River boundary due
9 to litigation during the preceding 150 years.

10 I think it's significant to note that despite
11 Kentucky's claim here that it has always asserted its
12 boundary to be the low-water mark as exists from time to
13 time, that claim was somehow lost on the authors of this
14 -- these bulletins, since neither one of those bulletins
15 advanced such a claim on Kentucky's behalf, and both of
16 them recognize the 1792 low-water mark.

17 So, based on those sources running from 1890
18 through 1972, and those two reports were even issued while
19 Ohio v. Kentucky was pending in this Court, it shows to me
20 first that Kentucky has repeatedly recognized the 1792
21 line. Also that -- oh, that's true, there was also
22 confusion within Kentucky, because the legislative
23 research commission was saying it's the 1792 line,
24 Kentucky in their answer to Ohio's original complaint said
25 no, it isn't.

1 And again, that kind of uncertainty and
2 confusion, I think, fits Illinois' position in this case
3 because you don't have acquiescence where the State
4 claiming the benefit of it can't show a longstanding
5 continuous claim to the boundary they are seeking to have
6 the Court adopt.

7 There is additional evidence in the record, I
8 think, also that shows that this uncertainty extends to
9 both States. The best evidence of that concerns the
10 taxation of the permanent structures. There are a number
11 of structures built on the Illinois shore that extend into
12 the river, barge loading facilities, coal loading
13 facilities, that sort of thing. Illinois identified 15 of
14 these structures, and admittedly we could produce evidence
15 that we were definitely taxing only one of them. That was
16 part of a grain-loading facility that is located in
17 Alexander County, Illinois.

18 Kentucky of course argued this shows that they
19 have exercised exclusive jurisdiction over the river,
20 Illinois hasn't. But in fact the record also shows that
21 Kentucky, too, has only taxed one of these 15 structures.
22 So really what you have, 13 out of 15 structures aren't
23 being taxed by either State.

24 Kentucky did try to tax a second one --

25 QUESTION: I bet they're paying taxes now.

1 (Laughter.)

2 MR. BRUNSMAN: They're waiting, holding their
3 breath.

4 Kentucky did try to tax a second structure, but
5 the taxpayer there protested on the grounds that they felt
6 that the whole thing was in Illinois and not in Kentucky.
7 And taxation I think is one of the factors the Court has
8 traditionally looked at in these acquiescence cases, and
9 here I think it supports a conclusion that the record
10 shows uncertainty in both States, and that's incompatible
11 with a finding of acquiescence.

12 Another example --

13 QUESTION: What is the -- is the water above
14 these dams heavily used for recreation?

15 MR. BRUNSMAN: I don't believe it is, Your
16 Honor. I have been down there -- all I can say is on my
17 personal visits there is not. It is mainly used for
18 commercial --

19 QUESTION: No, not a lot of boating or anything?

20 MR. BRUNSMAN: Not a lot of boating. I only
21 know of one --

22 QUESTION: But fishing? But fishing?

23 MR. BRUNSMAN: There is some fishing. There is
24 some commercial fishing. But the few times I have been
25 down there there is not a great deal of pleasure boating

1 on the river.

2 QUESTION: What do they get? Catfish?

3 MR. BRUNSMAN: I have no idea, Your Honor.

4 (Laughter.)

5 MR. BRUNSMAN: Another incident that Mr. Pearson
6 talked about was the -- had to do with the coroners. And
7 he mentioned the situation where the Illinois coroner
8 always asks permission before he takes charge of a
9 drowning victim in the river. While it happens to be the
10 coroner in Hardin County, Illinois, it is certainly true
11 that he has always done so. But it's also true that the
12 Kentucky coroner has always given his permission, even in
13 the most recent incident where the victim was still in the
14 river when the Kentucky coroner arrived on the scene.

15 And I would submit again this reflects
16 uncertainty in both States, since Kentucky doesn't suggest
17 how one of its coroners could legally delegate authority
18 over a death occurring in the Commonwealth to an Illinois
19 official. Plainly it's just neither of them knows what to
20 do exactly, so they work this out between themselves.

21 There is a similar arrangement that was in
22 existence for a long time between the Gallatin County,
23 Illinois coroners and their counterpart. The Illinois
24 coroner handled the victims if he was a resident of
25 Illinois. The Kentucky coroner handled the rest.

1 So again, I think these sorts of situations fall
2 far short of what normally takes and what this Court has
3 found in the past it takes to establish a new boundary by
4 means of acquiescence or prescription.

5 Finally, I'd like to discuss briefly the various
6 instances where Illinois has exercised jurisdiction over
7 part of the river. One example of this are the, some 78
8 permits Illinois' Department of Transportation has issued
9 over the last 69 years governing a variety of structures
10 built from the Illinois shore south into the river. And
11 these permits were issued pursuant to a statute that
12 requires such a permit for anyone who wishes to do any
13 construction within the public bodies of water of
14 Illinois. And I would submit that the actions of the
15 Department of Transportation is clear assertion that it
16 believed some part of the waters of the Ohio were within
17 Illinois, or it wouldn't have been issuing these permits
18 for the last 69 years.

19 Kentucky of course says that Illinois has never
20 exercised any jurisdiction on the water, and this I think
21 proves that that --

22 QUESTION: Do you think we ought to give some
23 deference to what the Master found?

24 MR. BRUNSMAN: Yes, Your Honor, I certainly
25 agree.

1 QUESTION: Well, I suppose you would. But do
2 you find any evidence in the -- in our original case
3 opinions that if it's a tie the vote goes to the Special
4 Master?

5 MR. BRUNSMAN: Your Honor, I think the Court has
6 said that although the Special Master's findings are
7 entitled to respect and a tacit presumption of
8 correctness, the Court nonetheless has to make an
9 independent review of each record in an original action,
10 since it's really this Court and not the Special Master
11 who is --

12 QUESTION: That's quite inconsistent, isn't it,
13 to say that there's a presumption but we do it
14 independently?

15 MR. BRUNSMAN: Well, Your Honor, I can only
16 repeat what I have read in the cases.

17 QUESTION: I've got you.

18 (Laughter.)

19 QUESTION: Well, what do you think?

20 MR. BRUNSMAN: I'd like you to rely heavily on
21 the tacit presumption of correctness and --

22 (Laughter.)

23 MR. BRUNSMAN: Another example of Illinois'
24 assertion of jurisdiction over the river has to do with
25 the 1927 decision of the Illinois Supreme Court in the

1 Joyce-Watkins case. That case involved an accident that
2 occurred on a railroad incline, and it occurred some 8 to
3 10 feet south of the existing Illinois shoreline. The
4 employer there argued that since it took place south of
5 the shoreline it didn't take place within the State of
6 Illinois, and the Illinois Industrial Commission has no
7 jurisdiction.

8 The Illinois Supreme Court rejected that
9 argument. It cited *Indiana v. Kentucky* for the
10 proposition that the boundary was the low-water mark on
11 the northwest side of the river. But then it also
12 observed that no commission between the States had ever
13 actually plotted that line, and that the dispute before it
14 really wasn't the proper vehicle for resolving an
15 interstate boundary dispute.

16 What it did, it was however able to resolve the
17 controversy because it concluded that the low-water mark
18 referred to in *Indiana v. Kentucky* was the record low-
19 water mark at any given point along the river. In other
20 words, each time the river got lower the boundary moved
21 further south. I would submit that that --

22 QUESTION: As opposed to a mean low-water mark.

23 MR. BRUNSMAN: Exactly. And under the way it
24 applied that rule in this case it's clear that it didn't
25 contemplate the boundary ever moving back. It would just,

1 each new --

2 QUESTION: Ratchet.

3 MR. BRUNSMAN: It would just ratchet further
4 south. And I submit that this certainly is not an
5 accurate interpretation --

6 QUESTION: That's about as chauvinistic approach
7 as you can take.

8 (Laughter.)

9 MR. BRUNSMAN: Exactly. This is the most
10 favorable boundary, I think --

11 QUESTION: Look at all the land you picked up.

12 MR. BRUNSMAN: It's mostly just water.

13 QUESTION: Look at all the shoreline you pick up
14 when it moves south.

15 MR. BRUNSMAN: Well, but we haven't really
16 picked up any shoreline. Regardless of what line the
17 Court would adopt in this case, it's a water line either
18 way. I don't think either State is going to gain any
19 shoreline one way or the other, no matter how it's
20 concluded.

21 But getting back to the Joyce-Watkins case, as
22 the Chief Justice indicated, that's the most favorable
23 possible version of low-water mark the State could have
24 come up with. That rule was cited by the various
25 authorities within the State of Illinois from 1927 through

1 1973. I would submit that that alone shows that Illinois
2 has not acquiesced to the less favorable line that
3 Kentucky claims in this case.

4 So in summing up, Illinois' position in this
5 case is first of all, of course, that the boundary between
6 Illinois and Kentucky is controlled by the prior decisions
7 of this Court in Ohio v. Kentucky and Indiana v. Kentucky.
8 It should be the 1792 low-water mark. Kentucky's defense
9 of acquiescence fails, I believe, first because Kentucky
10 authorities themselves have repeatedly recognized the 1792
11 low-water mark, and that is -- you can juxtapose that to
12 the fact that there is not a single witness or document in
13 the record that says -- that Kentucky can point to that
14 says it's the low-water mark as exists from time to time.
15 That, those words appear in the pleadings before this
16 Court, and nowhere else that I am aware of.

17 In addition, Illinois rely on the fact that
18 there is evidence of confusion in both States, and once
19 again that's incompatible with a finding of acquiescence
20 based on a continuous claim of right.

21 Finally, Kentucky has based its argument in part
22 on the suggestion that Illinois has never exercised any
23 jurisdiction on the river. I think there are examples in
24 the record at least as concrete as those Kentucky can
25 point to to show that we have exercised jurisdiction over

1 some part of the river south of the existing shoreline.
2 And that all of those factors add up to a situation where
3 you simply do not have acquiescence.

4 If the Court has no further questions, that's
5 all I have.

6 QUESTION: Thank you, Mr. Brunsman.

7 Mr. Pearson, do you have rebuttal? You have 3
8 minutes remaining.

9 REBUTTAL ARGUMENT OF RICKIE LEON PEARSON

10 ON BEHALF OF THE DEFENDANT KENTUCKY

11 MR. PEARSON: I do. Thank you very much. With
12 respect to the 78 permits issued by Illinois officials,
13 Kentucky would indicate from the outset that it cannot
14 stop Illinois from systematically developing its shoreline
15 or its bank. In other words, those riparians along the
16 bank have those rights. This is exactly the teachings in
17 New Jersey v. Delaware. Because you allow the development
18 of the Illinois shoreline, just like in New Jersey v.
19 Delaware, the State which allows that does not abandon the
20 defense of acquiescence.

21 Secondly, with respect to the Joyce-Watkins case
22 which was the Illinois case, as indicated in Vermont v.
23 New Hampshire, only the U.S. Supreme Court can determine
24 the boundary. The Illinois appellate court cannot
25 determine that boundary. Furthermore, if you read the

1 Joyce-Watkins case extremely closely, you'll find out that
2 they recognized that the boundary is a moving boundary,
3 which is consistent with our theory that it's the low-
4 water mark wherever it may exist from time to time.

5 Finally, with respect to Illinois' argument that
6 there is uncertainty regarding where the boundary is
7 located, this Court can end that uncertainty. It can
8 conclude that the boundary between the two States is the
9 low-water mark on the northwestern side of the river,
10 which everyone can see. Every fisherperson can see.
11 Every person having a boat on the river can see.

12 With that in mind, Your Honors, thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
14 Pearson.

15 The case is submitted.

16 (Whereupon, at 1:46 p.m., the case in the above-
17 entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
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#106 Orig. ILLINOIS, Plaintiff V. KENTUCKY

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BY *Robert Stuart Antel*
(REPORTER)