

ORIGINAL

In the

Supreme Court of the United States

STATE OF OHIO

PLAINTIFF,

v.

COMMONWEALTH OF KENTUCKY,

DEFENDANT.

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No. 27 Original

Washington, D. C.
December 3, 1979

Pages 1 thru 40

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STATE OF OHIO, :
Plaintiff, :
v. : No. 27 Original
COMMONWEALTH OF KENTUCKY, :
Defendant. :
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Washington, D. C.,
Monday, December 3, 1979.

The above-entitled matter came on for oral argument
at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES M. RINGO, ESQ., Assistant Attorney General
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40601; on behalf of the Defendant
MICHAEL R. SZOLOSZI, ESQ., Gingery, Palmer & Szolosi,
140 E. Town Street, Columbus, Ohio 43215; on
behalf of the Plaintiff

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JAMES M. RINGO, ESQ., on behalf of the Plaintiff	3
MICHAEL R. SZOLOS, ESQ., on behalf of the Defendant	11
JAMES M. RINGO, ESQ., on behalf of the Plaintiff -- Rebuttal	34

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 27 Original, State of Ohio v. Commonwealth of Kentucky.

Mr. Ringo, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES M. RINGO, ESO.,

ON BEHALF OF THE DEFENDANT

MR. RINGO: Mr. Chief Justice, and may it please the Court:

This original action initiated by Ohio in 1966 is before the Court today on Kentucky's exceptions to the report of a special master. The issue before the Court is the location of the boundary between the two states along the northerly edge of the Ohio River.

Ohio's claim, adopted by the report, is that the boundary is a fixed and static line located on the northerly low water mark as it existed in the year 1792. Kentucky contends that the boundary is the prevailing or current low water mark as it may exist at any given time as affected by the processes of accretion and erosion.

This Court in its 1973 opinion in this case rejected Ohio's attempt to amend its complaint to claim the middle of the river as the boundary and in so doing this Court held that the boundary between the two states was the northerly low water mark. This was based on two grounds: One, Ohio's long

acquiescence to Kentucky's open assertions of sovereignty over the river, and the other was the Court's earlier decision in *Handly's Lessee v. Anthony* that held that the boundary between Indiana and Kentucky is the river itself, not the banks but the river itself, wherever that may be at the low water mark on the northwest edge.

That decision was based on the cession made by Virginia and agreed to by the United States in 1784. This Court held that when Virginia ceded its lands northwest of the River Ohio to the national government, she intended to retain the entire river wherever it may be as the boundary between itself and unceded northwest territory. The river was to be a natural and ever-changing boundary for the convenience of the future population of the country and avoidance of controversy.

This holding in *Handly* simply reflects the universal commonlaw principle applied by this Court to state boundaries, that when a river serves as a boundary, the boundary follows the gradual changes in the river caused by accretion and erosion.

Besides this general rule of accretion, there are two other general principles relating to streams as boundaries. One is the principle of avulsion, which is when the boundary suddenly and perceptibly changes its old channel and adopts a new one, the boundary remains in the old channel. The other

opinion -- the other principle set forth by this Court in Missouri v. Kentucky is a well-recognized exception to the rule of accretion and which was applied in Indiana v. Kentucky. It is the abandoned or island rule, which is when a river gradually abandons its boundary channel and shifts around an island, adopting a new channel, the boundary remains in the original boundary channel. The result of this gradual shift of the channel of the river is the same as an avulsion.

QUESTION: Nebraska v. Iowa came after that case, did it not? It was decided later.

MR. RINGO: Two years later, I believe.

The result of this gradual shift of the channel of the river is the same as an avulsion; that is, the boundary stays in the original channel, but it differs in that it occurs over a long period of time, rather than suddenly, as in an avulsion.

Ohio's position in this case is based upon a misconception of Indiana v. Kentucky and this recognized exception to the rule of accretion or the island rule.

QUESTION: So you are suggesting that the regular rule is that no one loses title, or a boundary doesn't change with respect to an island? Whether there's an avulsion or whether it's gradual?

MR. RINGO: Right. Well, the island rule has two aspects; one, did it change the river, and what is the ownership

or dominion of the island.

QUESTION: I understand. But in any event, as far as the boundary between two states are concerned, it always remains the same, the island always remains in the same state.

MR. RINGO: If the island belonged to the state when it was admitted to the Union, then no subsequent change of the river --

QUESTION: Whether it's by avulsion, accretion, or otherwise?

MR. RINGO: Can divest it of its sovereign territory.

QUESTION: General Ringo, is it Kentucky's position that the boundary is at the low water mark on the Ohio side on any particular day? Just from day to day that it might change?

MR. RINGO: I think that the best statement of the position would be that it is the prevailing low water mark, wherever it may be.

QUESTION: Well, would that change? Might that change from day to day?

MR. RINGO: Well --

QUESTION: Or from year to year?

MR. RINGO: A day to day change probably wouldn't be as perceptible as perhaps over a large number of years, the --

QUESTION: Well, perceptible or not, it might change in 24 hours, might it not?

MR. RINGO: If there happens to be a flood or precipitation or something of that nature.

QUESTION: So that is Kentucky's position?

MR. RINGO: Right.

QUESTION: And you would concede, I take it, that if there had been an avulsive change in the Ohio River such that it wasn't gradual but a sudden shift, that that would change the boundary?

QUESTION: No, that is when it doesn't right? Avulsive changes do not change boundaries --

MR. RINGO: That's right.

QUESTION: My colleague White is right about --

MR. RING: A classic example of avulsion would be the Ox Bow situation, where it cuts through the Ox Bow. The boundary remains the abandoned river resulting from the cut through the Ox Bow.

QUESTION: Right.

MR. RING: Ohio's position is based upon the misconception of *Indiana v. Kentucky* which is an important case to this discussion and the island rule. In that case, it did not involve a determination of the entire boundary between the two states. It involved a dispute over Green River Island, a 2,000-acre tract of land on the Indiana side of the Ohio River. In that case, the Court found that when Kentucky became a state in 1792, the Ohio River ran in two channels

north and south of the island. The northern or boundary channel separated the island from the mainland of Indiana, but the river gradually abandoned the northern channel and by 1816, when Indiana became a state, the island had become attached to Indiana.

In applying the island rule, this Court held that the island was within Kentucky when it became a state and that subsequent abandonment of a boundary channel did not divest Kentucky of its dominion over the island. The boundary remained along the northern river watermark of the river's abandoned channel. Thus, *Indiana v. Kentucky* fixed only a land boundary along along the abandoned channel and did not involve a determination of the boundary between two states along the remainder of the entire river.

Another misconception Ohio has of the *Indiana v. Kentucky* case is based on the language which set the land boundary at Green River Island channel as the low watermark on the Indiana side of the north channel as it existed in 1792. However, in the absence of any accretive or erodive change in that channel after Kentucky became a state, and none was suggested, the abandoned channel which existed in 1792 continued to be the boundary.

On the other hand, the Court's principle set forth in *Handly's Lessee v. Anthony* continued to apply along the remainder of the original channel. The river

itself, wherever it may be, continues to be the boundary.

Ohio also misconstrues the Court's language in that case that Kentucky's jurisdiction and dominion continues as they existed when she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river. It is clear from the context of --

QUESTION: Counsel, you say in Handly's Lessee that the principle is that the river, however it may change, continues to be the boundary. Now, if it changes by avulsion, as my colleague White said, the river would no longer continue to be the boundary, would it?

MR. RINGO: That's true. This was the point that I was trying to reach at this very moment. It is clear, when they speak of the action of the forces of nature upon the river, the course of the river, in the *Indiana v. Kentucky* case it was clear from the context of the Court's opinion that this action of the forces of nature upon the course of the river referred to the abandonment of a channel, which would be the island example of an avulsion, and not to a gradual change in the channel which would be accretion and erosion and the boundary would follow that change. Nothing in that opinion suggests that the low water mark as it existed in 1792 is of any significance in those areas where the river, wherever it may be -- and the

words "wherever it may be" is exactly the words used by Chief Justice Marshall in *Handly* -- continued to flow in its original channel. Ohio cites absolutely no rule of law which would support its view of *Indiana v. Kentucky*, and we are aware of none.

The holdings in *Handly* and *Indiana v. Kentucky* each were recognized by the legislatures of Indiana and Kentucky in a 1943 compact approved by Congress. The compact connected the terminal points of the 1896 Green River Island survey line of *Indiana v. Kentucky* to the low water mark constituting the remainder of the boundary. This acknowledged that the boundary line is the river, wherever it may be at the prevailing low water mark on the northerly edge as set forth in *Handly*, and that the holding in *Indiana v. Kentucky* was limited to the fixing of a land boundary along the fill channel north of Green River Island.

In addition to all of this, Kentucky has openly maintained for almost 200 years that its boundary extends to the prevailing or current low water mark at its northerly edge. Such has been done through its legislative and judicial assertions of sovereignty over the river. This has been expressly recognized not only by previous decisions of this Court but by the courts of Ohio, Indiana, Illinois and Kentucky.

To adopt Ohio's position would completely ignore

the assertion of Virginia to retain the river itself wherever that may be as a natural and living boundary and the United States agreement to accept that assertion. A 1792 line would be unrealistic. It makes absolutely no sense to make a natural river a boundary and expect it to remain a fixed and beautiful line. Thus, no matter from what viewpoint this case is considered, the result indicated is the same: History, legal precedent and common understand all support the continuation of the natural boundary of the river's northerly edge at the prevailing low water mark. In the more than thirteen years since this case has been pending, Ohio has been unable to cite to this Court any rule which would warrant adoption of the 1792 low water mark as the boundary. Therefore, we submit that the decree should be entered providing that the boundary between the state of Ohio and the Commonwealth of Kentucky is the prevailing low water mark on the northerly edge of the Ohio River as it existed at any given time.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Ringo.

Mr. Szolosi.

ORAL ARGUMENT OF MICHAEL R. SZOLOS, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. SZOLOS: Mr. Chief Justice, and may it please the Court:

There is only one issue before this Court today and that is whether to adopt the Special Master's report wherein he concludes that the boundary between Ohio and Kentucky is the northerly 1792 low water mark. Ohio respectfully submits that the decisions of this Court fully support the recommendation of the Special Master and therefore it should be adopted. I hope to use my time this morning to make just two points.

First, the decision in *Indiana v. Kentucky* is indeed a fixed boundary decision; and, secondly, there are even policy considerations that are particularly appropriate today which compel this same decision to be followed.

QUESTION: Mr. Szolosi, are you going sometime during your argument to address the language of Justice Brewer in *Ohio v. Nebraska* on page 143 of 370 which I am about to quote to you, that not only in respect to the rights of individual landowners but also in respect to the boundary lines between the states, the law of accretion controls?

MR. SZOLOSÍ: Your Honor, we most assuredly agree with that statement. And I can direct Your Honor's attention for a moment to page 12 of Kentucky's exceptions, I submit that in *Arkansas v. Tennessee*, a case cited on page 12 by Kentucky, the general rule is set out, and as characterized by this Court in 1918, it is settled beyond

the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors, namely that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. And I submit, Your Honor, that in *Indiana v. Kentucky* if indeed, as Kentucky has already conceded, it was a gradual process which caused the channel north of Green River Island to dry up, then Indiana, not Kentucky, would have been determined to rightfully possess Green River Island and then later in the opinion, because of another doctrine, the doctrine of prescription and acquiescence, to have lost it. But that isn't what happened in *Indiana v. Kentucky*.

QUESTION: Then we are talking about basically a factual situation and that is whether the course of the Ohio River between Ohio and Kentucky changed, if it did change by avulsion or accretion?

MR. SZOLOSI: No, Your Honor, most decidedly we are not. What we are talking about is *Indiana v. Kentucky* holding that there is a fixed boundary between those states, a fixed boundary as of the date of Kentucky's statehood, 1792. Therefore the principles of accretion and avulsion do not apply to the Ohio River, and a Special Master so found.

QUESTION: But how can you reconcile that with Justice Brewer's language much later or at least two years later in *Nebraska v. Iowa*?

MR. SZOLOSZI: It is reconcilable, Your Honor, because this Court in 1890 determined that there was a fixed boundary along the river. It determined it because there are only two constructions that we can give to that case. Either it was an avulsion case or it was a fixed boundary case, and I submit it cannot be an avulsion case because the language in *Arkansas v. Tennessee* sets out a rule long settled and no longer the possibility of dispute that a gradual change in the river, in the channel and bed of the river would be accreted.

QUESTION: But you can have an avulsion at one point in the river, say, between Ohio and Kentucky, and nonetheless any changes in the river between Ohio and Kentucky as opposed to Indiana and Kentucky could be purely accreted and you could have two different results under *Nebraska v. Iowa*, couldn't you?

MR. SZOLOSZI: Your Honor, *Nebraska v. Iowa* was dealing with the middle of the river boundary and unlike the boundary here that is fixed by the cession, a deed and apparently this court in *Handly's* and in *Indiana v. Kentucky* construed those matters to have fixed the boundary as of 1792. The Special Master not only in this case but in

the original 81, in a report which is now lodged with the Court but has not as yet officially received, comes to that same conclusion in both matters.

QUESTION: That is what I thought your point was, Mr. Szolosi, that while you concede the general applicability of the common law rules of accretion and avulsion with respect to a typical boundary, which is the middle of the river, that this is an atypical boundary depending, as it does, upon the origins of the state of Kentucky and the origins of the Northwest Territory part of which became the state of Ohio, and that with respect to this atypical boundary it is the 1792 line that is the line, quite regardless of any subsequent avulsion or accretion. Isn't that your point?

MR. SZOLOSÍ: That is exactly, Your Honor.

QUESTION: And are you familiar with Texas v. Louisiana?

MR. SZOLOSÍ: Just in passing, Your Honor.

QUESTION: Well, that was another atypical boundary between two states, depending on the specific words of some treaties that overrode any ordinary rule about the boundaries between two states. There it was just the middle of the river, rather than the middle of the main channel and based on the word that control where the boundary was originally created, that was the rule, regardless of the general rule

about accretion and avulsion and things like that. But your point is that the words of the grant fixed the boundary.

MR. SZOLOSZI: That's right, Your Honor, and this Court's decisions recognized that in 1890 in *Indiana v. Kentucky*.

QUESTION: Then why did you have to go into Green Island and the abandonment of the channel and that sort of thing if the line was fixed by, in effect, metes and bounds?

MR. SZOLOSZI: It was most relevant that the Court inquire into exactly what the status of events was in 1792, and the Court points out in that opinion that if we could just look today we might come to a different result because the water is now all south of the island, but we can't do that. It is a fixed boundary. We have to look to June 1, 1792, and in looking at that date, the date that Kentucky became a state, we have to examine where was that river, and at that time, after examining all of the evidence, they were able to conclude that indeed the waters of the river Ohio did indeed run to the north of that island and therefore, because it is a fixed boundary, the boundary remains there irrespective of whether the boundary has changed by avulsion, by accretion or anything else.

QUESTION: So that, you say, was simply a different situation than *Nebraska v. Iowa*?

MR. SZOLOSZI: Yes, Your Honor, it most certainly

was because of the cession and the interpretation which this Court has placed on what that document did and what boundary it set, whereas in *Missouri v. Nebraska* or *Nebraska v. Iowa* the treaties that were involved set the boundary in the middle of the river. And obviously when the boundary is in the middle of the river, all of these normal common law rules of erosion and accretion and reliction and avulsion apply, but they don't apply here in our case, and this Court so found in the 1890 decision. Your Honor, I think --

QUESTION: What are the practical results of your position? Does a fisherman have to have licenses from both states because if the old line is now under water, how does he know whether he is in Ohio or in Kentucky?

MR. SZOLOS: Your Honor, I think that really brings me to the policy considerations that I indicated I wanted to discuss anyway.

QUESTION: Of course, that would be the rule if the ordinary rule of boundary lines applied, namely the deepest part of the channel.

MR. SZOLOS: It would have been, yes, that's right, as always, the navigable channel within the river. But in this case, Your Honor, the practical result is that somewhere in that river there is a 1792 low water mark. We've already -- this Court has already noted that the

damming of the river, particularly the large dams since 1955, have greatly widened the river and by widening it the 1792 low water mark is somewhere out in the river.

Clearly, Kentucky would have you believe that that makes it more difficult for the fishermen or for the industry that must discharge water or other substances into the river from determining where they are, are they in Ohio or are they in Kentucky. I submit the contrary is true: A fixed boundary is much more convenient and therefore much less subject to cause great amounts of litigation.

For instance -- and let's take the example of industry, a power plant, for example. Before the power plant can be constructed, it must obtain a certificate and a permit under the Clean Water Act from the state in which it will discharge. If the boundary is going to be a constantly moving boundary and if we assume that my arm is the discharge pipe and that this is the moving boundary today and the pipe is in Kentucky waters, tomorrow the boundary can be here. Does that mean they have to stop construction and go back to the other state?

QUESTION: Let me go back to my illustration of the fisherman. Do you have a little string of lights out in the river so he knows whether he is in Kentucky or in Ohio?

MR. SZOLOS: Absolutely not.

QUESTION: Or has he got two licenses?

MR. SZOLOSZI: Your Honor, if there is a 1792 low water mark that is fixed, whether it is by monuments or not, at least he has some idea and it will become generally well known, where you have about 80 to 100 feet on the river, if you are within 80 feet of Ohio's bank, you are safe, you are not going to be arrested by Kentucky for fishing in Kentucky waters. And if you choose to only fish in Ohio waters, you will only need an Ohio license. On the other hand, if you want to venture wherever your boat or the fish take you, then you may need two licenses. But that is much more difficult to accomplish if the boundary is a constantly moving boundary because --

QUESTION: What really is this case all about? What is the value for which each of you is contesting?

MR. SZOLOSZI: Your Honor, I really believe that there are two principal reasons that this case is in court: One, there is a revenue consideration, taxes can be levied to the extent there is property that is within your jurisdiction, bridge revenues, license revenues for fishing, boating, matters such as liquor license regulation and the revenues from that regulation --

QUESTION: Do you have saloons out in the middle of the river or --

MR. SZOLOSZI: Your Honor, there are the river

boats that at times do attach themselves to the boundary, but those matters are all part of the revenue producing aspects of this case.

As this Court has frequently noted in all boundary cases, there is the notion of sovereign jurisdiction here, and each state obviously feels strongly about having that matter finally determined by this Court.

QUESTION: You just like to litigate.

MR. SZOLOSÍ: No, Your Honor, most assuredly Mr. Ringo and I, as much as we enjoy being here today, would have easily passed it up if the matter could have been resolved short of this.

QUESTION: Do you have dependable evidence as to where the boundary was in 1792?

MR. SZOLOSÍ: Your Honor, I submit that we do.

QUESTION: What is it generally?

MR. SZOLOSÍ: In one proceeding already, a Nuclear Regulatory Commission proceeding which is referred to in Ohio's brief, the Public Service Company of Indiana has already proven where the 1792 low water mark lies with respect to a small area that they must -- to which they will discharge their waters from the plant.

QUESTION: What is the full length of the river between these two states, roughly?

MR. SZOLOSÍ: I'm really not sure, Your Honor.

QUESTION: But you are suggesting there is evidence that would enable the definite establishment of a boundary for the full length of the river between the two states 200 years ago?

MR. SZOLOSZI: Yes, Your Honor. The evidence is at least as good as the evidence which this Court accepted in *Indiana v. Kentucky* in 1896.

QUESTION: You mentioned a moment ago that it was the Indiana Public Service Company that had produced the evidence. Was that as to the boundary between Indiana and Kentucky or the boundary between Ohio and Kentucky?

MR. SZOLOSZI: Concededly, Your Honor, they were working with surveys that related to a portion of the Indiana boundary, but the same surveys can be depended upon, though those surveys exist, the 1806 surveys and the 1896 surveys --

QUESTION: Well, you could have had an avulsion or an accretion where the river runs between Ohio and Kentucky and not one where it runs between Indiana and Kentucky.

MR. SZOLOSZI: Your Honor, your question indicates to me that I have obviously failed in my attempt to convince you that there is a fixed boundary and therefore avulsions don't matter.

QUESTION: Or accretions.

MR. SZOLOSZI: Or accretions. They are simply

irrelevant, as in the Ohio River.

QUESTION: You say then that it doesn't make -- that the principle, the general principle doesn't apply on the Ohio River because of the findings of the earlier court in the Indiana v. Kentucky case?

QUESTION: First of all because of the language of the --

MR. SZOLOSZI: That's correct, Your Honor.

QUESTION: -- confirmed by two decisions of this Court and embodied today in the Master's report.

MR. SZOLOSZI: That's correct, Your Honor.

Your Honor, there is a second policy reason that for consistent I probably should go on and discuss it as well, and that is that in addition to the fact that it is much more convenient and therefore less likely to cause a great amount of litigation to have a fixed boundary, there is a more equitable concern that operates here today and that is with respect to a river like the Ohio that has a low water mark as a boundary and which has been dammed so that the river is now much wider than it was previously, the concepts of avulsion and accretion no longer work, the compensating theory that this Court talked about in Bonelli or Corvallis is no longer at work along the Ohio River. And so this reason also compels the Court to follow the decisions which it rendered in 1890.

For instance, normally along any river that has a middle of the river boundary, if there is accretion, the Court has noted, what you can gain on the one hand you might lose on the other. And with respect to avulsions, there is really no relevance because it fixes the boundary as of the avulsion.

But what happens on the Ohio River? It is a no-win proposition. Kentucky takes it all and Ohio loses it all.

QUESTION: But that is true with respect to the Arizona-California boundary made by the Colorado River. There have been four sets of dams in that river and yet it is recognized that if there is an accretion, the state that gets the land gets the boundary change, in effect.

MR. SZOLOS: Your Honor, is that a middle of the river case? I am not --

QUESTION: It is, yes.

MR. SZOLOS: Therefore, the distinction is apparent. It is not a river like the Ohio where we are not working from the middle where those equities can play, where you can gain on the one hand or lose on the other. We don't gain anything along the Ohio River if you happen to be a state to the north of the river, and those traditional principles which this Court looked at the underlying reasons for those principles in trying to apply them in

Bonelli and Corvallis. If you examine it, it is a windfall to the State of Kentucky.

QUESTION: But Nebraska v. Iowa came along a long time before either Bonelli or Corvallis and it simply stated a general rule.

QUESTION: Well, you concede that is the general rule, don't you?

MR. SZOLOSÍ: I do indeed, Your Honor.

QUESTION: But you assert that this is a special situation.

MR. SZOLOSÍ: But for a different set of cases.

QUESTION: Texas v. Louisiana, the case I mentioned to you, came a long time after the Nebraska case and yet it said that a general rule doesn't apply because of the specifics of the creation of the boundary.

MR. SZOLOSÍ: Which would therefore support --

QUESTION: But you have to cross two bridges, I gather. One is that this isn't a middle of the river case, it is a low water mark case, but then you have to cross the other bridge that it is the low water mark at the time of admission.

MR. SZOLOSÍ: That's correct, Your Honor, and that is what the Court held.

QUESTION: And that is where you rely on the cases in this Court.

MR. SZOLOSÍ: That's correct.

QUESTION: It is an unchanging low water mark.

MR. SZOLOSÍ: That's right. Your Honor, if I may, there are additional reasons why this Court should read *Indiana v. Kentucky* as having found a fixed boundary. For instance, again, if I may just direct the Court's attention to pages 21, 20 and 12 of the exceptions filed by Kentucky: First, on page 21, Kentucky sets out the language that we all concede is the most important language in that case as far as determining this question. If when Kentucky became a state, a focus on statehood, not on some date prior to an avulsion. On the first of June 1792, clearly the date that Kentucky officially became a state. Kentucky concedes that.

Later in that language, that her jurisdiction extended at that time -- and the Special Master recognized it -- that can only refer to the date of statehood. Thus a fixed boundary, not a boundary fixed by avulsion, a fixed boundary, because of the deed and the cession, at that time was the low water mark on the northwest side of the river, and then some very important language in the *Indiana v. Kentucky* case, where the court said these rights -- I am paraphrasing today -- these rights could not be affected by any subsequent change of the Ohio River.

QUESTION: What page are you reading that from

now?

MR. SZOLOSZI: From page 21 of Kentucky's exceptions, from the passage that is quoted from *Indiana v. Kentucky*, and it is about half-way down in the passage, the line begins "They could not be affected," and I submit that means these rights that Kentucky had inherited from Virginia -- could not be affected by any subsequent change of the Ohio River. And the word "any" includes not only avulsion changes but accretion changes, and it goes on to say "or by the fact that the channel in which the river once ran is now filled up from a variety of causes, natural and artificial."

Now, I submit, Your Honor, that that language clearly indicates to this Court that in 1890 the Court felt that this was a fixed boundary, but you don't have to rely on my interpretation. Kentucky tells us as much on two other pages in their exceptions.

On page 20, they try to finesse the issue when they say that the -- they admit first that the river gradually began to change its course so that the main channel flowed to the south of the island. So we have a change in the channel which Kentucky is going to argue was an avulsive change. And that is what they do, they argue that the change in the Ohio River -- now I am reading on page 20, about half-way down the page -- the change in the Ohio River

around the island had been an avulsive change, a change in the bed or main channel of the river itself, and that is how they are going to define avulsion on page 20. But if we look at page 12 of their exceptions, we find out that that is not an avulsive change.

The Court recognized the long settled rule that when the bed -- and I am reading from *Arkansas v. Tennessee*, the quote on page 12, about the fourth or the fifth or eighth lines -- that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream.

Well, clearly if the Court in *Indiana v. Kentucky* held or noted in its language that this boundary couldn't be changed by any process, and Kentucky's argument is they were talking about an avulsion, they couldn't have been talking about an avulsion because an avulsion doesn't involve a gradual change, and Kentucky admits it on page 12 of their brief. It involves a sudden change. In all of the avulsion cases that this Court has decided, there is a date that you can find in the opinions, a date that points out the year in which the avulsion occurred. In one case, in *Missouri v. Nebraska*, 1904, they were able to point to the day, July 5, 1867.

If *Indiana v. Kentucky* were an avulsion case,

then this Court would have pointed to a day or at least a year in which the avulsion occurred, but they didn't do that. They pointed to the date statehood became official, and that has absolutely no relevance to an avulsion at all.

So I submit, Your Honor, that even on Kentucky's brief, this Court's interpretation of Indiana -- that the interpretation applied to *Indiana v. Kentucky* in 1890 is that they found a fixed boundary. The only way it could have been an avulsive finding in *Indiana v. Kentucky* is if the definition of avulsion included a gradual change. And not only do they cite the case that shows to the contrary, but all of the other avulsion cases point out that it has to be a sudden change and so do all of the treatise writers, and that simply is not the facts in *Indiana v. Kentucky*.

QUESTION: And you are making that point to support your argument that the 1792 boundary is the applicable boundary and that that decision in this Court cannot be explained in terms of avulsion but can be explained only in terms of the 1792 boundary?

MR. SZOLOS: That's correct, Your Honor.

QUESTION: Do I understand your argument correctly?

MR. SZOLOS: You do indeed, Your Honor.

QUESTION: Your friend at some point asserted or at least I thought he did that an island can never be subject

to these changes. Now, I don't recall that he cited any case. Do you have any comment on that?

MR. SZOLOSI: Well, Your Honor, in a fixed boundary situation, obviously wherever the island lies on one side or the other of a fixed line, it can't be changed.

QUESTION: It remains there, yes.

MR. SZOLOSI: With respect to a middle of the river boundary situation, which is the more general case, the Nebraska v. Iowa case, the boundary I submit can and may change; if there is an avulsion it won't, but if there is an accretion it can.

QUESTION: Also Indiana v. Kentucky was decided the same day as Plessie v. Ferguson.

MR. SZOLOSI: The second case was, Your Honor, the boundary --

QUESTION: The second case, that is when the decree came down.

MR. SZOLOSI: Yes.

QUESTION: Do you think that -- Plessie has been overruled. Do you think we should overrule the other one?

MR. SZOLOSI: Absolutely not, Your Honor.

QUESTION: Can I go back to the practical problem for a minute. I guess you mentioned the power company has a survey of a very small portion of this boundary. Are there surveys in existence for this entire -- it is a

rather long boundary between --

MR. SZOLOSÍ: Your Honor, although it is not evidence in the record, we have the benefit of a rather prodigious project by Dean Wallace, the former Dean of the Indiana Law School where at the request of the state of Indiana he has been researching in Great Britain and in all of the archives available in this country, all of the old surveys and many surveys that can be referred to, competent surveyors today so that they can do the same thing that was done in *Indiana v. Kentucky*, take those surveys and do the best job to come up with the 1792 low water mark, and that is with respect to the river boundary along the entire Ohio, the Ohio-Kentucky boundary as well.

QUESTION: Well, would it be within the scope of this litigation to fight out all the details of that for the whole length of the river?

MR. SZOLOSÍ: Unfortunately, Your Honor, it is. In *Indiana v. Kentucky*, this Court in its decree remanded the matter to the three commissioners to actually locate the boundary, and the Special Master in this case recommends to this Court that if you approve and adopt his recommendations, one of those is to have the matter remanded to him so that we can begin the task of actually locating the 1792 low water mark.

QUESTION: But it is not within the scope therefore

of any issues now before us?

MR. SZOLOSÍ: No. There is only one issue here today, Your Honor, and that is whether to adopt the Special Master's report.

QUESTION: I understand.

MR. SZOLOSÍ: Your Honor, I would submit that -- I notice my time is almost up. There are two points I want to make before I stop talking, and one is that there is only one issue and all of the suggestions by Kentucky with respect to acquiescence is simply not an issue before the Special Master and under the stipulation we are not presented -- they are factual matters, there is no record on which to premise any findings. The Special Master didn't make any findings and therefore all of the argument that Kentucky devotes to that question is simply irrelevant to the proceedings before the Court today.

QUESTION: Aren't you simply saying that where the granting state says it isn't the middle of the river, all of the river belongs to us, and it is the low water mark on the other side, that the accretion-avulsion rule has nothing to do with it?

MR. SZOLOSÍ: Yes, Your Honor.

QUESTION: I don't see why that follows at all. I can see why it would be a different point that you look to for accretion and avulsion, but I can't see why the

general rule of accretion-avulsion wouldn't apply. I don't see why that is any more of a fixed boundary point than the fixed boundary point between Nebraska and Iowa.

MR. SZOLOSÍ: Your Honor, let me correct my answer in one respect, and that is that not only because it is a low water mark but because that is what was apparently intended when they ceded the land northwest of the Ohio River.

QUESTION: Your point is that it is a 1792 low mark.

MR. SZOLOSÍ: That's right. That's right.

QUESTION: Not just low water mark generally.

MR. SZOLOSÍ: But a particular low water mark. And the low water mark -- there was a question from the Court while Mr. Ringo was arguing as to which low water mark it is. Under the definitions that this Court has handed down, it is the lowest point to which the river recedes during the year.

QUESTION: And the special master took a look at that and now for us it would go back to the original grant, is that it?

MR. SZOLOSÍ: Pardon me, Your Honor?

QUESTION: It would go back to the original grant to determine this issue?

MR. SZOLOSÍ: Well, you don't have to go back

that far to actually fix the boundary.

QUESTION: The Louisiana case, we look to the treaty.

MR. SZOLOSZI: This Court only need go back as far as 1890 because the decisions of the Court are already there. They stand as stare decisis on the question --

QUESTION: Yes, when it goes back to the Master, if we agree with you and if we agree with the Special Master's report, and if this goes back to him, then, as the Chief Justice says, the question will be where was the 1792 low water mark --

MR. SZOLOSZI: That's correct, Your Honor.

QUESTION: -- and that is your boundary.

MR. SZOLOSZI: That's correct, Your Honor.

Your Honor, there is one other point that I wish to make and that is that Kentucky has not always asserted the argument that is before the Court today, and I suggest that that should be considered when you try to determine whether *Indiana v. Kentucky* stands for the proposition that it is a fixed boundary or not. In the answer --

QUESTION: Ohio hasn't been entirely confined to its position today either.

MR. SZOLOSZI: No, Your Honor, and unfortunately we are back to our original position. But my point is with respect to *Indiana's* position today, it is inconsistent --

QUESTION: Kentucky's.

MR. SZOLOSZI: Kentucky's, I'm sorry -- is inconsistent with the answer which they gave in this case initially, and their answer admitted that it was a 1792 low water mark but argued that for practical reasons you can't find it so we ought to have a prevailing low water mark. And then if we look at their exceptions, they talk about avulsion, 36 times they mention avulsion, and when we see their reply brief the word doesn't appear once, and I submit that is instructive, that they felt avulsion to argue avulsion was a weak position and they retreated from it. And that inconsistency should be considered when this Court tries to determine whether to read *Indiana v. Kentucky* --

MR. CHIEF JUSTICE BURGER: Your time is expired, counsel.

MR. SZOLOSZI: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Ringo?

ORAL ARGUMENT OF JAMES M. RINGO, ESQ.,

ON BEHALF OF THE PLAINTIFF--REBUTTAL

MR. RINGO: Yes, Mr. Chief Justice, I do!

The first thing I would like to address is this misunderstanding as to the distinction between the use of the word avulsion and in our reply brief the absence of the word avulsion, and this goes back to the distinction

between the general principle of an avulsion, which is a certainly perceptible change that the boundary remains in an abandoned channel.

The island rule recognizes the exception to the rule of accretion. It has the same result as an avulsion, but it happens very gradually and it is the very same thing that happened in the Missouri v. Kentucky case involving a dispute over Wolf Island which was an island of some 15,000 acres. When Kentucky was admitted to the union, first of all, the boundary between Kentucky and Missouri was the middle of the main channel of the Mississippi River. When Kentucky was admitted to the union, the main channel ran west of the island and therefore the island was within Kentucky's jurisdiction. But by the time of the dispute, the main channel of the Mississippi had changed and shifted and ran east of the island and therefore putting at that time Wolf Island on the other side of the main channel, but the Court held that the subsequent change of the channel did not divest Kentucky of its sovereign territory of Wolf Island, and this is the same principle that was applied in Indiana v. Kentucky.

QUESTION: Yes, but in that earlier case it didn't involve the Ohio River, did it?

MR. RINGO: Well, the reason we discuss --

QUESTION: And it didn't involve a boundary that

concededly now is from the low water mark, the north low water mark?

MR. RINGO: But that is the reason I discussed Missouri v. Kentucky, because that principle which we are calling the island principle, rather than avulsion because in looking through all the cases of avulsion it always involves a sudden and perceptible change, but this was a result that was the same, so since it wasn't sudden and perceptible it differs from avulsion. But the reason that we mention Missouri v. Kentucky, that is precisely the principle that the Court relied upon in Indiana v. Kentucky. It states the principle and then cites that principle, whether it is in the middle of the river or the low water mark that is in the Kentucky case.

QUESTION: Mr. Ringo, what is your response to this language in the Indiana v. Kentucky case where the court says that if when Kentucky became a state on the first of June 1792, the waters of the Ohio River ran between that tract known as Green River Island and the main body of the state of Indiana, and her right to it falls from the fact that her jurisdiction extended at that time to the low water mark on the northwest side of the river. Now, that says the boundary between the state is the low water mark. Then it says she 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 the river once ran is now filled up from a variety of causes, natural or artificial. Now, doesn't that just say in plain words that it is the north, it is the low water mark on the north side and that the north low water mark -- the boundary **doesn't** change by changes in the river?

MR. RINGO: First you must look at the context of the case. It was a dispute over Green River Island, that 2,000-acre tract of land. The jurisdiction that were talking about was jurisdiction remaining over that island. It was not discussing the entire river or the entire state.

QUESTION: Well, the Court goes on and says her dominion and jurisdiction continue as they existed at the time she was admitted to the union, unaffected by the action of the forces of nature upon the course of the river.

MR. RINGO: Okay. Now, this is the point I tried to make earlier, that it is clear from the context of that portion of the Court's opinion, that this referred to the island rule exception, that they were discussing an abandonment of this northern channel, did not strip or divest Kentucky of this island.

Another important point is that the opinion in *Indiana v. Kentucky* did not refer to changes in the remainder of the course, it was consistent with the policies of *Handly's Lessee v. Anthony*.

Going back to an earlier question of the Court, we look to the cession which determined the boundary and how the river was to be perceived as a boundary. The cession fixed the river as a natural, ever-changing boundary subject to accretion, and it mentioned in the opinion that the states had the right to it and if there was an accretion to the Indiana side then the accretion would belong to Indiana.

To accept Ohio's position, you fix the 1792 line and locate it wherever it happens to be located, we can assume that this is a natural river and accretions have occurred. Any accretion that has occurred north of the 1792 low water mark now would not belong to Indiana, Ohio, or Illinois, but would belong to Kentucky, and you would have situations where you would have the River in Kentucky and Ohio or Indiana and it would cause additional problems and this is exactly the reason that Virginia retained the river itself as a natural river, because no matter what the decision of this Court is or the arguments of counsel, the river will continue to go through its natural processes of adjustment which will be through accretion and erosion, and to do anything to the contrary would defeat or defy the terms of Virginia's cession of the national government and the government's exception of that cession.

That is all I have, Your Honor, except I do have -- there are some Eighth Circuit cases concerning this island rule which I did not put in my brief and in fairness to the Court I --

QUESTION: Mr. Ringo, unless you know where the 1792 low water mark is all along the river, unless you know that now and have it in your mind, you really don't know whose ox is going to be gored with this line, do you?

MR. RINGO: Well, I don't think it is -- if you are going to follow the traditional rules that have been set forth by this Court and adopted by this Court in its federal common law, whose ox is being gored is not in question.

QUESTION: I agree with you, but this is a matter of fact you don't know, do you?

MR. RINGO: No, Your Honor, I don't.

QUESTION: The recommended survey will develop that, will it not?

MR. RINGO: If it can be determined.

QUESTION: I thought both parties agreed that the low water mark in 1792 was lower than it now is and that it is now higher as a result of the activities of the Army Corps of Engineers.

MR. RINGO: It is not in evidence. It possibly could be, but Kentucky does not admit this. There are

some --

QUESTION: You say it is irrelevant, but I thought it was pretty clear what the result would be in this case.

MR. RINGO: That is all I have, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

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