

1971 O. A. G.

OFFICIAL OPINION NO. 23

September 15, 1971

Hon. Phillip E. Gutman
Chairman, Indiana Legislative Council
Room A1-Senate Chamber
The State House
Indianapolis, Indiana 46204

Dear Senator Gutman :

In response to your request for an Official Opinion regarding the Indiana-Kentucky boundary dispute as it relates to the proposed Southwind Maritime Center, east of Mt. Vernon, Indiana, the following is submitted :

ANALYSIS

It is necessary, at this time, to outline the historical background that has led to the present boundary question. Indiana's southern boundary was established at the time of statehood to be :

“* * * on the South, by the Ohio River from the mouth of the Great Miami River to the mouth of the Wabash River * * *” (See 1816 Act of Congress and Art. 14, Section 1 of the Indiana Constitution of 1852.)

It was determined by the United States Supreme Court in *Handly's Lessee v. Anthony* (1820), 18 U.S. 374, that Indiana's southern boundary extended only to the Ohio River and not in the middle of the stream. This conclusion was reaffirmed in *Indiana v. Kentucky* (1890), 136 U.S. 479, and the boundary was established at the low water mark at the northern bank of the Ohio River in 1792, the year of Kentucky's statehood.

In 1896, the United States Supreme Court, in *Indiana v. Kentucky* (1896), 163 U.S. 520, fixed the Indiana-Kentucky boundary for approximately 3.6 miles in Vanderburgh County. This “Green River Island” dispute, caused by a change in the channel of the Ohio River, was settled by a survey under the authority of C. C. Genung for the Commis-

OPINION 23

sioners appointed by the United States Supreme Court. It is important to note that the entire boundary was not determined in this case, but only the area in dispute. The Court stated:

“And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between the States as may not have been settled by this decree under the pleadings in this case.”

In the late 1930's, a Kentucky taxing district attempted to tax the Evansville Water Works. It is unclear what authority was presumed for this harassment. To settle the dispute, the states each appointed a commissioner to reach an agreement. The commissioners caused a survey to be made, and as the Wallace Report stated:

“* * * thus ending the harassment of the Evansville Water Works, which harassment was unsupported by any persuasive evidence which we (or the 1942 Commissioners) were able to find.”

In the early 1940's, as a result of the survey that established the 1942 low water mark, the State of Indiana and the Commonwealth of Kentucky entered reciprocal legislation to establish the boundary. Chapter 116 of the Acts of Kentucky of 1942 and Chapter 2 of the Acts of Indiana of 1943 were submitted to Congress. This procedure is required by the United States Constitution, Article 1, Section 10, Chapter 3, which provides that:

“No state shall, without the consent of Congress * * * enter into agreement with another state or with a foreign power.”

These agreements were accepted by Congress as an interstate compact on June 29, 1943. (See H. J. Res. 131, 78th Congress, 1st Session.)

A difference of opinion exists among those persons who have researched this situation as to whether the 1942 low-

water mark or the 1792 low-water mark should be used to determine the boundary. It is the conclusion of this office, however, that even with the assumption that Indiana and Kentucky entered the 1943 compact based on the mutual mistake that the 1792 low water mark could not be established, Indiana must abide by this compact as it has been adhered to for 28 years.

At the August 25, 1971, meeting of the Legislative Council, representatives of this office suggested the possible alternative of intervention into the Ohio-Kentucky suit that commenced in 1966. The State of Ohio has since amended its original complaint to ask that the Ohio-Kentucky boundary extend to the middle of the Ohio River. Ohio's amended complaint is based on the fact that the boundary question between the two states has never been authoritatively settled. In view of the United States Supreme Court decisions in this area and the 1943 compact, the factual situations are sufficiently different to make intervention inadvisable.

On the issue of taxation, this office is making a recommendation to the Indiana Port Commission to cause a survey to be made or to locate the survey made for the commissioners from Kentucky and Indiana prior to the 1943 compact. This survey should show the low water mark of 1942 at the proposed location of the port and industrial park. Until this information is submitted, any conclusions made by this office on the matter of taxation, must, of necessity, be conjecture.

When considering the tax aspects of this project, it is important to consider the significance of the taxable items involved. Mr. John H. McGavock, P.E., Assistant Vice President of Sverdrup & Parcel and Associates, Inc., stated that in the entire project there will be seven mooring docks (concrete cylinders reinforced with steel) in the Ohio River. This constitutes 5% of the project. Mr. McGavock further stated that the engineering firm is using two quadrangle maps from the U. S. Geological Survey entitled the "Smith Mills" map (1952) and the "Uniontown" map (1958). These maps state, in appropriate terms, that the Indiana-Kentucky boundary as of 1912 and 1913 extends into the Ohio River at its present stage, 50 to 100 feet, or 300 to 400 feet, respectively. It is the opinion of Mr. McGavock, from his

OPINION 23

familiarity with the entire project as a conservative estimate, only 2% could be subject to taxation by the Commonwealth of Kentucky.

CONCLUSION

It is therefore my official opinion that the 1942 low water mark should be determined and results made available. If any of the Indiana port project extends into the Ohio River beyond the 1942 low water mark, it may be subject to taxation by Kentucky. However, it appears that the problem of taxation may be *de minimis*.