IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 81 Original

COMMONWEALTH OF KENTUCKY,
Plaintiff,

vs.

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

ANSWER

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ANSWER

First Defense

Come now the Defendants, State of Indiana and Theodore L. Sendak, Attorney General of the State of Indiana, by Theodore L. Sendak, Attorney General of Indiana and Donald P. Bogard, Chief Counsel-Staff, and in Answer to Plaintiff's Complaint, say as follows:

1. That they admit the material allegations of paragraphs 1, 2, 3, 6, 7, 9, 11, and 12.

2. That they deny the material allegations of paragraphs 8 and 14.

3. That they admit in paragraph 4 that previous decisions of this Court have held that the Commonwealth of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that certain act of the Virginia Legislature entitled "An act concerning the erection of the district of Kentucky into an independent state," passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact, but deny that Virginia had any such jurisdiction over the District of Kentucky in 1789.

4. That they admit in paragraph 5 that under the Virginia-Kentucky Compact, Kentucky succeeded to whatever rights Virginia previously had, but deny that Virginia had any such rights in 1789.

5. That they are without sufficient information in paragraph 10 that would enable them to admit or deny whether the 1792 northerly low-water mark of the Ohio River is presently unascertainable at various locations, but deny that said 1792 low-water mark may not reasonably be ascertained along the entire length of the boundary.

6. That they admit in paragraph 13 that there have been original action boundary disputes between Indiana and Kentucky in this Court, but deny that that boundary line must be "resolved" since this Court has already determined that said boundary is the low-water mark on the northwestern side of the Ohio River as of 1792, a decision

in which Kentucky has acquiesced for over eighty (80) years and is therefore estopped from challenging, and would further deny that any action is required by this Court other than to appoint a special master and to order him to physically determine the low-water mark as of 1792 and to run that line.

Second Defense

Come now the Defendants, by counsel, and for their second defense, allege as follows:

1. This Court has previously determined, *Indiana v. Kentucky,* 136 U.S. 479 (1890), that the boundary line between the Commonwealth of Kentucky (hereafter Kentucky) and the State of Indiana (hereafter Indiana) is the low-water mark on the northwest side of the Ohio River as of 1792.

2. In a subsequent opinion in that case this Court stated that its confirmation of part of the Indiana-Kentucky boundary was without prejudice to the rights of the parties to bring further proceedings to resolve disputes over parts of the boundary not settled therein.

3. Kentucky has acquiesced in that determination and has failed to bring any further proceedings in the intervening eighty (80) years to challenge that decision, and this claim must now be denied.

Third Defense

Come now the Defendants, by counsel, and for their third defense, allege as follows:

1. That Kentucky's failure to bring further proceedings in this Court to attempt to establish the boundary between

Kentucky and Indiana as something other than the low-water mark as of 1792, constitutes laches, and therefore, Kentucky's claim in this cause must be disallowed.

Fourth Defense

Come now the Defendants, by counsel, and for their fourth defense, allege as follows:

1. The low-water mark on the northwestern side of the Ohio River as of 1792 may reasonably be ascertained from various documents, and the boundary between Kentucky and Indiana should be run on that line.

Fifth Defense

Come now the Defendants, by counsel, and for their fifth defense, allege as follows:

1. That between 1910 and 1930 a number of low-rise dams and locks were constructed on the Ohio River by the United States Corps of Engineers and that said dams raised the level of the Ohio River.

2. That those low-rise dams and locks were replaced in the 1950's and 1960's by five (5) high-rise dams and locks on the Ohio River between Indiana and Kentucky which have substantially raised the level of the Ohio and which have resulted in the inundation of a large number of acres of Indiana territory along the Ohio River.

3. That the present low-water mark is, therefore, much higher than the low-water mark of 1792, and if the present low-water mark is construed to be the boundary line between Indiana and Kentucky, then a great deal of territory previously belonging to Indiana will become the territory of Kentucky.

WHEREFORE, the Defendants, State of Indiana and Theodore L. Sendak, Attorney General of the State of Indiana, urge Plaintiff take nothing by its Complaint; that the boundary line between Indiana and Kentucky be reaffirmed as the low-water mark on the northwest side of the Ohio River as of 1792; that a Special Master be appointed to physically determine and run that line; that they be awarded their costs in defending this action; and for all other just and proper relief.

Respectfully submitted,

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