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What Are the Respective Rights of Virginia and Maryland in Relation to the Potomac River?

by Robert H. Abrams

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Case at a Glance

Maryland asserted authority to regulate a water withdrawal by Virginia from that portion of the Potomac River that forms the state boundary between those two states.

The project that led to this lawsuit was to be built on the Virginia side of the river with an intake extending across the recognized boundary into Maryland's portion of the river. While the specific project eventually was approved by Maryland, Virginia now seeks a judgment that declares her free of Maryland's regulatory jurisdiction in such cases.

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Through a centuries-old quirk of history, the state boundary between Virginia and Maryland runs along the low-water mark on the Virginia side of the Potomac River. As part of a water-supply project, Virginia sought in 1996 to build a water-intake facility on the Virginia shore with pipes extending into Maryland's portion of the river. Maryland insists that its regulatory approval is required, whereas Virginia insists that the historical agreements that fixed the interstate boundary did not cede to Maryland any regulatory authority over Virginia's use of the river.

ISSUES

Did the Special Master err in finding that the Compact of 1785 and the Black-Jenkins Award of 1877 did not create regulatory jurisdiction in favor of Maryland over Virginia water projects that extend into the Maryland waters of the Potomac River?

Did the Special Master err in finding that actions by Virginia submitting to Maryland regulatory procedures

in past cases have not resulted in acquiescence by Virginia to Maryland sovereignty over the waters of the Potomac River beyond the low-water mark on the Virginia side of the river?

FACTS

This case has two sets of facts, one recent and one steeped in the history of the colonial period and the founding of the American nation. The recent facts can be set forth succinctly; the historical facts are considerably more voluminous, but also fairly easily stated.

Fairfax County, Virginia, in a response to its growing population, sought to increase its water supply by building an additional water-intake structure on the Virginia shore of the Potomac River at a point where that river forms the boundary between Maryland on the north and Virginia on the south. The project would serve approximately 1.2 million people in north-

*COMMONWEALTH OF VIRGINIA v.
STATE OF MARYLAND*
Docket No. 129 Original

Argument Date:
October 7, 2003
From: The Report of the
Special Master, sitting by designation
of the United States
Supreme Court





ern Virginia. The water intake was planned to extend 725 feet into the river, a distance that, through a quirk in history, placed its terminus beyond the state line into the Maryland portion of the river. On January 4, 1996, the Fairfax County Water Authority sought approval from Maryland state agencies for permits that would allow it to construct the portions of the water-intake project that would be submerged in Maryland portions of the river.

Eventually, after four years of little progress, Maryland issued a preliminary denial of the permit to construct the facility. Virginia thereupon initiated this litigation, invoking the original jurisdiction of the United States Supreme Court over disputes between two or more of the states. The case was assigned to Ralph Lancaster of Portland, Maine, to serve as Special Master.

Although the requested permit was eventually issued by Maryland authorities, three of Virginia's four claims for relief were of a more generic nature, contesting, in essence, how much control, if any, Maryland may exercise over Virginia water projects in the Potomac River. In late 2002, the Master delivered his report that, in almost every regard, ruled in favor of Virginia. The case is now before the Supreme Court to review the "exceptions" of each of the parties to the Special Master's report. In fact, the "exceptions" being taken are entirely those of Maryland, while Virginia seeks to have the report accepted.

The historical facts begin in the colonial period of American history when both Virginia and Maryland were created by charters issued by several of the English monarchs, beginning as early as 1606 and King James I and stretching up to 1688 and King James II. Importantly, in

1609, James I gave, and in 1688, James II confirmed, grants to Virginia of its "Northern Neck" that included lands north of the Potomac and all of the Potomac River itself. Even so, Charles I, in 1632, granted to Maryland the Potomac River from shore to shore. Thus, with conflicting charters in place, the groundwork was set for several subsequent centuries of disputes between Virginia and Maryland.

The pivotal actions that set the stage for resolving the conflicting claims of Virginia and Maryland occurred late in the eighteenth century when the United States was formed. In its state constitution adopted in 1776, Virginia ceded its conflicting charter claims to the lands and waters to Maryland and three of the other original states. Virginia's 1776 constitution, however, excepted from the cession "the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon." Later in 1776, Maryland ratified its own constitution, rejecting the Virginia exception by claiming sole and exclusive jurisdiction over "the river Potowmack." Thus, a slightly more sophisticated groundwork for further disputes was now in place.

As soon as 1777, jurisdictional disputes arose between Virginia and Maryland. In 1785, following the conclusion of the Revolutionary War but before the ratification of the United States Constitution, those two states entered into an interstate compact. Article 7 of this compact granted exclusive rights to each state in the lands on their respective shores, and common rights of fishing and navigation, but did not resolve with specificity the competing claims to the river and territori-

al jurisdiction beyond the shores. There was common purpose uniting the states: the desire to improve upstream navigation. With the compact in place, whatever disputes arose were susceptible of settlement or of being ignored for a bit less than a century.

The absence of a precisely defined and agreed border between Virginia and Maryland came to the fore again following the Civil War. Seeking resolution of the "true line of boundary," the states submitted the matter to binding arbitration. In 1877, in a decision named for two of the three arbitrators, the "Black-Jenkins Award" fixed the state boundary at the low-water mark on the Virginia side of the river, thereby giving Maryland the vast majority of the river. The award relied heavily on the language of the Charter of 1632 from James I to Lord Baltimore that specifically granted to Lord Baltimore and Maryland the river to the south (Virginia) bank. Additionally, however, the arbitrators found that Virginia had retained the use of the river beyond the low-water mark. This finding relied on the ambiguities in the charters and in the Compact of 1785, buttressed by the long, continued use of those waters by Virginia (legally known as the doctrine of prescription). Both states ratified the award in 1878 and Congress consented a year later. The Black-Jenkins Award expressly recognized sovereignty rights in both states that can be in opposition to each other. Maryland's sovereignty over the portion of the river eventually awarded to it by Black-Jenkins seemingly includes regulatory jurisdiction sufficient to deny a permit to the Fairfax County Water Authority to place an intake in Maryland waters. Virginia's sovereignty that was explicitly recognized in Black-Jenkins, however, included

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“a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership. ...”

In the next 120 years, with the boundary well settled, the states exercised sovereignty with reference to that line of demarcation. In particular, Maryland exercised the full range of state authority over all aspects of activities that occurred north of the low-water mark on the Virginia side of the Potomac. Correlatively, Virginia, though continuing to assert sovereign rights to use the river, did not attempt to exercise regulatory authority beyond the southern side of the now-resolved boundary. Indeed, as was done in the case now before the Court, when Virginia activities reached from the Virginia shore into the Maryland portions of the river, the proponents on the Virginia side of the river would engage the Maryland regulatory process as well as that of Virginia. With the exception of an oystering dispute in Potomac estuary that arose in 1957 and was resolved by compact in 1958, after 1877, the two states managed the river cooperatively until the present dispute.

CASE ANALYSIS

As it was litigated before the Special Master, this case ultimately was simplified to seeking resolution of three legal questions: (1) What was the geographical extent of Virginia's Potomac access rights declared in the Compact of 1785 and preserved in the Black-Jenkins Award of 1877? (2) May Virginia exercise those access rights free of Maryland regulation in cases in which the exercise of the rights is accomplished by construction on the Virginia shore that extends into the Maryland portions of the river? (3) Did Virginia, by acquiescence, sub-

mit to Maryland regulatory authority on a continuing basis?

Owing to the litigation strategies of the states, the Special Master reconfigured the issues for analysis.

Maryland did not dispute Virginia's allegation that the activities at issue in this case—building facilities on its own shore and making a water withdrawal from the Potomac—were among the rights reserved to Virginia under the 1785 Compact. What the parties did dispute is whether that reservation of power extends to the “entire river” or only to the portion of the river above the low-water mark on the Virginia side. The language of the 1785 Compact did not clearly answer this question, so the legal analysis is to sift the record to properly discern the intent of the compacting parties based on inferences from the total record of all the relevant historical materials. History buffs may be entertained, but those with a taste for pulp fiction will not be. In the end, the decision, whomever it favors, will be of little precedential importance.

Even deciding in favor of Virginia that its rights include the taking of water from the entire river does not answer the second question framed by the Special Master, the so-called “regulation issue.” Can Maryland regulate Virginia's right when the exercise of the right physically “invades” waters lying on the Maryland side of the interstate border? Once again, the matter is one of finding an answer when the primary agreements governing this relationship are ambiguous.

In addition to historical materials, the Special Master reviewed at some length the one previous case that had addressed these issues, *Maryland v. West Virginia*, 217 U.S.

577 (1910), finding that the Supreme Court had there answered both the “entire river issue” and the “regulation issue” favorably to the Virginia position in this case.

Comparatively speaking, the Special Master gives short shrift to the claim of acquiescence, again inquiring as to whether acquiescence can be found both in relation to the “entire river issue” and to the “regulation issue.” Maryland, as the party seeking to establish acquiescence as a defense, has the burden of showing the two elements of the defense, each by a preponderance of the evidence. The elements are (1) long and continuous assertion of sovereignty by one state and (2) agreement of the other to submit to that sovereignty. Here, the Special Master found the showing was not made as to either of the two issues. In part, the Special Master found the assertion of authority undercut by the history of the states' agreements that claimed to preserve Virginia's rights and a near-total lack of evidence that Virginia agreed that its rights were no longer going to be exercised independently. Also importantly, all other state-acquiescence cases involve disputes about the boundary location itself and thus involve the surrender of a territorial claim, not the surrender of a sovereign right, which is a far different proposition.

SIGNIFICANCE

Although the parties may say it implicates the very core of their respective sovereignties, this is a case of limited significance. The principal limit on the significance of this case is its rarity. Few states will share a history of overlapping, inconsistent royal charters that create so much uncertainty regarding their sovereign relations.



Beyond the history, it is seldom the case that a state will seek to erect a facility that is not physically located entirely within its own borders. At this point in America's history, dry-land state boundaries are well defined, and a state will build its facility within its own borders and its own sovereignty. Where water bodies form the state line, there is some potential for a project that reaches across the state line, but even this situation will seldom result in controversy. Bridges, for example, usually are subject to advance agreement over regulatory authority, and water projects built on boundary rivers, in most cases, do not cross the boundary line. In this case, however, and in a very small number of other instances, the interstate boundary places all the deeper water on one state's side of the river. In these few cases, to be effective, a water intake (or outfall) would necessarily have to extend into the portion of the river located in the neighboring state. In these few cases, the question will arise regarding the authority of the physically "invaded" state to regulate the project.

Even if the situation were less rare, claims that common issues of core sovereignty are at issue in this case are a bit exaggerated. Federal law controls most of the important issues that might arise between the states. If the dispute is about water quantity, authoritative interstate allocations can be made only by Congress (interstate apportionment), the states and Congress (interstate compact), or the United States Supreme Court (equitable apportionment). If the dispute is about water quality, the federal Clean Water Act puts the United States Environmental Protection Agency in a position to mediate and control the activities in one state that interfere with water quality laws in another. If the issue is navi-

gation, the federal navigation servitude applies and the United States Army Corps of Engineers has jurisdiction. What is left, as in this case, is more nearly a matter of sovereign ego that is raised by a remarkable series of historical events. Maryland, despite the federal law limits mentioned, wants to regulate this project on the "same" basis as any other that occurs in its waters, and Virginia does not want to submit its governmental water projects to the "say-so" of another state.

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