No. 129, Original

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

REPORT OF THE SPECIAL MASTER

RALPH I. LANCASTER, JR.
Special Master
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December 9, 2002

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REPORT OF THE SPECIAL MASTER

BACKGROUND

For well over two hundred years tensions have existed between the State of Maryland and the Commonwealth of Virginia. The core source of the dispute – the location of the boundary between those States – has generated subsidiary questions focused on navigation of, jurisdiction over, and fisheries in and along the Potomac River ("Potomac" or "River"). By compact,[1] arbitration,[2] and litigation,[3] the States have sought resolution of these conflicts. Despite their best efforts, disputes continue to arise requiring resort to the courts. This is the most recent.

This action involves the Commonwealth of Virginia's right to construct improvements connected to the Virginia shore of the Potomac without regulation by Maryland. Virginia contends that the Compact of 1785 and the Black-Jenkins Award of 1877, confirmed by the Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), and by the Potomac River Compact of 1958, grant it the right to make improvements along the entire length of its Potomac boundary without regulation by Maryland. It seeks a

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[1] Compact of 1785 ("Compact" or "1785 Compact"), 1785-86 Md. Laws ch. 1, 1785 Va. Acts ch. 17 (Appendix ("App.") B); Potomac River Compact of 1958 ("1958 Compact"), 1958 Md. Laws ch. 269, 1959 Va. Acts ch. 28, Pub. L. No. 87-783, 76 Stat. 797 (1962) (App. E).

[2] Black-Jenkins Award of 1877 ("Black-Jenkins Award" or "Award"), 1878 Md. Laws ch. 274, 1878 Va. Acts. ch. 246, Act of March 3, 1879, ch. 196, 20 Stat. 481 (App. C); Board Of Arbitrators To Adjust The Boundary Line Between Maryland And Virginia: *Opinions And Award of Arbitrators On The Maryland And Virginia Boundary Line* (M'Gil & Witherow 1877) ("Black-Jenkins Opinion" or "Opinion") (App. D).

[3] *Virginia v. Maryland*, No. 12, Original, 355 U.S. 269 (1957).

declaration that it has a right to construct improvements connected to its shore and withdraw water from the River, including specifically the right to construct a water intake extending some 725 feet from the Virginia shore into the Potomac at a location above the River's tidal reach. Maryland has denied Virginia's contention by asserting that Virginia's rights do not extend above the tidal reach of the River and contending that, even if they do, Maryland can regulate Virginia's construction of improvements appurtenant to the Virginia shore and its withdrawal of water from the River. Maryland has also asserted the affirmative defense of acquiescence.

The controlling documents in this dispute, consisting of the Compact of 1785, the Black-Jenkins Award and Opinion, and the Potomac River Compact of 1958 are reproduced as Appendices B through E attached hereto.

A. The Potomac River

The disputes between Virginia and Maryland, including this one, have in large part involved the Potomac. The River is today the principal water supply for the Washington, D.C., metropolitan area. The Potomac River Basin drains an area of 14,670 square miles, 39% of which is in Virginia and 26% of which is in Maryland.[4] It flows for some 383 miles from West Virginia to Chesapeake Bay[5] and forms the boundary between Maryland on the north,

[4] *Potomac River Basin Report*, H.R. Doc. 343, 91st Cong., 2d Sess. 33 (1970) (Report of the Board of Engineers for Rivers and Harbors dated 12/16/1963) (Virginia Exhibit ("VX") 82).

[5] Declaration of Roland C. Steiner, ¶ 2 (VX 286).

and West Virginia and Virginia on the south. From its sources, the River flows for 99 miles to the confluence of its North and South Branches and another 114 miles to the intersection of the Maryland State line and the West Virginia and Virginia State lines.[6] The River then flows over Great Falls, and, fifty-four miles downstream from the intersection of the Maryland State line and the West Virginia and Virginia State lines, the River flows over Little Falls.[7] Little Falls marks the boundary between the tidal and non-tidal reaches of the River, with more than two-thirds of the River's entire length above Little Falls.[8] Shortly after Little Falls, the River enters the District of Columbia. The River then empties into Chesapeake Bay some 117 miles farther downstream from Little Falls.[9]

B. The States' Conflicting Claims

The Court has previously detailed the States' conflicting territorial claims and their origins in *Morris v. United States*, 174 U.S. 196, 223 (1899). In sum, at the time Virginia adopted its Constitution in 1776, the respective territories of Virginia and Maryland were undetermined because of conflicting charters. Virginia claimed its territorial limits under charters that King James I issued in 1606, 1609, and 1612; a patent from King Charles II in 1649 for Virginia's "Northern Neck"; and a confirmatory patent for the Northern Neck from King James II in 1688.

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[6] *Id*. ¶¶ 3-4.

[7] *Id.* ¶ 5.

[8] *Id.*

[9] *Id.* ¶ 6.

The Second Charter from King James I in 1609 and the grant of Virginia's Northern Neck contained territory now in Maryland, including the entire Potomac. Maryland's territorial claims were based on a 1632 charter by King Charles I. That charter also included the Potomac River from shore to shore. Thus, ownership of the River was unclear and unsettled.

Prior to 1776, Virginia claimed broad territorial interests in accordance with its charter grants. In its Constitution, adopted June 29, 1776, Virginia ceded, to Maryland and three other states, territories within the charter boundaries of those other states, but specifically excepted "*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.*"[10] In October of that same year, Maryland adopted a resolution at a convention of its constitutional delegates that rejected the exception in Virginia's Constitution by declaring that "*the sole and exclusive jurisdiction over the . . . river Potowmack . . . belongs to this state*."[11]

Thus, as of 1776, jurisdiction over and the right to regulate activities in, on and surrounding the Potomac remained in active dispute. Virginia's cessions to Maryland had specifically reserved "the free navigation and use of the . . . Potowmack . . . with the property of the Virginia

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[10] 1776 Va. Const., *reprinted in* 9 Hening's Statutes at Large ch. II, at 118 (1821) (emphasis added) (VX 11).

[11] *Proceedings of the Conventions of the Province of Maryland* (Oct. 29-30, 1776), *reprinted in* 78 Md. Archives, at 292-93 (Baltimore, 1836) (emphasis added) (Maryland Exhibit ("MX") 9).

shores or strands bordering on [the Potowmack] . . . and all improvements which have been made or shall be made thereon." However, Maryland claimed sole and exclusive jurisdiction over "the river Potowmack."

C. Resolution of Jurisdictional Issues and the Boundary – The Compact of 1785 and the Black-Jenkins Award of 1877

To resolve some of the uncertainty surrounding jurisdiction over the River, efforts that led to the Compact of 1785 began as early as 1777, when Virginia and Maryland each appointed Commissioners to settle the two States' respective rights to the Chesapeake Bay and the Potomac and Pocomoke Rivers.[12] The Commissioners appointed in 1777 never met, however, because Virginia would not meet with Maryland until Maryland ratified the Articles of Confederation[13] and by then the Revolutionary War had intervened.[14]

After the end of the War, Maryland (in December 1784) and Virginia (in January 1785) incorporated the Potomac Company through joint legislation passed in almost identical language. The Potomac Company's

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[12] *Journal of the House of Delegates of the Commonwealth of Virginia*, October Session, 1777, at 65, 74 (White ed. 1827) ("*Journal of the Virginia House of Delegates* (1777)") (VX 12); *Votes and Proceedings of the Senate of the State of Maryland*, October Session, 1777, at 10, 25, 27-30 ("*Votes and Proceedings of the Maryland Senate* (1777)") (MX 11).

[13] 2 *The Papers of George Mason* 755 (Robert A. Rutland et al., eds. 1970) ("Rutland, *Mason Papers*") (Letter from George Mason to Edmond Randolph dated October 19, 1782) (VX 246).

[14] *Id*. at 813 (Ed. note).

purpose was "the extension of the navigation of Patowmack river, from tide water to the highest place practicable on the north branch" in order to promote commerce to the west, particularly to the Ohio River and ultimately the Mississippi River and the Gulf of Mexico.[15] During the same period, Virginia (in June 1784) and Maryland (in January 1785) again appointed Commissioners to settle issues of Potomac navigation and jurisdiction.[16] At the invitation of George Washington, the Commissioners – Daniel of St. Thomas Jenifer, Thomas Stone, and Samuel Chase for Maryland and George Mason and Alexander Henderson for Virginia – met at Mount Vernon from Friday, March 25 through Monday, March 28, 1785.[17] Their conference produced the 1785 Compact. Both Maryland and Virginia approved the 1785 Compact and Congress subsequently approved it also.[18]

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[15] An act for establishing a company for opening and extending the navigation of the river Patowmack, 1784 Md. Laws ch. 33, Preamble; An act for opening and extending the navigation of Patowmack river, 1784 Va. Acts ch. 43, Section 1 ("Potomac Company Charter") (MX 18, 22).

[16] *See infra* notes 37-38 and accompanying text, pp. 29-30.

[17] 2 John C. Fitzpatrick, *The Diaries of George Washington* 354 (1925) ("Fitzpatrick, *Diaries*") (VX 217).

[18] Virginia and Maryland entered into the Compact prior to the adoption of the United States Constitution. Therefore, Congress did not approve it pursuant to the Constitution's Compact Clause, U.S. Const. art. I, § 10, cl. 3. However, the Supreme Court held in *Wharton v. Wise*, 153 U.S. 155, 172-73 (1894), that Congressional approval of the Black-Jenkins Award "render[ed] the compact of 1785 . . . thus consented to by congress, free from constitutional objections, if any that were valid had previously existed . . . . [Congressional] consent, taken in connection with the conditions upon which the [Black-Jenkins

(Continued on following page)

Article Seventh of the Compact defines the rights that Virginia and Maryland and their riparian owners have to and along the Potomac. It provides:

> The citizens of each state respectively shall have full property in the shores of the Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river, but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seanes on the shores of the other.

The activities of 1785 addressed issues of jurisdiction and navigation but did not address the long-simmering boundary dispute between the States. The precise location of the boundary was still undetermined and remained so until, in 1874, the two States submitted the question of the "true line of boundary" to binding arbitration by a panel consisting of Jeremiah S. Black, William A. Graham, and Charles A. Jenkins.[19] On January 16, 1877, the arbitrators issued their Award, sometimes referred to as the

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Award] was authorized, operated as an approval of the original compact, and of its continuance in force under the sanction of congress."

[19] 1874 Va. Acts ch. 135 (VX 55) (MX 37); 1874 Md. Laws ch. 247 (VX 56); 1875 Va. Acts ch. 48 (VX 59). When Graham died in 1875, J.B. Beck replaced him. 1875 Va. Acts ch. 48.

"Black-Jenkins Award," and their accompanying Opinion. The arbitrators placed the interstate boundary at the low-water mark on the Virginia shore of the Potomac.[20] Both States ratified the Award in 1878, and Congress gave its consent the following year.[21]

The Compact of 1785 (see Appendix B) and the Black-Jenkins Award and Opinion (see Appendices C and D) are the principal documents relevant to the resolution of this case.

PROCEEDINGS BEFORE THE SPECIAL MASTER

Commencing on January 4, 1996, Virginia's Fairfax County Water Authority sought permits from Maryland for construction of a water intake structure extending some 725 feet from the Virginia shore into the Potomac at a location above its tidal reach. The tortured history of the processing of those permit applications through Maryland's administrative and judicial venues is of only tangential relevance at this stage of the proceedings. Frustration with lack of progress in the application process caused Virginia to seek leave to file a Bill of Complaint in the Supreme Court of the United States. The Court granted Virginia's motion on May 30, 2000, and referred the matter to me as Special Master on October 10, 2000.[22]

[20] *See* Black-Jenkins Opinion, App. D, at D-18 to D-19.

[21] *See supra* note 2, p. 1.

[22] 530 U.S. 1201 (2000); 531 U.S. 922 (2000).

A. Pleadings

Virginia's Complaint contains four specific Prayers for Relief. The Third Prayer is for an injunction enjoining Maryland from requiring the Fairfax County Water Authority to obtain a waterway construction permit for its proposed offshore intake project. That permit has been granted[23] and that intake pipe has been constructed. Hence, Virginia's Third Prayer is moot.

There remain, however, the First, Second, and Fourth Prayers. The First and Second Prayers request declaratory judgments that (a) Virginia's right to use the Potomac and to construct improvements appurtenant to the Virginia shore, as established by the Compact of 1785, the Black-Jenkins Award of 1877, and the Potomac River Compact of 1958 apply upstream of the tidal reach of the Potomac and (b) Maryland may not require that Virginia, its governmental subdivisions, or its citizens obtain a Maryland waterway construction permit in order to construct improvements appurtenant to their properties on the Virginia shore of the Potomac. The Fourth Prayer requests that the Court enjoin Maryland from requiring Virginia, its political subdivisions, or its citizens to obtain water appropriation permits to withdraw water from the Potomac.

[23] State of Maryland Department of the Environment, Water Management Administration, Waterway Construction Permit No. 96-NT-0024/199661481 (MX 1024).

Maryland's Counterclaim asks for a comprehensive declaration that its

> territorial sovereignty includes the right to regulate the activities of Virginia entities that take place in the bed and waters of the Potomac River lying within Maryland and extending to the low water mark on the Virginia side.

In the context of this litigation, Maryland's requested relief is overly broad. This case is limited to consideration of Maryland's attempt to regulate construction in and water withdrawal from the Potomac by Virginia and its citizens. That is all that either Virginia's Complaint or the factual context of this case puts in controversy. Whether Maryland has the right to regulate Virginia's other activities in and on improvements constructed by Virginia or its residents below the low-water mark on the Virginia shore through imposition and collection of taxes, enactment and enforcement of criminal laws or other general licensing laws relating to public safety, occupational safety, health, alcohol, gambling, hunting or fishing, or general entertainment licensing, including restaurant inspection, is not at issue in this litigation.

Accordingly, this Report addresses only the remaining relevant issues in this original action.

B. Preliminary Issues

Before the parties framed the principal issues for decision in this case, several preliminary motions were filed. Appendix F attached hereto summarizes those motions and their disposition.

C. Record Before the Special Master

In framing the remaining issues and in arguing their respective positions on each of them, the parties presented evidentiary material supplemental to their briefs. The parties submitted a total of twenty-five volumes of historical documents, correspondence, and secondary source materials. Indices of those materials, prepared by the parties, are provided in Appendices G1 and G2 attached hereto.

D. Consideration of the Merits

While the last of the preliminary issues was under consideration, the parties submitted briefs on the first substantive issue presented for decision – the geographic extent of Virginia's Potomac access rights declared in the Compact of 1785 and preserved in the Black-Jenkins Award of 1877 and subsequent documents and decisions. Then, after a period of discovery, the parties submitted briefs on the remaining question – whether Virginia may, free of regulation by Maryland, exercise its rights under the Compact to construct improvements in the River appurtenant to the Virginia shore and withdraw water from the River. In its briefs on each of those issues, Maryland also elected to pursue one, and only one, of the eight affirmative defenses it had pleaded – acquiescence.

E. Mediation

After submission of final briefs and oral argument, I gave the parties one last chance to resolve the case amicably. On April 24, 2002, I ordered them to enter a period of mediation with a mediator of their choosing. A mediator conducted at least six sessions with the parties over the

course of nearly five months. All mediation activities were conducted under seal. The parties were ultimately unsuccessful in reaching a mediated settlement.

Accordingly, I have prepared this Report for filing with the Court.

ISSUES PRESENTED

Neither party has disputed that the activities in question here, namely, the construction of water intake facilities appurtenant to the shore of the River and the withdrawal of water from the River, fall within the rights declared for both States in the 1785 Compact. As defined by the arguments the parties put forth on the fundamental question in this case – whether Virginia has the unrestricted right to construct improvements in the Potomac appurtenant to its shore and to withdraw water from the River – the issues for the Court to decide are:

1. *The "Entire River Issue."* Whether the 1785 Compact extends to the entire Potomac, including its non-tidal reach.

2. *The "Regulation Issue*." Whether Maryland, whose southern boundary line along the Potomac lies at the low-water mark on the Virginia shore, has the power to regulate Virginia's exercise of its rights under the 1785 Compact to construct improvements in the Potomac appurtenant to its shore and to withdraw water from the River.

3. *The "Acquiescence Issue*." Whether, in any event, Virginia has, under the doctrine of acquiescence, lost whatever rights it had under

the 1785 Compact to construct improvements in the Potomac appurtenant to its shore and to withdraw water from the River because:

a. Virginia is bound by its acquiescence in certain holdings or dicta issued by Maryland state courts that the 1785 Compact does not extend to the non-tidal reach of the Potomac; and/or

b. Virginia has subjected itself to Maryland's regulation of its Compact rights to construct improvements appurtenant to the Virginia shore, and to use them to withdraw water, by acquiescing in the same type of regulation by Maryland in the past.

For convenience, I will refer throughout the balance of this Report to each of the issues by the shorthand titles used above.

For the reasons stated below, I do not find Maryland's arguments persuasive. Accordingly, I recommend that the Court enter judgment declaring that Virginia and its citizens have the right, free of regulation by Maryland, to construct improvements in the Potomac appurtenant to the Virginia shore and to withdraw water from the Potomac. No live controversy exists that would justify any of the broader relief sought in the Complaint and the Counterclaim.

ANALYSIS

As argued by the parties, both the Entire River Issue and the Regulation Issue turn on consideration and interpretation of the same documents and prior decisions. Therefore, my analysis considers what impact each of those major documents and prior decisions has on those two issues. After discussing those two issues in light of each of the pertinent documents and prior decisions, I consider the evidence offered by the parties in support of their respective positions on the Acquiescence Issue posed by Maryland's affirmative defense.

I. The Entire River Issue and the Regulation Issue

RECOMMENDATION I.A

Article Seventh of the Compact of 1785 between the Commonwealth of Virginia and the State of Maryland, which governs the rights of Virginia, its governmental subdivisions, and its citizens to withdraw water from the Potomac and to construct improvements appurtenant to the Virginia shore applies to the entire length of the Potomac, including its non-tidal reach.

RECOMMENDATION I.B

Virginia, its governmental subdivisions, and its citizens may withdraw water from the Potomac and construct improvements appurtenant to the Virginia shore of the Potomac free of regulation by Maryland.

As to both the Entire River Issue and the Regulation Issue, I conclude that the Court in *Maryland v. West*

Virginia, 217 U.S. 577 (1910), already has decided claims regarding the Potomac of the same nature as those made here on those issues and has decided them adversely to Maryland (see discussion at pp. 58-67 below). However, since the 1785 Compact and the 1877 Black-Jenkins Award form the basis for that decision as well as for my recommendations, I will first discuss their terms and scope.

A. The Compact of 1785

1. Entire River Issue

The question presented here is one of law – interpretation of a compact between sovereign States. As both a contract and a statute, this interstate Compact is interpreted by using customary rules of contract interpretation and statutory construction. *See Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). By one of those rules, where the language of the Compact is clear and unambiguous, that language is conclusive and no evidence extrinsic to the Compact needs consideration. *See Kansas v. Colorado*, 514 U.S. 673, 690 (1995); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). Only if a compact is ambiguous may resort be had to extrinsic evidence, including compact negotiations and related indications of the parties' intent. *See Oklahoma v. New Mexico*, 501 U.S. at 235 n.5; *Texas v. New Mexico*, 462 U.S. at 568 n.14; *Arizona v. California*, 292 U.S. 341, 359-60 (1934). Thus we begin with the question of the ambiguity *vel non* of the Compact.

a. Language of Article Seventh

Because Article Seventh of the Compact defines the rights that both Virginia and Maryland and their riparian owners have to and along the Potomac, its language is worth repeating. It provides:

> The citizens of each state respectively shall have full property in the shores of *the Patowmack river* adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of *the river*, but the right of fishing in *the river* shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seanes on the shores of the other.

(emphasis added).

Other Articles of the Compact address other issues: some, by their terms, apply only to the tidal portion of the River; others concern matters along its entire length. Article Seventh is clearly in the latter category. The language of Article Seventh is clear, unambiguous, and susceptible of only one interpretation, *viz.*, that it applies to the entire length of the Potomac. It gives to the citizens of *each* State "full property in the shores of *the Patowmack river* adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements" (emphasis added). It protects for the citizens of *both* States

property rights in their lands adjoining the River, the privilege of making improvements so as not to obstruct navigation, and the right of fishing in the River so as not to hinder fisheries on the shore of the other State. Article Seventh in no way expressly, or even by implication, limits the reach of its grant to the tidal portion of the River. There is nothing in its plain language to suggest that its drafters or its legislative enactors intended to restrict its scope. In the absence of limiting language, it is improper to import the interpretation that Maryland urges. *See New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." (quoting *Texas v. Mexico*, 462 U.S. at 564 (alteration in original)).

Despite the use of the unlimited term "Patowmack River" in Article Seventh, Maryland has urged that by its plain language Article Seventh applies only to the tidal reach of the River because (a) the term "Patowmack River" was understood in 1785 to mean only the tidal Potomac and (b) the words "shores," "navigation," and "wharves" used in Article Seventh demonstrate that Article Seventh applies only to the tidal Potomac because those words were not then used in a non-tidal context.

Maryland has offered no evidence in support of its first argument, simply asserting that its historian experts have shown that no need existed to state in the Compact that it applied only to the tidal portion of the Potomac because that was the clear understanding at that point in

history.[24] However, other than to draw the legal conclusion that a tidewater focus in some articles of the Compact meant that the term "Patowmack River" referred to only the tidal Potomac, neither expert suggested that "Patowmack River" in 1785 meant only the tidal Potomac and there is no evidence to support that opinion. Thus, no basis exists for that conclusion. To the contrary, the evidence shows that in 1785 the term "Patowmack River" was not used to refer only to the tidal Potomac. When the legislatures or the Commissioners wanted to distinguish or specify a section of the River, they did just that.[25]

In support of its second argument – that the plain language of the Compact manifests an intent that it apply only to the tidal reach – Maryland relies on cases decided by its own courts to interpret the words "shores," "navigation," and "wharves" in Article Seventh. Maryland, however, overstates the precedential and persuasive force of these cases – *Binney's Case*, 2 Bland 99 (Md. Ch. 1829) (VX 268); *United States v. Great Falls Manufacturing Co.*, Circuit Court for Montgomery County, Maryland,

[24] Affidavit of Douglas R. Littlefield, Ph.D (MX 772); Affidavit of Prof. Ronald Hoffman, *The Mount Vernon Compact of 1785* (MX 753).

[25] *See* Letter to the President of the Executive Council of the Commonwealth of Pennsylvania from George Mason et al. (Enclosure 2 to Letter to the Speaker of the House of Delegates, dated March 28, 1785), 2 Rutland, *Mason Papers*, *supra* note 13, at 822 ("[I]t is in Contemplation of the said two States to promote the clearing & extending the Navigation of Potomack, from tide-Water, upwards . . . .") (VX 246); *Journals of the House of Burgesses of Virginia 1766-1769*, at 314 (John Pendleton Kennedy ed. 1906) ("*Ordered*, That Leave be given to bring in a Bill for clearing and making navigable the River *Potowmack*, from the great Falls of the said River, up to Fort *Cumberland*. . . . ") (MX 3).

reprinted as Sen. Doc. 42, 35th Cong., 2d Sess. (1859) (MX 140); *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1 (1861) (VX 326); and *Middlekauff v. LeCompte*, 132 A. 48 (Md. 1926).

No state court decision can provide a controlling interpretation of the Compact. In a controversy between States, only the Supreme Court of the United States can make such a ruling. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Moreover, *Binney's Case*, *O'Neal*, and *Great Falls Manufacturing* were all decided prior to the Black-Jenkins Award of 1877. In their Opinion accompanying the Award, the arbitrators specifically disagreed with *Binney's Case*, and in the Opinion and Article Fourth of the Award they found that Virginia had access rights by prescription along the entire length of the River to the low-water mark, including full rights to make improvements appurtenant to its shore. Maryland later accepted the Award, including its Article Fourth.[26] *Middlekauff*, the fourth Maryland case, was decided in 1926, after the United States Supreme Court's controlling decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), but inexplicably failed even to mention that authority. These facts destroy any weight the Maryland state court cases might have had in the context of the present controversy.

Finally, contrary to the assertion of Maryland and its expert witnesses, the record contains ample evidence of the contemporaneous use of the terms "navigation" and

[26] *See supra* note 2, p. 1.

"shores" to apply to non-tidal waters.[27] Perhaps the most telling use occurred in December 1785, the same year the Compact was crafted, when an act of the Virginia legislature ceded land for Kentucky statehood. That legislation provided in relevant part:

> **Seventh.** That the use and *navigation* of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite *shores* of the said river.[28]

The Ohio River is, of course, entirely non-tidal.

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[27] *See, e.g.*, Potomac Company Charter*, supra* note 15 ("An Act for . . . extending the navigation of the river Patowmack"); *Report of the Maryland and Virginia Commissioners* (Dec. 28, 1784), *reprinted in* 2 *The Papers of George Washington*, *Confederation Series* 237 (W.W. Abbot & D. Twohig eds. 1992) ("removing the obstructions in the River Potomack and the making the same capable of Navigation from Tide Water as far up the North Branch of the said River as may be convenient and practicable will increase the Commerce of the Commonwealth of Virginia and State of Maryland") (VX 207); 1772 Va. Acts ch. 27 (establishing a ferry crossing "from the land of the right honourable the earl of Tankerville, in Loudoun County, in the tenure and occupation of John Farrow and Alexander Reame, over Potowmack river, to the opposite shore, in Maryland") (VX 9).

[28] 8 *The Papers of James Madison* 450, 452 (Robert A. Rutland et al., eds. 1973) ("Rutland, *Madison Papers*") ("An Act Concerning Statehood for the Kentucky District" (Dec. 22, 1785)) (emphasis added) (VX 247).

Based upon the legal standards applicable to compact interpretation, I conclude that Article Seventh, by unambiguous language, is applicable to the entire Potomac.

b. Context of Article Seventh in the Compact

Looking beyond Article Seventh, analysis of the other Articles of the Compact confirms the plain reading of Article Seventh. The Compact has many provisions that by their terms are not restricted to the tidal reach. For example, Article Sixth provides that "[t]he *river Patowmack* shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland" (emphasis added). This "common highway" is not restricted to any segment of the River and the Compact nowhere suggests that it is. The same can be said of other parts of the Compact: the Preamble (reciting that it is intended to regulate and settle the "*jurisdiction and* navigation of Patowmack and Pocomoke Rivers," without limitation); Article Eighth (providing for concurrent regulations for the preservation of fish "in *the river Patowmack*" and for keeping open the channel and navigation thereof); Article Tenth (providing for the jurisdiction of each State "over *the river Patowmack*" for crimes and offenses); Article Eleventh (allowing seizure of property for violations of commercial regulations for persons "carrying on commerce in *Patowmack . . . river*[ ]" and setting forth rules for service of process); and Article Twelfth (permitting a citizen of one State, owning land in the other, to transport his produce or effects to the other side of the *River* free of any duty) (all emphasis

added). Each of these provisions straightforwardly applies to the "river," that is, the entire Potomac, without limitation. Moreover, in every instance, the authors and enactors of the Compact referred to either the "River Patowmack," "river," or "rivers." Not a single modifier is used at any point to limit the scope of the Compact to a small portion of the River. There are provisions that plainly speak to the tidewater portion of the River, *see, e.g.*, Article Ninth (erection of lighthouses, beacons, and buoys at the expense of both States), but there are several others that unqualifiedly apply to the entire River. It is inconceivable that the drafters and enactors could have intended to restrict these provisions to only a portion of the River without saying so or that they would have left such important substantive matters unresolved as to any portion of the River, least of all the nearly seventy per cent of its length that lies above tidewater.

Nevertheless, Maryland claims that the non-tidal Potomac in 1785 was a "non-navigable" river above the tidal reach. Therefore, Maryland asserts, it was privately owned by Maryland citizens as a matter of law, and (1) granting fishing or construction rights to Virginians without compensation to Maryland citizens would have violated the private property rights of Maryland citizens; and (2) Articles Eighth (concurrent legislation regarding fishing); Tenth (jurisdiction over crimes) and Eleventh (service of process) have no application above the tidal reach and crimes in that section would be subject to the jurisdiction of the Maryland county in which the given act took place. The record amply demonstrates that both of the premises underlying Maryland's argument and the conclusions drawn from those premises are incorrect.

Among the rights that the Compact preserves is a right for the public to fish in the River. Maryland's stated position is that, as a "non-navigable" and thus privately owned river above the tidal reach, the non-tidal Potomac was exclusively owned by Maryland citizens, subject only to a right of public transportation. Maryland thus argues that protection of fisheries rights for citizens of both States would have been inconsistent with private ownership and the drafters would not have deprived Maryland riparian owners of such rights without providing compensation rights. That argument does not withstand scrutiny. Nothing in the Compact did anything other than *confirm* existing rights in or on the River. The Compact neither addressed ownership of the bed of the River nor altered ownership of the shores of the River. This makes perfect sense, not because, as Maryland argues, the Compact would have violated settled private property rights if it applied above tidewater, but rather because ownership of the bed of the River was still unsettled in 1785, *see Marine Railway & Coal Co. v. United States*, 257 U.S. 47, 63-64 (1921) (1785 Compact "left the question of boundary open to long continued disputes"), and the Compact was not intended to address that question. There was no need to include compensation for a taking and the absence of such a provision from the Compact proves nothing.

For its claim that the non-tidal Potomac was non-navigable in 1785, Maryland relies on the application of English common law in the United States as expressed in an 1824 treatise.[29] In response, Virginia cites

[29] Maryland cites and discusses *Angell on Watercourses* (1824 and 4th ed. 1854).

numerous instances of commerce on the Potomac above tidewater prior to 1785 to prove that the Potomac was, as a matter of fact, navigable.[30] Virginia also cites numerous contemporaneous instances, the Potomac Company

[30] *Potomac River from Washington D.C., to Cumberland, Md.*, H.R. Doc. No. 893, 63rd Cong., 2d Sess. 5 (1914) (VX 67); *Chesapeake & Ohio Canal*, H.R. Rep. No. 90, 19th Cong., 2d Sess. 2, 27 (1827) (VX 45); Letter from Washington to Lee of 8/1754, 1 John C. Fitzpatrick, *The Writings of George Washington* 100-01 (1931) ("Fitzpatrick, *Writings*") (VX 218); Letter from Washington to Carter of 8/1754, 1 W.W. Abbott & Dorothy Twohig, Eds., *The Papers of George Washington, Colonial Series* 196 (1983) ("Abbott, *Washington Papers*") (VX 205); Letter from Washington to Carver of 8/1754, *id*. at 197; Letter from Sharpe to Calvert of 3/12/1755, 1 *Correspondence of Governor Horatio Sharpe* (1753-1757), 6 Md. Archives 185, 186 (1888) ("*Correspondence of Sharpe*") (VX 250); Letter from Sharpe to Baltimore of 4/19/1755, *id*. at 196, 202; *Proceedings and Acts of the General Assembly of Maryland at a Session Held at Annapolis, February 22-March 26, 1755*, 52 Md. Archives 280, 281-82 (1935) (VX 2); Letter from Sharpe to Dinwiddie of 5/9/1755, *Correspondence of Sharpe*, *supra*, at 205; Douglas R. Littlefield, Master's Thesis, University of Maryland, *A History of the Potomac Company and Its Colonial Predecessors, 1748-1828* 13-14 (1979) (VX 232); Act of June 15, 1768, *Proceedings and Acts of the General Assembly of Maryland 1766-1768*, 61 Md. Archives 427 (1944) (VX 7); 1800 Va. Acts ch. 42 (VX 35); John Semple's Proposal for Potomac Navigation (1769), 8 Abbott, *Washington Papers*, *supra*, at 284, 286, 287, 288 (VX 206); Angus W. McDonald, *Report to Gov. Letcher [of Virginia], reprinted in* 9 The Historical Magazine and Notes & Queries Concerning the Antiquities, History & Biography of America 13 (1865) (VX 239); 1755 Va. Acts ch. 12, *reprinted in* 6 Hening's Statutes at Large 494 (1819) (VX 1); 1757 Va. Acts ch. 10, *reprinted in* 7 Hening's Statutes at Large 125 (1820) (VX 3); 1761 Va. Acts ch. 9, *reprinted in* 7 Hening's Statutes at Large 401 (1820) (VX 4); 1765 Va. Acts ch. 32, *reprinted in* 8 Hening's Statutes at Large 146 (1821), *repealed by* 1766 Va. Acts ch. 43, *reprinted in* 8 Hening's Statutes at Large 263 (1821) (VX 5-6); 1769 Va. Acts ch. 25, *reprinted in* 8 Hening's Statutes at Large 368 (1821) (VX 8); 1772 Va. Acts ch. 27, *reprinted in* 8 Hening's Statutes at Large 554 (1821) (VX 9); 2 Fitzpatrick, *Diaries*, *supra* note 17, at 402; 1 Fitzpatrick, *Writings*, *supra*, at 511, 512.

Charter among them, that use the word "navigation" in connection with non-tidal waters.[31] Both parties cite cases decided after 1785 to support their respective positions.[32] It is unclear what the drafters themselves would have understood to be the *legal* definition of the word "navigable." The legal definition of navigability was, at best, in flux in 1785.[33] That uncertainty, in connection with contemporaneous usages of the word "navigation" in specific reference to non-tidal waters,[34] undercuts any inference that the drafters intended by the use of the word "navigation" that the Compact apply only to the tidal reach of the River. It also undercuts Maryland's argument that Maryland citizens as a matter of law owned the bed of the River and that, the Compact, if applied to the non-tidal reach, would have been at odds with that ownership.

Even assuming that Maryland's contention were correct and that the courts both in Maryland and in Virginia at the time would have *legally* defined certain waters as "navigable" (and thus publicly owned) by reference to tidality alone, that assumption begs the question. The question is not what the *law* of navigability was in

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[31] *See supra* notes 27-28 and accompanying text, pp. 19-20.

[32] Those cases include *The Montello*, 87 U.S. (20 Wall.) 430 (1874); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *The Propeller Gennessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Peyroux v. Howard*, 32 U.S. (7 Pet.) 324 (1833); *Middlekauff v. LeCompte*, 132 A. 48 (Md. 1926); and *Binney's Case*, 2 Bland 99 (Md. Ch. 1829) (VX 268).

[33] *See* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 Fla. St. U. L. Rev. 513, 587-605 (1975).

[34] *See supra* notes 27-28 and accompanying text, pp. 19-20.

1785 but rather what the men who drafted and enacted the Compact intended when they used the words "River Patowmack" and "navigation." There is nothing to permit – much less to compel – a reasonable inference that the use of the word "navigation" was intended by the drafters and enactors to define "River Patowmack" by a *legal* definition of navigability and to restrict – by implication – the term "Patowmack River" to tidewater. It is much more likely that the "navigability" that concerned them was navigability in fact. There is no reason to think that they would have wanted to prevent obstructions to navigation in only one section of the River and would have used a legal definition to accomplish that unlikely limitation without saying so.

Furthermore, in focusing on the word "navigation," Maryland disregards the word "jurisdiction" used in the Preamble's phrase "navigation and jurisdiction." Attempting to minimize the presence of the word "jurisdiction," Maryland relies on the Maryland Circuit Court's 1859 opinion in *United States v. Great Falls Manufacturing Co.*, *supra*, for the proposition that, notwithstanding the use of the word "jurisdiction," Article Seventh is the only Article that "'could be construed as applying to the river above tide'" (quoting *United States v. Great Falls Manufacturing Co*. at 7).[35] This arguably concedes that Article Seventh by its terms applies to the entire River, but Maryland's argument is that because some provisions have tidewater as their principal focus, the complete Compact applies only

[35] The court specifically refers to Article Ninth, but clearly means Article Seventh.

to tidewater even if some provisions (including the Preamble and Article Seventh) by their plain terms apply to the entire River. Maryland thus seeks to overcome the plain meaning of Article Seventh by suggesting that the draftsmen and enactors of the Compact should have included language making crystal clear their intent to make the Compact applicable to the non-tidal portion of the River. This, according to Maryland, is because emphasis on activity affecting the tidewater portion of the Potomac shows that the term "river Pawtomack," no matter where or how it is used, meant only the tidewater portion. That cart is indeed before the horse. As earlier laid out at pages 21 and 22, it is simply not the case that all, or even most, of the Compact's Articles are limited to tidewater. Without that premise, there is no support for Maryland's contention.

The use of the terms "naval office," "naval officer," "sailing," "harbor," "port," "wharf," "quarantine," "ballast," "lighthouse," "beacon," and "piracy" also does not support the proposition that the Compact has no application beyond the tidal portion of the River. In context, and read carefully, some Articles may have more applicability or even total applicability to the tidal portion while others, by their terms, clearly apply to the entire River. Even accepting as true that the Compact's drafters were principally concerned with tidal waters would not prove *a fortiori* that the Compact was intended to apply exclusively to such waters.

In sum, contract interpretation and statutory construction rules permit no conclusion other than that Article Seventh of the Compact granting Virginia the authority to "make" and "carry out" "improvements" from

its shore applies by its clear language to the entire Potomac. Analysis of the remainder of the Compact only affirms that conclusion.

c. Historical Context of the Compact

Maryland has also argued that whether or not the Compact is ambiguous, resort must be had to extrinsic documents to place the Compact in its proper historical context. It bases that argument on analogies to the Court's interpretation of royal charters and grants as well as the United States Constitution.[36] However, Maryland has cited no authority to contradict the rule for *interstate compacts*, as discussed above at page 15, that where the language of the compact is clear and unambiguous, that language is conclusive and no evidence extrinsic to the compact need be considered.

Nevertheless, for purposes of completeness and thoroughness, a discussion of contemporaneous documents and subsequent events follows. This review confirms exactly the same conclusion – the rights guaranteed by Article Seventh of the Compact apply to the entire Potomac. It should be clearly understood, however, that "only

[36] *See Vermont v. New Hampshire*, 289 U.S. 593, 605-06 (1933) (construing an order of the King-in-Council to determine the Vermont/New Hampshire boundary); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 629 (1846) (construing an ambiguous charter from the King of England and the Council of Plymouth to the Plymouth Colony); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411-12 (1842) (construing a charter from the King of England to the Duke of York); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (construing the scope of the Court's original jurisdiction under the Constitution).

the most extraordinary showing of contrary intentions from [external sources] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984). Because I find the Compact unambiguous on its face, this review is unnecessary and done only for completeness.

i. Negotiation of the 1785 Compact

Efforts to resolve Potomac-related questions sputtered and faltered until, after cessation of hostilities with the British, the coalescence of mutual concerns regarding jurisdiction over and navigation on the Rivers Potomac and Pocomoke and on Chesapeake Bay led to the two States' adoption in June 1784 and January 1785 of substantially similar resolutions authorizing negotiations for regulation of the Potomac. Virginia's resolution read:

> Whereas, great inconveniences are found to result from the want of some concerted regulations between this State and the State of Maryland, touching the jurisdiction and navigation of the *river Potomac*;
>
> Resolved, That George Mason, Edmund Randolph, James Madison, jun., and Alexander Henderson, Esquires, be appointed commissioners; and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland; and, in concert with them, frame such liberal and equitable regulations concerning *the said river*, as may be mutually

> advantageous to the two States; and that they make report thereof, to the General Assembly.[37]

The Maryland resolution similarly provided:

> RESOLVED, That Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer, Esquires, be commissioners for this State to meet the commissioners appointed by the commonwealth of Virginia, for the purpose of settling the navigation of, and the jurisdiction over, that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Patowmack and Pocomoke; and that the said commissioners, or any two of them, have full power, in behalf of this state, to adjust and settle the jurisdiction to be exercised by the said States respectively, over the said waters and the navigation of the same . . . .[38]

The resolutions in 1784-85 had been preceded by an attempt to the same end that, for various reasons, had failed. On December 10, 1777, Virginia had appointed Commissioners to meet with Maryland "in order to adjust the rights of the use, and navigation of, and jurisdiction over, the Bay of Chesapeake, and *the rivers* Patowmack and Pocomoke."[39] In response, on December 21, 1777,

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[37] *Journal of the House of Delegates of the Commonwealth of Virginia*, May Session, 1784, at 84 (White ed. 1828) (emphasis added) ("*Journal of the Virginia House of Delegates* (1784)") (MX 16).

[38] *Votes and Proceedings of the House of Delegates of the State of Maryland*, November Session, 1784, at 113 ("*Votes and Proceedings of the Maryland House of Delegates* (1784)") (MX 23).

[39] *Journal of the Virginia House of Delegates* (1777), *supra* note 12, at 74 (emphasis added).

Maryland similarly appointed Commissioners whose instructions charged them to endeavor to obtain agreement "that the use and navigation of the *rivers Patowmack and Pocomoke* shall be free to the subjects of both states, and to all other persons trading to either state, and that *the said rivers* be considered as a common highway, free to all persons navigating the same."[40] That resolution reflected the November 25, 1777, sentiment of the Maryland Senate, which had proposed a letter to the Assembly of Virginia stating that the legislatures of each State ought to confirm "the free navigation and use of *the rivers Patowmack and Pocomoke*, and of that part of the bay of Chesapeake within the limits of Virginia, together with the jurisdiction, as heretofore respectively exercised by each state."[41] In the 1777 resolutions, as in the 1784-85 resolutions themselves, the instructions spoke of the "River Patowmack" without qualification or limitation.[42]

There is nothing in the voluminous documentation submitted by the parties to indicate that any of the 1785 negotiators ever expressed any opinion that the phrase "River Patowmack" in the Compact had anything other than its natural meaning; namely, the entire River. Although George Mason and Alexander Henderson, the two Commissioners who negotiated the Compact of 1785 on Virginia's behalf, did not see Virginia's 1784 authorizing resolution before they negotiated the Compact, their

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[40] *Votes and Proceedings of the Maryland Senate* (1777), *supra* note 12, at 30 (emphasis added).

[41] *Id*. at 10 (emphasis added).

[42] As explained above, the Commissioners appointed in 1777 never met. *See supra* text accompanying notes 12-14, p. 5.

assumption about what the resolution authorized demonstrates that they in fact negotiated about Virginia's rights to the entire River. Mason's letter of August 9, 1785, to James Madison, written over four months after negotiating the Compact, states his belief, one apparently shared by his fellow negotiator Alexander Henderson, that the negotiators' authority was the same as it had been in the 1777 resolutions, and that that authority extended to negotiating jurisdiction over the entire River, not just a portion of it:

> [I]t was natural for us to conclude that these last Resolutions had pursued the Style of the former respecting the Jurisdiction of the two States; as well as that this Subject had been taken up, upon the same Principles as in the Year 1778;[43] when Comrs. were directed to settle the Jurisdiction of *Chesapeake Bay & the Rivers Potomack & Pokomoke*; in which Sentiments, Mr. Henderson, from what he was able to recollect of the Resolutions, concurred.[44]

Given the understanding by George Mason and his fellow Virginia negotiator that their charge was "to settle the Jurisdiction . . . of the River[ ] Potomack," without qualification as to length, it is most unlikely that Mason and Henderson would have negotiated a compact that applied only to less than one third of the River and would have done so without giving any indication in the Compact of that crucial limitation.

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[43] Mason is plainly referring to the December 1777 resolutions.

[44] 2 Rutland, *Mason Papers*, *supra* note 13, at 827 (Letter from Mason to Madison (Aug. 9, 1785)) (emphasis in original).

Before the Compact was negotiated and before he had seen the Compact as drafted, James Madison had written letters in which he focused on the tidal stretch of the Potomac and on Chesapeake Bay.[45] From those letters, Maryland argues that the phrase "River Patowmack" in the Compact necessarily was intended to apply to only the tidal portion of the River. The letters James Madison wrote to Thomas Jefferson on April 25, 1784, January 9, 1785, and April 27, 1785 shed no light on the language of the Compact for one simple reason: unlike his parenting role for the United States Constitution, Madison, although appointed as a commissioner, was not present at the Mount Vernon conference of March 25-28, 1785, at which

[45] *See* 8 Rutland, *Madison Papers*, *supra* note 28, at 20 (Letter from Madison to Jefferson (Apr. 25, 1784)) (MX 72) ("Among others I suggested to your attention the case of the Potowmac, having in my eye the river below the head of navigation. It will be well I think to sound the ideas of Maryland also as to the upper parts of the N. branch of it. The policy of Ba[l]timore will probably thwart as far as possible, the opening of [it]; & without a very favorable construction of the right of Virginia and even the privilege of using the Maryland bank it would seem that the necessary works could not be accomplished." (alterations in original); *Id*. at 225 (Letter from Madison to Jefferson (Jan. 9, 1785)) (MX 84) ("This Resolution [regarding communication to Pennsylvania about leave to clear a road from the Potomac to waters connected with the Ohio River] did not pass till it was too late to refer it to Genl. Washington's negociations with Maryland. It now makes a part of the task alloted to the Commissrs. who are to settle with Maryd. the jurisdiction and navigation of Potowmac below tide water."); *Id*. at 268 (Letter from Madison to Jefferson (Apr. 27, 1785)) (MX 89) ("I understand that Chase and Jennifer on the part of Maryland, Mason & Henderson on the part of Virginia have had a meeting on the proposition of Virga. for settling the navigation & jurisdiction of Potowmack below the falls, & have agreed to report to the two Assemblies, the establishment of a concurrent jurisdiction on that river & Chesapeak. The most amicable spirit is said to have governed the negociation.").

the Virginia and Maryland representatives negotiated the Compact, and he participated in no way in the drafting of the Compact language. No document suggests that after the Compact was drafted either Madison or any of the negotiators ever expressed an opinion that the natural scope of the phrase was limited. To the contrary, one of the Maryland negotiators confirmed his charge to be "to settle the jurisdiction and navigation of the . . . rivers Potomack and Pocomoke."[46]

The meaning of the Compact cannot be derived from the views of a single individual who took no part in drafting it. Even for negotiators:

> It is beyond cavil that statements allegedly made by, or views allegedly held by, "those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body," are of little use in ascertaining the meaning of compact provisions.

Oklahoma v. New Mexico, 501 U.S. at 236-37 n.6 (quoting *Arizona v. California*, 292 U.S. at 360); *cf. Garcia v. United States*, 469 U.S. at 76 ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates." (citations omitted)). Madison was even further removed. He was not even "engaged in negotiating" the Compact.

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[46] Letter from Thomas Stone to George Washington (Jan. 28, 1785), *quoted in* John M. Wearmouth, *Thomas Stone National Historic Site Historic Resource Study* 48 (1988) (VX 260).

Even assuming that Madison believed the Compact that was being negotiated in 1785 would apply only to the tidal reach of the Potomac,[47] his letters cannot undo what the Compact as negotiated and enacted actually says. There is no evidence that any one of Madison's letters was ever communicated to any Compact negotiator or to anyone other than the addressee, Thomas Jefferson. Only his last letter (that to Jefferson of April 27, 1785) was written after the Compact was actually negotiated and drafted, and even that letter was based on only second-hand reports of the Compact that had been negotiated.[48] As of the time Madison wrote that letter, there is no evidence that he had seen the Compact or discussed it with any of the Commissioners who negotiated it. There is also no sign that, when Madison learned of the terms of the Compact as negotiated, he raised any objection to its full reach (which stood in sharp contrast to the limited portion of the River mentioned in his prior letters) and there is no evidence that anyone in the Virginia legislature ever believed that the Compact they ratified applied to anything less than the full length of the Potomac.[49] Without

[47] Madison's letter of April 25, 1784, suggests that he thought it wise to reach some agreement about the non-tidal reach of the Potomac River as well. *See supra* note 45, p. 33.

[48] Madison's letter states that he "understands" that the negotiators met and that "[t]he most amicable spirit is said to have governed the negociation." *See supra* note 45, p. 33.

[49] Madison did guide the Compact through the Virginia Assembly through "adroit floor management," 2 Rutland, *Mason Papers*, *supra* note 13, at 814 (Ed. note), but there is no evidence that Madison believed, after he had seen the Compact, that it was limited to the tidal reach. Nor is there any evidence that he shared such a view with the other legislators or that they agreed with him.

any showing that either the negotiators or the legislative bodies that ultimately adopted the Compact shared Madison's limiting view (if he held such), his letters are not helpful in determining the intent of the negotiators in drafting, or of the legislators in approving, the Compact, even if such recourse were warranted.

Thus, set in the context of Compact negotiations, the term "Patowmack river" carries its natural meaning, which does not limit it to less than the whole.

ii. The Potomac Company

In the same period of time that Maryland and Virginia were commissioning the negotiation of the 1785 Compact, the two States by joint legislation chartered the Potomac Company ("Company") to improve navigation in the non-tidal part of the River.[50] Although substantially contemporaneous, neither the Compact nor the Potomac Company Charter ("Charter") mentions the other. From this, Maryland syllogistically argues that:

> The legislatures and the prominent people involved in both projects were aware of the Compact and Charter language.
>
> Neither document mentions the other and the Company's records contain no reference to the Compact.

[50] *See supra* note 15 and accompanying text, pp. 5-6.

> Therefore, the Charter was intended to apply only to the non-tidal reach and the Compact was intended to apply only to the tidal reach.

Analysis of the Compact and the Charter does not support Maryland's argument. The two documents are by no means mutually exclusive. They are entirely compatible and were meant to work together.

The Charter's language, as well as circumstances of its enactment, show clearly that not only do the Charter and the Compact have no necessary incompatibility, the Charter drives home the Compact's intended applicability to the entire River. The Charter, by its express terms, applies only above the tidal reach of the River. The Compact conspicuously has no such limiting language that would make it applicable only to the tidal reach of the River. The Company's purpose was, by the terms of its authorizing legislation, to "open and extend" the navigation of the Potomac. The chartering legislatures obviously wanted the Company to achieve the intended result and desired that, if that goal were reached, the non-tidal stretch of the River would remain open to navigation. One of the goals of the Compact as stated in Article Sixth was to maintain the Potomac as a "common highway for . . . navigation." Likewise, the Charter declared the River, after the payment of tolls, a public highway. To accomplish that goal, Sections II and IX of its Charter granted the Company the ability to raise capital and fund its projects through subscriptions and gave it the limited power to impose tolls at three specified points on the River in

amounts that the States specifically prescribed.[51] Thus, the Company was already available in concept to supplement the 1785 Compact by performing specific work necessary to fulfill a shared goal of making the Potomac a "common highway for . . . navigation."

In addition, Article Eighth of the Compact provided that any legislation "necessary . . . for preserving and keeping open the channel and navigation [of the River]" must be jointly enacted by the compacting States. The Company, chartered by concurrent legislation of Maryland and Virginia for the very purpose of opening and keeping open to navigation the River channel "from tide water to the highest place practicable on the North branch,"[52] is completely compatible with, and facilitates, Articles Sixth and Eighth of the Compact. The only reasonable conclusion is that, in accordance with the Compact's stated goal of keeping the River open for navigation, the States that chartered the Company and nearly contemporaneously negotiated the Compact intended that the Compact apply to the entire River to keep it open to navigation for all time.

One of the Compact's negotiators at the time, as well as the Supreme Court itself much later, connected the goals of the Compact with the purpose of the Company. Thomas Stone, a Maryland negotiator of the 1785 Compact, wrote to George Washington:

> It gives me much pleasure to know that our act [of Maryland] for opening the navigation of

[51] Potomac Company Charter, *supra* note 15, Sections II and IX.

[52] Potomac Company Charter, *supra* note 15, Preamble.

> Potomack arrived in time to be adopted by the Assembly of Virginia. If the scheme is properly executed I have the most sanguine expectation that it will fully succeed to the wishes of those who are anxious to promote the wellfare [sic] of these States and to form a strong chain of connection between the western and Atlantic [state] governments. Mr. Jenifer, Johnson, Chase and myself are appointed commissioners to settle the jurisdiction and navigation of the bay and the rivers Potomack and Pocomoke with the commissioners of Virginia. We have also instructions to make application to Pennsylvania for leave to clear a road from Potomack to the western waters.[53]

Stone clearly saw the Company, the upcoming compact negotiations with Virginia, and the plans to make application to Pennsylvania as all complementary pieces of the same mission.

Much later the Supreme Court stated in *Marine Railway & Coal Co. v. United States*, 257 U.S. at 64:

> [W]ith a view to opening up a route to the West [the Compact] provided in Article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland.

Thus, as suggested in the Court's statement, one of the goals of the Compact is the same as the basic goal of the

[53] Letter from Thomas Stone to George Washington (Jan. 28, 1785), *supra* note 46 (alterations in original).

Charter. Therefore, the two documents are by no means mutually exclusive.

Maryland further asserts that comparing the language of the Charter with that of the 1785 Compact demonstrates in three different ways that the Compact does not apply above the tidal reach. It first argues that the toll and duty charges permitted by the Compact and the Charter, respectively, are not the same because they pertain to different sections of the River. Thus, Maryland says, the Charter authorized the collection of tolls on commodities transported through the locks and canals it was to build while the Compact eliminated the right to impose tolls and also limited the right to impose "port duties" and other charges. The simple answer, however, is that the Compact did not eliminate the right to impose tolls. Article First of the Compact recites that Virginia will not impose any tolls "on any vessel whatever sailing through the capes of Chesapeake bay to the State of Maryland, or from the said State through the said capes outward bound." No sleight of hand can transform that language into something inconsistent with permitting the Company to impose tolls at three locations on the non-tidal part of the River. The fact that certain portions of the Compact are directed to the tidal reach of the Potomac cannot be twisted into a conclusion that the entire Compact was intended to apply exclusively to the tidal reach. A review of the Compact language in Articles Second, Third, Fourth, Fifth, and Sixth compels the very same conclusion.[54]

[54] Article Second is an undertaking by Maryland that Virginia's vessels may enter Maryland's rivers "as a harbour, or for safety against an enemy, without the payment of any port duty, or any other charge."

(Continued on following page)

Maryland's second argument is that Article Twelfth of the Compact and Section X of the Charter are irreconcilably in conflict. That argument likewise fails. Charter Section X permitted the Company to collect tolls at three specified locations on the River. Compact Article Twelfth, as subsequently enacted, gives "citizens of either state having lands in the other . . . full liberty to transport to their own state the produce of such lands, or to remove their effects, free from any duty, tax or charge whatsoever." The Compact provision is strictly limited to a citizen who owns land in the other State and to the transportation of that citizen's own property to his home State. It does not provide a wide exemption from tolls for all transportation by all persons on all parts of the River and, therefore, does not constitute an "irreconcilable conflict" with the Charter. Rather, it is a narrow exception, capable of conflict with the Charter only by use of an active imagination that conjures up the unusual circumstance where a Maryland or Virginia resident wanted to transport produce or effects from the land he owned in the non-resident State, up or down the River through one of the three toll points of the Potomac Company, to the State of his citizenship. Even then, it is simply a deliberate and narrow

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This Article says nothing about the imposition of tolls upon the transport of commerce up and down the River. Article Third exempts vessels of war from the payment of any port duty or other charge. Article Fourth exempts from the payment of any port charge any vessel smaller than a certain size belonging to Virginians or Marylanders that is trading from one State to the other and has only produce of those States on board. Article Fifth, which deals with merchant vessels navigating "the River Patowmack," proportionately divides the tonnage rates according to the commodities carried to or taken from a particular state. Article Sixth names the River Patowmack as a common highway but says nothing either way about the imposition of tolls.

exemption from tolls for a very limited class. In the face of the other overwhelming evidence, that very rational exemption is a slender reed upon which to rest a conclusion that the Charter and the Compact are in hopeless conflict if the Compact applies to the entire River.[55]

Maryland's third argument is that Section XIX of the Charter is duplicative of Article Twelfth of the Compact. Compact Article Twelfth, as noted, governs transportation across the River of goods produced on lands in one State that are owned by a citizen of the other State. Charter Section XIX is not similarly tied to land ownership. It simply provides that the produce carried or transported *through locks or canals* may be sold free from any duties *other* than those imposed for similar commodities of the State in which they happen to be landed. The sections address different subject matter and are in no way duplicative.

[55] Nor do the condemnation provisions in the Charter, *supra* note 15, Sections XI and XII, demonstrate that the Compact and the Charter were to be mutually exclusive. The argument that compensation provisions similar to those in the Charter would appear in the Compact if it applied above tidewater completely ignores the reason condemnation powers were necessary in the Charter. The Company needed the condemnation powers in order to condemn *shore land* of riparian owners for construction of locks or canals. Ownership of the riverbed had not been settled in favor of Maryland citizens as of 1785. Nor is there evidence that the Compact drafters thought that it had. There is thus no reason to conclude that the Compact drafters would have thought that by granting fishing or construction rights to Virginians, the Compact would violate any private property rights of Maryland citizens, thus requiring condemnation powers in the Compact. The inclusion of a condemnation provision was necessary in the Charter but not in the Compact.

The nature of the Charter vis-à-vis the Compact must be kept in mind. The projects and the purpose of the Company were by nature and design of limited scope and duration.[56] As men of affairs, the Compact negotiators certainly recognized both the limited nature and the speculativeness of the Company's undertaking. After all, the Compact was drafted at a time when the success of the Company and its length of existence were matters of great uncertainty – the Company had not yet held even its first meeting. The Compact of 1785, in contrast, is a document intended to govern the jurisdiction and regulation of the Potomac indefinitely, and is therefore broader in scope. In the terms of the Maryland resolution, the Compact negotiators had been given "full power, in behalf of [the] state, to adjust and settle the jurisdiction to be exercised by the said states respectively, over the said waters [including "the river Patowmack"] and the navigation of the same."[57] Several of the Compact's broader and more basic regulatory provisions, which are not duplicated in the Charter,

[56] Maryland has argued that the Company's rights to its tolls "for ever" indicate the intention of longevity for the Charter. This interpretation ignores the substantial contingencies expressly placed on that right. *See* Potomac Company Charter, *supra* note 15, Section 17 (tolls allowed only if the Company makes the river capable of navigation by vessels drawing one foot of water); Section 18 (Company receives no benefit unless it begins work within one year and navigation is improved as contemplated in the Charter within three years from Great Falls to Fort Cumberland and within ten years from Great Falls to tidewater).

[57] *Votes and Proceedings of the Maryland House of Delegates* (1784), *supra* note 38, at 113.

demonstrate the Compact's much larger scope.[58] That broader scope in subject matter and in likely longevity explain what little, if any, facial duplication may be found in the Compact and the Charter.

In short, Maryland's comparison arguments amount to no more than an assertion that because the Charter applied above the tidal reach the Compact could not. Those arguments have no logical or persuasive basis.

2. Regulation Issue

As in so many things, where you begin determines where you end. Maryland begins by asking: "Where in the Compact of 1785 is there a specific cession of its sovereign rights over the Potomac?" Virginia begins by asking: "Where in the Compact of 1785 did Maryland reserve a right to regulate?" I begin by asking: "What does the language of Article Seventh of the Compact, which indisputedly remains in effect today, mean?"

a. Language of the 1785 Compact

The Compact negotiated by the Commissioners and approved by the legislatures of both states, and

[58] Those Compact provisions include Articles Seventh (protecting property rights along the shores of the River, the right to make improvements extending into the River, and the public right of fishing); Eighth (providing for concurrent legislation to preserve fish and keep the River open for navigation); Tenth (setting forth jurisdictional rules for crimes); and Eleventh (allowing seizure of property for violations of commercial regulations for persons "carrying on commerce in Patowmack . . . river[ ]" and setting forth rules for service of process).

subsequently by Congress,[59] contained Article Seventh, which reads in full as twice quoted above.[60] The Compact of 1785 did *not* resolve the boundary line dispute between the two states. That issue was then unsettled. The Compact did, however, *in perpetuity* and apart from any boundary dispute, reserve to the citizens of each state "full property in the shores of the Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements." Thus, in 1785, when the exercise of jurisdiction over the Potomac remained unsettled, at least insofar as Virginia's remaining claims to the River after adoption of its 1776 Constitution, the two states entered into a binding agreement granting to the citizens of each state, on an even-handed basis, full property rights in their respective shores along the Potomac River with all emoluments and advantages flowing from that ownership, together with the privilege of making and carrying out wharves and other improvements.

That language is unambiguous and unrestricted. Although the two states can, by solemn agreement, modify it, neither can unilaterally alter it. What then does Article Seventh guarantee to Virginia? Simply stated, the sovereign Commonwealth of Virginia has:

> . . . full property in its shores of the Potomac river
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> . . . with all emoluments and advantages thereunto belonging

[59] *See supra* note 18, p. 6.

[60] *See supra*, pp. 7 and 16.

> . . . and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the River.

Article Seventh itself prescribed its own regulations on carrying out wharves and other improvements (i.e., no obstruction of navigation) and on the right of fishing (i.e., no hindrance of fishing on the opposite shore). These Compact regulations were equally applicable to both States. Also, in subsequent Articles Eighth and Tenth the Compact specifically required joint action by Virginia and Maryland where such cooperation was appropriate to the subject matter of those Articles. Any notion that Maryland had, in addition, an overriding "police power" to impose further regulation upon the express rights vested in Virginia under Article Seventh would certainly have been abhorrent to the Virginia Commissioners and legislators and at least foreign to the Maryland Commissioners and legislators.

In sum, Article Seventh straightforwardly contains no restrictions, no limitations, and no requirements for approval of the right to make and carry out wharves and other improvements, other than the obligation not to obstruct or injure the navigation of the River.

b. Circumstances of the Compact Negotiations

Although I find no ambiguity in the language of Article Seventh, I will assume, for the purpose of completeness, that the meaning of the Compact may be informed by the circumstances surrounding its negotiation and adoption. Those circumstances only confirm that the Commissioners negotiated the Compact as representatives

of equal sovereigns at a time when the boundary and jurisdiction over the Potomac remained unsettled.

Maryland contends that the Compact negotiators would have understood that Maryland exercised exclusive sovereign jurisdiction over the entire Potomac as of 1785, and that, on the basis of that underlying premise (1) the Compact negotiators would all have understood that Maryland had the sovereign authority to regulate any and all rights with respect to the Potomac declared in the Compact except where expressly stated otherwise, and (2) Maryland is entitled to a presumption that it did not relinquish such exclusive authority unless it agreed to do so in explicit and unmistakable language in the Compact. The evidence, however, does not support the underlying premise of Maryland's argument. Without that premise, one cannot conclude that Maryland regulates Virginians' Compact rights unless otherwise stated in unmistakable terms.

The simple fact is that the men who negotiated the Compact could not have understood that Maryland exercised exclusive sovereign jurisdiction over the entire Potomac. Virginia had long claimed broad territorial interests encompassing the Potomac. Although in adopting its Constitution on June 29, 1776, Virginia had ceded certain of the territorial rights it had previously claimed, it very specifically reserved to itself "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 made or shall be made thereon."[61] In October of that same year, Maryland, at a convention of its delegates, passed a resolution claiming "sole and exclusive jurisdiction" over the Potomac because the Potomac "belongs to this state."[62] One year later, the Maryland House of Delegates proposed to send a letter to the Virginia General Assembly "requesting their sentiments" on Maryland's claims.[63] However, the Maryland Senate thought a better course would be to appoint commissioners to produce a "happy and expeditious settlement."[64] Either way, both Maryland legislative bodies recognized the existence of a disagreement. Thus, at that time, jurisdiction over and the right to regulate activities in, on and surrounding the Potomac remained unsettled to the extent of Virginia's remaining claims. Even though Virginia ceded to Maryland in 1776 most of the rights it had previously claimed to certain territories, it is clear that the very rights at issue in this case – the rights to use the Potomac as a water source and to make and carry out improvements along the shore of the River – were unsettled in 1785 and the States' relative sovereignty over and authority to regulate such rights remained undetermined.

The contemporaneous evidence permits no other conclusion. Before Maryland and Virginia began negotiations that culminated in the Compact of 1785, the

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[61] *See supra* note 10 and accompanying text, p. 4.

[62] *See supra* note 11 and accompanying text, p. 4.

[63] *Votes and Proceedings of the House of Delegates of the State of Maryland*, October Session, 1777, at 8 (MX 10).

[64] *Votes and Proceedings of the Maryland Senate* (1777), *supra* note 12, at 10.

legislatures of both states had enacted relevant and complementary legislative resolutions. On June 28, 1784, the Virginia General Assembly, finding that "great inconveniences . . . result from the want of some concerted regulations between this State and the State of Maryland, touching the jurisdiction and navigation of the river Potomac" proceeded to appoint Commissioners to meet with Maryland Commissioners and:

> in concert with them, frame such liberal and equitable regulations concerning the said river, as may be mutually advantageous to the two States.[65]

The Maryland legislature, in turn, after having entertained a resolution "to frame such liberal and equitable regulations touching the jurisdiction and navigation of . . . the rivers Potowmack and Pokomoke, as may be mutually advantageous to the two states," enacted a resolution in January 1785 that appointed Commissioners

> for the purpose of *settling* the navigation of, and *the jurisdiction over*, . . . the *rivers Patowmack* and Pocomoke; and [that declared] that the *said Commissioners*, or any two of them, *have full power, in behalf of this state to adjust and settle the jurisdiction to be exercised by the said states respectively, over the said waters* and the navigation of the same . . . .[66]

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[65] *Journal of the Virginia House of Delegates* (1784), *supra* note 37, at 84.

[66] *Votes and Proceedings of the Maryland House of Delegates* (1784), *supra* note 38, at 113 (emphasis added).

Thus, although Maryland had stated its *claim* to sole and exclusive jurisdiction and had rejected Virginia's reservation of any rights whatsoever, it is clear that Maryland recognized the ongoing nature of the dispute by giving its Commissioners full power "to adjust and settle the jurisdiction to be exercised by the said states respectively, over the said waters and the navigation of the same" and Virginia gave its Commissioners power to frame "liberal and equitable regulations concerning" the Potomac.

And they did just that.

In its legislation to "approve, confirm and ratify the compact," the Maryland legislature specifically recognized that the Compact commissioners had been appointed to "regulate and *settle the jurisdiction and navigation of Patowmack* and Pocomoke rivers" and recited that, upon enactment, everything in the Compact "shall be for ever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact" and that it "shall never be repealed or altered by this legislature of this government, without the consent of the government of Virginia."[67]

Subsequent events also confirm that as of 1785 the parties disputed sovereignty and jurisdiction at least to the extent of Virginia's remaining claims. First, a 1794 map of the State of Maryland, titled "Map of the State of Maryland Laid down from an actual Survey of all the *principal Waters*, public Roads, and Divisions of the Counties therein" and paid for in part by the Maryland

[67] 1785-86 Md. Laws ch. 1 (App. B at B-1, B-7 to B-8) (emphasis added).

House of Delegates, shows the boundary between the two States as running down the middle of the Potomac.[68] The delegates who reviewed the map while it was under development in 1792 found that it "appear[ed] to them to be accurate" and would be "of great public utility."[69] In 1799, legislators "attentively examined" the map and thought it "a work of great merit, ornament, and utility."[70] The map and the statements of Maryland legislators constitute additional evidence to show that the negotiators of the 1785 Compact would not have understood that Maryland had exclusive control of the Potomac and that Maryland would regulate Virginia's exercise of rights under it.

Second, in the proceedings before the arbitrators who issued the Black-Jenkins Award, Maryland contended that the "true" boundary line should be drawn around "all wharves and other improvements now extending or which may hereafter be extended, *by authority of Virginia* from the Virginia shore into the [Potomac] beyond low water mark."[71] In earlier proceedings of commissioners appointed by each State "to adjust the boundary line between the two

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[68] Dennis Griffith, *Map of the State of Maryland* (June 20, 1794) (emphasis added) (VX 320).

[69] *Votes and Proceedings of the House of Delegates of the State of Maryland*, November Session, 1792, at 27 (emphasis added) (VX 320).

[70] *Votes and Proceedings of the House of Delegates of the State of Maryland*, November Session, 1799, at 58 (VX 320).

[71] William P. Whyte and Isaac D. Jones, *Boundary Line Between the States of Maryland and Virginia, Before the Hons. Jeremiah S. Black, William A. Graham, and Charles J. Jenkins, Arbitrators upon the Boundary Line between the States of Virginia and Maryland* 1 (June 26, 1874) (VX 365) (emphasis added).

States," Maryland had taken the same position.[72] In a report of those proceedings to Maryland Governor William Whyte, the Maryland commissioners described that position as follows:

> The line along the Potomac River is described in our first proposition according to *our construction* of the compact of 1785, and as we are informed, *is according to the general understanding of the citizens of both States residing upon or owning lands bordering on the shores of that river, and also in accordance with the actual claim and exercise of jurisdiction by the authorities of the two States hitherto*.[73]

Maryland's position as stated in the 1870s, and its own description of it, are simply impossible to harmonize with the notion that nearly a century before all parties would have understood that Maryland had the power to regulate the Compact rights of both Marylanders and Virginians.

Third, this Court has previously recognized that the boundary between Virginia and Maryland, and thus the right to assert regulatory authority, was unsettled as of 1785. In 1838, the Court recognized that "Maryland and Virginia were contending about boundaries in 1835 . . . and the dispute is yet an open one." *Rhode Island v. Massachusetts*, 37 U.S. at 724. After the boundary had

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[72] *See* Commission (Maryland) on Boundary Lines Between Virginia and Maryland (1870-1874), *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia, Authorized by the Act of 1872, chapter 210*, at 3, 140 (VX 57).

[73] *Id*. at 27 (emphasis added).

been resolved, the Court stated in *Marine Railway & Coal Co. v. United States*, 257 U.S. at 64, that the 1785 Compact "left the question of boundary open to long continued disputes."

Thus, because it is clear that sovereignty over and the right to regulate the Potomac was unsettled at least to the extent of Virginia's remaining claims as reserved in its 1776 Constitution – the very rights at issue here – and remained so until the Black-Jenkins Award in 1877, no reasonable person could conclude, based upon the evidence presented, that Maryland exercised sovereign authority over the entire Potomac in 1785 or that the Compact negotiators would have all understood that Maryland did so and would have based the Compact on that unstated understanding. As evidenced by both States' resolutions appointing Commissioners to negotiate the Compact and the subsequent events discussed above, neither State believed Maryland could, in 1785, regulate Virginia's rights to "carry out" wharves and other improvements and to have "full property in the shores" of the Potomac River. Maryland is entitled to no presumption that it had in 1785 exclusive sovereign authority over the entire Potomac for all purposes. Without such a presumption, there is no basis for its argument that it could lose exclusive control over the River only by explicitly and unmistakably relinquishing that authority in the Compact. Therefore, in the context of the Compact and its negotiations, the only way Maryland could have gained the regulatory authority it now asserts would be in the language of the Compact, and the Compact certainly does not give any such regulatory power to Maryland.

B. The Black-Jenkins Award of 1877

1. Entire River Issue

The Black-Jenkins Award provides an independent basis for concluding that Virginia's right to construct improvements appurtenant to its shore of the Potomac extends to the entire length of the River. The Black-Jenkins Award concludes:

> Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has 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 . . . agreeably to the compact of seventeen hundred and eighty-five.[74]

That Award is not by its terms restricted to any portion of the River and must be read to mean what it plainly says.

Even if the language of the Award were not clear enough on its own, its authors made perfectly clear in their Opinion that the Award applied to the entire length of the River. Although the arbitrators noted that they were "not authority for the construction of this compact, because nothing which concerns it [was] submitted to" them, they went on to say: "but we cannot help being

[74] Black-Jenkins Award, App. C, Article Fourth (emphasis added). The phrase "agreeably to the compact of seventeen hundred and eighty-five" shows that the arbitrators believed the Award, based on prescription, was entirely consistent with the rights and limitations in the Compact of 1785. Exclusion of over two-thirds of the River's length from those rights would require clear expression.

influenced by our conviction (Chancellor Bland notwithstanding) that [the Compact] applies to the whole course of the river above the Great Falls as well as below."[75]

Significantly, the Opinion makes clear that the arbitrators independently based their Award in Article Fourth on the doctrine of prescription[76] – that as a result of Virginia's use of the river bank to the low-water mark "from the earliest period of her history,"[77] it had earned, along its entire Potomac shore, the rights declared in Article Fourth. Although the arbitrators believed they entered their Award "agreeably to the Compact of 1785," the arbitrators also found, independent of the Compact of 1785, that Virginia had gained the right "to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership" as a result of its continuous use of the south shore of the River for a great many years.[78]

2. Regulation Issue

The Black-Jenkins Award confirmed the broad and unqualified language of Article Seventh of the 1785

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[75] Black-Jenkins Opinion, App. D, at D-18 to D-19. Chancellor Bland authored the opinion in *Binney's Case*, 2 Bland 99 (Md. Ch. 1829).

[76] *See Smoot Sand and Gravel Corp. v. Washington Airport, Inc.*, 283 U.S. 348, 350-51 (1931) (Black-Jenkins Award held that the low-water mark for the boundary was established by prescription and that prescription was a sufficient basis for the decision, independent of the 1785 Compact).

[77] Black-Jenkins Opinion, App. D, at D-18.

[78] *Id*. at D-19.

Compact. Adding force to the Award, both States had agreed to binding arbitration; both States subsequently confirmed through their legislatures the binding nature of the resulting Award; Congress blessed it; and both States remain bound by it. In agreeing to enter into arbitration, Maryland specifically declared:

> [N]either of the States, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year 1785, but that the same shall remain to and be enjoyed by the said States and the citizens thereof, forever.[79]

After the arbitration, the Award, having been ratified and accepted by Virginia and Maryland, received the approval of Congress on March 3, 1879.[80]

The Black-Jenkins Opinion concluded:

> Virginia has a proprietary right on the south shore to low water-mark and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership. . . . To that extent Virginia has shown her rights on the river so clearly as to make them indisputable.[81]

The arbitrators conclusively located the boundary between the two states at the low-water mark on the Virginia

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[79] 1874 Maryland Laws, ch. 247 (Apr. 11, 1874) (VX 56).

[80] *See supra* note 2.

[81] Black-Jenkins Opinion, App. D, at D-19.

shore. They then went on in Article Fourth of the Award to conclude that Virginia had the "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." Here, the arbitrators recognized the unity of Virginia and its citizens and ruled that *Virginia* had a proprietary right on the south shore to low-water mark and "appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of *her* riparian ownership."[82]

The language is clear and unequivocal, in accordance with what one would expect in an arbitration *between sovereigns*. The rights of Virginia under the Award are those of an independent *sovereign*, and not of an individual property owner. In the ordinary boundary dispute between citizens, if an arbitration granted or preserved certain rights for one party, clearly those rights would be subject to regulation by the State in which the property lies. Here, where an arbitration between equal sovereign States at last decides the location of a boundary and simultaneously confirms pre-existing rights in one of those States, it would be anomalous to conclude that the rights of that sovereign State and its citizens are subject to regulation by the other co-equal sovereign without the slightest suggestion of that fact.

[82] *Id*. (emphasis added).

C. *Maryland v. West Virginia*, 217 U.S. 577 (1910)

1. Entire River Issue

The present original action is not the first time that sovereign States have called upon this Court to settle rights to the Potomac River. After West Virginia was carved out of Virginia's territory in 1863,[83] Maryland commenced in 1891 an original action against West Virginia to fix the boundaries between the two States.[84] In *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Court established the north/south boundary between the States at the low-water mark on the Potomac's southern bank. *Id*. at 581. Although the Court noted that Maryland's southern boundary as originally chartered had been the high-water mark on the Virginia shore of the Potomac, it agreed with the Black-Jenkins Award arbitrators and concluded that that boundary had been altered to the low-water mark by prescription. *Id*. at 579-80. The prescriptive low-water mark, the Court noted, was declared *after* West Virginia was created, when Virginia and Maryland submitted the boundary question to binding arbitration, leading to the Black-Jenkins Award of 1877. *Id*. at 579. Although Virginia's rights of access to and use of the River were not specifically before the Court in the West Virginia case, the Court's opinion cannot be read in any way other than as concluding that the 1785 Compact applies to the entire River, including the non-tidal reach. This conclusion is compelled because:

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[83] *See Virginia v. West Virginia*, 220 U.S. 1, 26 (1911).

[84] *See Maryland v. West Virginia*, 217 U.S. 1, 22-23 (1910).

First, West Virginia's frontage on the Potomac is totally non-tidal.

Second, as the Court noted, West Virginia "is but the successor of Virginia in title." 217 U.S. at 578.

Third, West Virginia, in its brief on the final decree, by extensively quoting from the arbitrators' Opinion, brought the 1785 Compact as well as the Black-Jenkins Award and its acceptance by Maryland to the Court's attention. After quoting at length from the arbitrators' Opinion, West Virginia's brief stated:

> It will be noted that the arbitrators were of [the] opinion that the compact of 1785 applied to the whole course of the river above the Great Falls as well as below; therefore it applies to that part of the River between Maryland and West Virginia, and whilst West Virginia was not a party to this arbitration, and is not bound by the award, yet the State of Maryland is bound by it and has accepted it so far as the Potomac River lies between her and Virginia and it would seem that she cannot with very good grace ask for a different line to be established between her and West Virginia, having brought about through this arbitration the establishment of the low water-mark as the limit of her territorial rights under her charter, and under her compact with Virginia. Upon exactly the same state of facts existing between her and West Virginia, she would

> seem to be estopped to ask for a different decision from this Court.[85]

Fourth, the Court quoted liberally and favorably from the Black-Jenkins Award by "eminent lawyers," 217 U.S. at 579, noted the "elaborate opinion" the arbitrators rendered, *id*., and quoted excerpts from that opinion, including:

> [Virginia] expressly reserved "the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Pocomoke) and all improvements which have or will be made thereon." By the compact of 1785, Maryland assented to this, and declared that "the citizens of each state respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements."

Id. at 580 (quoting Virginia Constitution of 1776 and Compact of 1785, Article Seventh).

Fifth, the Black-Jenkins "elaborate opinion" to which the Court referred includes the arbitrators' firm conclusion that although they were "not authority for the construction of this compact [of 1785]" they could not "help being influenced by [their] conviction . . . that it applies to the

[85] Brief of Counsel for West Virginia on Points Involved in the Settlement of the Final Decree, *Maryland v. West Virginia*, at 5 (May 14, 1910) (VX 351).

whole course of the river above Great Falls as well as below."[86]

Sixth, the Court quoted the arbitrators' conclusion:

> "Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water-mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.
>
> To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

Id. at 580 (quoting Black-Jenkins Opinion, App. D, at D-19).

Seventh, having thus discussed the Opinion and the Award, the Court continued:

> *The compact of 1785 is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both states*. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two states on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that

[86] Black-Jenkins Opinion, App. D, at D-18 to D-19.

> Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.
>
> This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia, at low-water mark on the south bank of the Potomac river to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the states respectively.

Id. at 580-81 (citation omitted) (emphasis added).

Eighth, the draft decree that Maryland presented to the Court contained the following language that the Court incorporated in the final decree:

> Fourth. That this decree shall not be construed as abrogating or setting aside the compact made between commissioners of the state of Maryland and the state of Virginia at Mount Vernon, on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland, and afterwards by act of the general assembly of Virginia, passed on the 3d day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, *shall remain obligatory upon and between the states of Maryland and West Virginia, so far as it is applicable to that part of the Potomac river which*

> *extends along the border of said states*, as ascertained and established by this decree.

Id. at 585 (emphasis added).

Thus, this Court has already provided in its *Maryland v. West Virginia* decision an authoritative answer to the Entire River Issue by quoting favorably from the Black-Jenkins Award and Opinion, by noting that the 1785 Compact's "binding force" was preserved in the draft decrees submitted by Maryland as well as West Virginia, by specifically stating that the privileges reserved in the 1785 Compact to the citizens of Maryland *and Virginia* "on the shores of the Potomac" were inconsistent with Maryland's claim to a high-water boundary and by ordering that the 1785 Compact "shall remain obligatory" on Maryland and West Virginia, whose joint border is entirely in the non-tidal section of the Potomac. The words "shall remain obligatory" were offered by Maryland itself in its proposed decree in the 1910 case.[87] If the Court had believed that the Compact of 1785 was inapplicable above the tidal reach, the Court could not have decreed that the rights granted under that Compact "shall remain obligatory" between Maryland and West Virginia.

The Court's intention in *Maryland v. West Virginia* is made even more clear in its statement, after quoting from the Opinion that accompanied the Black-Jenkins Award, that:

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[87] *See* State of Maryland, Decree Proposed by the State of Maryland, *Maryland v. West Virginia*, at 5 (Apr. 20, 1910) (VX 349).

> There is no evidence that Maryland has claimed any right to make grants on th[e Virginia] side of the river, and *the privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river*.

Id. at 580-81 (emphasis added). In the context of the case between Maryland and West Virginia, whose frontage on the River is totally in its upper, non-tidal reach, this passage plainly refers to the entire length of the River, not some segment of it. Even more significantly, the Court certainly would not have expressly discussed riparian rights on both sides of the River as dealt with in the 1785 Compact, and favorably incorporated passages from the arbitrators' Opinion accompanying the Black-Jenkins Award, if the Court did not believe, as the arbitrators had believed, that Virginia had access rights along the entire River, rights that passed proportionately to West Virginia upon its separation from Virginia.

Pointing to the words "so far as it is applicable to that part of the Potomac river which extends along the border of said states," Maryland argues that because the Compact does not apply above the tidal reach, the Court's decree that the Compact "shall remain obligatory" between Maryland and West Virginia is of no effect. Even setting aside the fact that Maryland put these very words in its own proposed decree, this suggestion – that the Court would expressly preserve an obligation that did not exist, and refer to an obligation that never existed as one that "shall *remain*" – would render the Court's statement meaningless. The only sensible reading of the decree is that the Court in 1910 intended to preserve between

Maryland and West Virginia obligations laid down by such parts of the 1785 Compact that by their plain terms and subject matter had application to the non-tidal reach of the Potomac along Maryland's border with West Virginia. The cautionary language in the decree simply recognizes that certain portions of the Compact were not geographically applicable to West Virginia because their subject matter was relevant only to Chesapeake Bay, the Pocomoke River or the tidal reach of the River.

I thus conclude that the Court has already decided in 1910 the Entire River Issue in Virginia's favor.

2. Regulation Issue

In *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Court also explicitly recognized Virginia's rights to the Potomac as the rights of an independent sovereign. After quoting extensively from the section of the Black-Jenkins Award that preserves for Virginia the very rights here in dispute, the Court stated:

> We agree with the arbitrators in the opinion above expressed, that the privileges [in the compact] reserved respectively to the citizens of the two states on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and *the privileges reserved to the citizens of the respective states in the compact of 1785*, and its subsequent ratifications, *indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river*.

Id. at 580-81 (emphasis added). Thus, in the context of establishing the Maryland/West Virginia boundary line, the Court in 1910 unmistakably stated its view that in the 1785 Compact each of the two sovereign States intended to maintain for its citizens the rights specifically set forth in the Compact. Among those rights is the specific "privilege of making and carrying out wharfs and other improvements." 1785 Compact, App. B, Article Seventh. There is no possible way to read the Court's conclusion as anything other than a validation of Virginia's (and Maryland's) "intention" that the Compact would maintain and govern the rights and privileges of its citizens on *its* side of the River. For example, each State intended to govern and regulate the construction of improvements appurtenant to the shore on its side.

I thus conclude that the Court has already decided the Regulation Issue in Virginia's favor.

D. Subsequent Legislation and Agreements

1. Joint Legislation of 1896

In complete accord with Article Fourth of the Black-Jenkins Award, the treatment of the Compact by both States later in the 19th Century further undercuts Maryland's present argument on the Entire River Issue. In 1896, Virginia and Maryland (along with West Virginia) passed concurrent legislation to restrict the portion of the year for, and methods of, taking certain fish from the River.[88] This legislation, exactly the type of concurrent

[88] 1896 Va. Acts ch. 627 (VX 65); 1896 Md. Laws ch. 427 (VX 66).

State action contemplated in Article Eighth of the Compact, *both specifically referred to the Compact and expressly applied only to the non-tidal reach of the River*. The adoption of this legislation demonstrates both States' recognition of the Compact's applicability above tidewater.

2. Potomac River Compact of 1958

a. Entire River Issue

Some forty-five years after the *West Virginia v. Maryland* decision, Virginia sought and was granted leave to file an original action against Maryland asking the Court to invalidate Maryland legislation attempting to repeal the Compact and give Maryland exclusive jurisdiction over the Potomac. *Virginia v. Maryland*, No. 12 Orig., 355 U.S. 269 (1957). Retired Justice Stanley F. Reed, acting as Special Master, persuaded the parties to settle their dispute amicably. The Potomac River Compact of 1958 resulted. It was adopted by both States and duly consented to by Congress.[89] Although it superseded the 1785 Compact, it specifically preserved the rights granted in the 1785 Compact's Article Seventh. The 1958 Compact, entered into for the principal purpose of establishing and setting the territorial jurisdiction and powers of the Potomac River Fisheries Commission, preserved the rights of Article Seventh of the 1785 Compact by providing in its Section 1 of its Article VII that:

> The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the

[89] *See supra* note 1.

> shores of the *Potomac River* adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact, and the decisions of the courts construing that portion of Article VII of the Compact of 1785 relating to the rights of riparian owners shall be given full force and effect.

(emphasis added).

This provision plainly applies to the entire Potomac, not simply to some segment of it, and placement of that language within the context of the 1958 Compact corroborates that conclusion. Article II of the 1958 Compact specifically establishes the limited "territory in which the Potomac River Fisheries Commission shall have jurisdiction," whereas the above-quoted Article VII, Section 1 of the same 1958 Compact applies without limit to the "Potomac River." The specific limitation of the Potomac River Fisheries Commission's jurisdiction to "those waters of the Potomac River enclosed within the . . . described area"[90] carries the strong implication that other provisions of the 1958 Compact that by their terms apply generally to the "Potomac River" are free of any geographic limitation whatever.[91]

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[90] 1958 Compact, App. E, Article II.

[91] The portion of Article VII, Section 1 of the 1958 Compact that gives effect to "the decisions of the courts construing that portion of Article VII of the Compact of 1785 relating to rights of riparian owners" protects those decisions as to private riparian owners in either compacting State who have litigated those rights and accepted the results. However, such decisions could affect this dispute between sovereigns only to the extent they were rendered by the Supreme Court of the United States. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28.

(Continued on following page)

b. Regulation Issue

The preamble to the 1958 Compact states:

> Maryland and Virginia each recogniz[e] that Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore thereof, as laid out on the Matthews-Nelson survey of 1927, and that Virginia is the owner of the Potomac River bed and waters southerly from said low water mark, as laid out, and the citizens of Virginia have certain riparian rights along the southern shore of the River as shown on said Matthews-Nelson survey . . . .

Section 1 of Article VII of the 1958 Compact also states that the "rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each state along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact." Thus, the 1958 Compact did not alter these explicitly listed rights.

It is also noteworthy that the Report of the Commissioners on the 1958 Compact, which was submitted to the Governors of Maryland and Virginia, states that Maryland's legislation attempting to repeal the Compact had affirmatively purported to "*assume*[ ] exclusive jurisdiction and control over the Potomac River" and describes that legislation as "designed to . . . place exclusive jurisdiction

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Thus, the Compact statement giving "full force and effect," as applied to the decisions of either State's courts, cannot transform those decisions into binding authority against the other State in this original action.

of the Potomac River in Maryland."[92] The Commissioners' joint description of the Maryland legislation is wholly inconsistent with the notion that as of 1785 or 1877 (or any time thereafter) both States understood that Maryland already enjoyed sovereignty over the entire River for all purposes and could regulate all of the rights Virginians hold under the Compact. If that had been true, the Maryland legislation would have been unnecessary.

In short, the 1958 Compact both recognizes the rights of Virginia as a sovereign and suggests that both States understood that Maryland had no right to regulate Virginia's rights and privileges declared in the 1785 Compact.

E. Miscellaneous Evidence

Maryland has also argued that additional events show that Maryland has at all relevant times exercised regulatory authority over the Potomac for all purposes. Those arguments have no merit.

Cession of Territory for District of Columbia. In December 1791, Maryland passed legislation granting commissioners for what is today the District of Columbia the authority to issue licenses for wharves built into the Potomac until Congress assumed jurisdiction over the new federal district. [93] Maryland contends that this legislation shows that Maryland alone had the authority to regulate

[92] *Report of the Commissioners to the Governors of Maryland and Virginia, The Potomac River Compact of 1958*, *reprinted in* Virginia House Document No. 22 (1960) (VX 80) (attached hereto as part of App. E).

[93] 1791 Md. Laws ch. 45 (MX 28).

the building of such structures. This argument does not withstand scrutiny because in 1790 Congress had enacted legislation authorizing commissioners to purchase land on the Maryland side of the River for creation of the federal district, and, by the autumn of 1791, plans had been laid for the creation of Washington, D.C. on the Maryland side of the River. The December 1791 Maryland legislation by its terms applied to wharves "adjoining the . . . city,"[94] and therefore shows no more than that Maryland had granted the commissioners the power to issue licenses for construction on the Maryland side of the River. The regulations later adopted by the commissioners clearly refer to wharves extended from the Washington, D.C. side of the River.[95]

Washington Aqueduct. Maryland also argues that its consent in 1853 to the creation of the Washington Aqueduct and the withdrawal of water for it, in contrast to Virginia's consent to the acquisition of land for the construction of a dam across the River to the Virginia side, shows that both States knew that only Maryland could approve water withdrawals from the River. This argument, too, fails on examination. The Army Corps of Engineers had recommended that the water supply structures be on the Maryland shore of the Potomac and President Fillmore sent that recommendation to Congress.[96] The legislation approving funds to construct water

[94] *Id.* § 12.

[95] Regulations of the Commissioners of the District of Columbia, Group 42 (July 20, 1795) (VX 271).

[96] *See* Senate Exec. Doc. No. 48, 32nd Cong., 2d Sess. (1853), at 1, 24-29, 33 (VX 48).

appropriation facilities for Washington, D.C. specified that if the plan required water to be withdrawn from "any source within the limits of Maryland," then Maryland's consent to the project should be obtained.[97] Maryland gave its consent to the United States "to purchase such lands, and to construct such dams, reservoirs, buildings and other works" necessary to supply the city with water.[98] Maryland never approved any water withdrawal for the project and Maryland has never required a water appropriation permit for the city's water supply.[99] In short, the withdrawal facilities were to be constructed on the Maryland side of the River and Congress decided that Maryland's consent to build them should be obtained.

Conclusions on the Entire River and Regulation Issues

Conclusion: Entire River Issue

I conclude that in 1910 this Court, in *Maryland v. West Virginia*, 217 U.S. 577 (1910), decided the Entire River Issue in Virginia's favor. Furthermore, even in the absence of that prior decision, I reach the same conclusion – that Virginia's rights in Article Seventh of the 1785 Compact extend along its entire Potomac boundary – based upon the unambiguous language of Article Seventh of the 1785 Compact and the Compact language outside of Article Seventh. Examination of historical sources contemporaneous with the negotiation of the 1785 Compact, if such examination were necessary, as well as the

[97] Act of March 3, 1853, ch. 97, 10 Stat. 189, 206 (1853) (VX 49).

[98] 1853 Md. Laws ch. 179 (VX 50).

[99] Herbert M. Sachs, Deposition, at 74-75 ("Sachs Dep.") (VX 342).

Black-Jenkins Award of 1877 and the 1958 Compact, independently confirm that conclusion.

Conclusion: Regulation Issue

I conclude that the plain language of Article Seventh of the 1785 Compact, along with the Black-Jenkins Award of 1877 and the Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), also compel a decision in Virginia's favor on the Regulation Issue. Maryland failed to present any convincing evidence that the negotiators of the 1785 Compact would have understood that Maryland had exclusive sovereignty over the Potomac. Without that evidence, it is not entitled to a presumption that it would lose exclusive regulatory authority only if it agreed to do so in explicit and unmistakable language in the Compact. In the absence of any such presumption, one cannot read Article Seventh of the Compact and conclude that its negotiators silently incorporated an understanding that the exercise of Compact rights by Virginia, an equal and independent sovereign, would be subject to Maryland regulation. Both the Black-Jenkins Award and the Court's treatment of the Compact in *Maryland v. West Virginia*, 217 U.S. 577 (1910), confirm that conclusion and no other evidence presented by Maryland contradicts it.

II. The Acquiescence Issue

RECOMMENDATION II

Maryland has failed to establish that Virginia has lost any rights under the Compact of 1785 by its alleged acquiescence in Maryland state court decisions or its alleged acquiescence in permitting action by Maryland.

For both the Entire River Issue and the Regulation Issue, Maryland has pressed the affirmative defense of acquiescence. Neither argument is persuasive.

A. Alleged Acquiescence on the Entire River Issue

Maryland contends, citing Maryland judicial decisions and positions allegedly taken with regard to them by the Virginia legislature and the Virginia Attorney General, that Virginia has in the past acquiesced in Maryland's present position on the Entire River Issue and that the doctrine of acquiescence bars Virginia's claim in this action.

Application of the doctrine of acquiescence can, it is true, cause a State to lose rights and foreclose a claim it could otherwise assert against another State. *See*, *e.g.*, *Nebraska v. Wyoming and Colorado*, 507 U.S. 584, 595 (1993); *Illinois v. Kentucky*, 500 U.S. 380, 384-85 (1991). However, that doctrine does not here bar Virginia from asserting that the Compact applies to the entire length of the Potomac River. No evidence has been presented that Virginia has ever acquiesced in any claim by Maryland, or in any holding of any Maryland court, that the Compact does not apply above the tidal portion of the Potomac.

In its assertion of acquiescence, Maryland relies on decisions of the Maryland courts expressing the view that the Compact applies only to the tidal reach of the Potomac. As previously discussed,[100] all of these cases except one were decided prior to the Black-Jenkins Award of 1877. Virginia could not have acquiesced in Maryland's exclusive jurisdiction over the non-tidal reach of the Potomac at a time when the Virginia/Maryland boundary was still a subject of controversy between the States and that

[100] *See supra* text following note 25, pp. 18-19.

controversy had not yet been submitted to binding arbitration by *both* States. Furthermore, the Black-Jenkins arbitrators expressly rejected the conclusion reached by Maryland courts and, in their Opinion and Article Fourth of their Award, by plain language applying to the entire length of the River, preserved Virginia's rights under Article Seventh of the 1785 Compact to construct improvements and use Potomac water.[101] In addition, the arbitrators declared the doctrine of prescription as an independent legal basis for those rights.[102] Consequently, no possible claim of acquiescence can be based on any of the Maryland cases decided prior to 1877 when the Award was issued and subsequently accepted by both States.

The adoption by Maryland and Virginia in 1896 of concurrent legislation regarding freshwater fishing above Little Falls underscores this conclusion.[103] If Maryland had believed that the Compact did not apply above tidewater, and that as a consequence Virginia had no rights in the River above the tidal reach, Maryland would have had no reason to join Virginia in enacting joint legislation that specifically referred to the Compact and applied *only* to the *non-tidal* portion of the River.

The one Maryland case decided after 1877 on which Maryland relies does not compel the conclusion that Virginia has lost its Compact rights above the tidal reach of the River because of its acquiescence. In *Middlekauff v. LeCompte*, 132 A. at 50, the Maryland Court of Appeals

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[101] *See supra* Part I.B.1., pp. 54-55.

[102] *See supra* Part I.B.1., p. 55.

[103] *See supra* Part I.D.1., pp. 66-67.

decided in 1926 that Maryland did not need the concurrence of Virginia for a statute prohibiting the use of fish pots in the non-tidal stretch of the River because the Compact did not apply to that portion of it. Virginia and its citizens, who were not parties in the case, could not have appealed the decision.[104] Virginia's Attorney General, however, notified Maryland that Virginia disagreed with the decision and with Maryland's attempt to limit the need for concurrent legislation to the tidal reach of the River. He pointedly stated that Virginia continued to insist that the Compact and the concurrent legislation adopted by Maryland and Virginia applied to the entire length of the Potomac.[105] Thus, Virginia specifically did not acquiesce in *Middlekauff* and continued to dispute Maryland's position. Finally, *Middlekauff* failed even to mention the controlling authority on the Entire River Issue, *Maryland v. West Virginia*, 217 U.S. 577 (1910), and some thirty years after *Middlekauff*, Maryland joined in the 1958 Compact that expressly preserved Virginia's rights under Article Seventh of the Compact of 1785.

These circumstances dispose of Maryland's claim of acquiescence with respect to the Entire River Issue.

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[104] The individuals involved in the suit were all citizens of Maryland or West Virginia. *Middlekauff*, 132 A. at 48.

[105] *See* Letter from John R. Saunders, Attorney General of Virginia, to Swepson Earle, Commissioner of the Maryland Conservation Department (June 23, 1927), *reprinted in* 1927 Report of the Attorney General of Virginia, at 182 (VX 333).

B. Alleged Acquiescence on the Regulation Issue

Maryland argues that, even if Virginia had Compact rights in 1785 that it could exercise freely as a sovereign, Maryland has now acquired the power to regulate Virginia's construction of improvements appurtenant to its Potomac shore and water withdrawal from the Potomac because Maryland has long exercised regulatory authority over the River without any objection from Virginia.

In an acquiescence claim, one State is assumed to have had a right originally and to have lost that right by its acquiescence in the acts of another State. *See New Jersey v. New York*, 523 U.S. at 786 (jurisdiction may be *obtained* through action at the other State's expense and the proponent of the defense has the burden of proving it). Thus, the necessary predicate of an acquiescence argument here is that Virginia had sovereign rights under the Compact to make and carry out improvements appurtenant to the Virginia shore and to withdraw water from the Potomac free from regulation by Maryland. Maryland must then show that Virginia's regulation-free right has been lost by Virginia's acquiescence in the exercise of Maryland's regulatory power over those rights. To prevail on its acquiescence argument, Maryland has the burden to show by a preponderance of the evidence, first, "'its long and continuous . . . assertion of sovereignty'" . . . , *id.* at 786-87 (quoting *Illinois v. Kentucky*, 500 U.S. at 384), over Virginia's Potomac construction appurtenant to its shore and Virginia's water appropriation and, second, Virginia's acquiescence in that regulation by Maryland, *id.* The acquiescence cases between sovereign States show that

the period for finding acquiescence must be extensive – in many cases approaching or exceeding 100 years.[106]

Maryland falls well short of making the required showing.

Before considering the evidence presented, it is essential to discuss the use of the doctrine of acquiescence in the unique circumstances presented here. This case presents circumstances that distinguish it from all other acquiescence cases. All cases the parties have cited and discussed in their arguments on sovereign acquiescence involve an interstate boundary dispute or a dispute about sovereignty over a particular tract of real estate, i.e., a dispute in which the complete range of regulatory authority over the disputed parcel is at issue. For example, even though *New Jersey v. New York* involved a compact, it, like all of the other acquiescence cases cited, was a boundary dispute about which State had sovereignty over filled portions of Ellis Island for all purposes.

The boundary between Maryland and Virginia is not at issue. It was settled when both States accepted the Black-Jenkins Award well over a century ago. Also not in dispute is a large swath of Maryland regulation – enactment and enforcement of criminal laws or other general licensing laws relating to public safety, occupational safety, health, alcohol, gambling, hunting or fishing, or general entertainment licensing, including restaurant inspection –

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[106] *See Georgia v. South Carolina*, 497 U.S. 376, 392-93 (1990); *California v. Nevada*, 447 U.S. 125, 126 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 650-52 (1973); *Arkansas v. Tennessee*, 310 U.S. 563, 567-72 (1940); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893).

in that portion of the Potomac that lies below the low-water mark on the Virginia side. In this case, Virginia makes no challenge regarding that regulation.[107] The current dispute involves only the narrow question of the power to regulate specific Compact rights – construction of improvements appurtenant to the southern shore of the Potomac and withdrawal of water from it. Thus, the case does not involve whether Maryland can regulate Virginians' use of and rights in the River generally, as would the usual boundary and acquiescence cases. It is concerned only with whether Virginia has acquiesced in Maryland's exercise of a very specific type of regulation where the boundary is now settled but the parties dispute the scope and meaning of explicit rights that were (1) declared in an interstate compact that was negotiated when sovereignty over those specific rights was unsettled and (2) preserved and reaffirmed by the later boundary decision itself.

In this context, the many different ways that Maryland regulates other activities of Virginians in and on the River are irrelevant to a showing that it has the specific regulatory power over the particular activities at issue here. In these unique circumstances – not duplicated in any case cited by the parties – Maryland's regulation of matters separate from Virginia's construction appurtenant to its own shore and Virginia's Potomac water appropriation demonstrate in no way that Virginia has acquiesced in Maryland's regulation of Virginia's waterway construction and water appropriation activities. Those regulatory efforts do not show that the parties have understood since the 1877 Black-Jenkins Award that Maryland was for all

[107] *See* Stipulations Relating to Designee Depositions, ¶¶ 7-14 (MX 143); Responses to Maryland's Interrogatories, No. 13 (MX 144).

purposes sovereign over the entire Potomac to low-water mark on the Virginia side. It may well be that those efforts show an understanding that Maryland exercises sovereign authority over the Potomac for other purposes, but they demonstrate nothing at all about the parties' understanding of regulatory authority over Virginia's rights specifically agreed to in the Compact, upheld in the Award, and involved in the present action.

Maryland cites cases involving typical boundary disputes – those where regulation of every kind is at issue – noting that the Court in those cases has focused on all categories of activity to inform its decision about where the boundary lies and which State is sovereign over the disputed territory for all purposes. Regulation outside of shoreline construction and water appropriation would clearly be relevant if this case was about fixing a boundary or determining which State owned the Potomac or had the right to regulate all activities in and on the Potomac.

But it is not. In other words, Maryland's right to regulate activities A, B, and C, which is not here in dispute, is not relevant to show Maryland's power to regulate activities D and E, where activities D and E are rights specifically conferred by a Compact and binding arbitration award between the States. Maryland's argument that all regulatory activity is pertinent fails. Here, the very decision (the Black-Jenkins Award and Opinion) that determined the boundary between the two States contains explicit and broadly worded statements that carve out authority for Virginia for "activities D and E," i.e., the "right to such use of the river . . . as may be necessary to

the full enjoyment of her riparian ownership"[108] and the "privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership."[109] Accordingly, evidentiary materials that Maryland submitted pertaining to categories of regulation other than the construction of improvements appurtenant to the Virginia shore and water appropriation are not relevant in this case.

Where, as here, the dispute is focused on particular rights agreed to in the 1785 Compact and preserved in the 1877 arbitration Award that finally set the boundary between the two States, the only facts relevant to demonstrate acquiescence are those that bear *directly* on the specific type of regulation Maryland is attempting here – regulation of Virginia's construction of improvements appurtenant to its own shore and Virginia's water appropriation from the Potomac. Assuming that the doctrine of acquiescence could apply to the unique situation presented here, the relevant evidence presented on the issue of Virginia's acquiescence is not persuasive.

Although there is some evidence of the required type of regulation by Maryland and of acquiescence on the part of Virginia, Maryland has not, on balance, come close to making the necessary showing. The facts set forth in the left column of the table below constitute some evidence of regulation by Maryland and of acquiescence by Virginia, but even in the absence of contradictory evidence, they are not enough to constitute the requisite showing of Virginia's

[108] Black-Jenkins Award, App. C, Article Fourth.

[109] Black-Jenkins Opinion, App. D, at D-19.

acquiescence in Maryland's regulation of water appropriation and construction of improvements appurtenant to the Virginia shore. Arrayed against the facts Maryland has offered suggesting acquiescence are the additional facts, circumstances and qualifications noted by Virginia that are included in the right column of the table below. Taken as a whole, the evidence the parties have presented shows nothing more than that the two States have disagreed about whether Maryland has the authority to require Virginians to obtain waterway construction and water appropriation permits.

Relevant Evidence of Regulation and Acquiescence and Positions Offered by the Parties on the Regulation Issue

Maryland	**Virginia**
Water Appropriation Activities • *Statutory Authority*. – In 1933, Maryland enacted the Maryland Water Resources Law. Section 4 requires permits for appropriation or use of Maryland waters.[110]	Water Appropriation Activities • *Statutory Authority*. – The water appropriation permitting process required by Maryland's Water Resources Law referred specifically to "the State" (i.e., Maryland) and its political subdivisions and was not amended to apply facially to Virginia or its political subdivisions until 1973, when the statute was

[110] 1933 Md. Laws ch. 526, § 4 (VX 69) (MX 41).

	amended to apply to any "person." Until 1973, the water appropriation section of the statute also exempted from permitting requirements the use of water for domestic purposes and for an approved water supply of any municipality.[111]
– Virginia has never implemented an administrative system for permitting and regulating the withdrawal of water from the Potomac River.[112]	– In 1977, the Vice Chairman of the Virginia State Water Control Board, for the purpose of "authoriz[ing] Maryland to operate a permit program on behalf of Virginia, in effect as its agent,"[113] wrote a letter to the director of the Maryland Water Resources Administration stating that the Virginia Board would allow Maryland's continued issuance of water appropriation permits to Virginia users until Virginia enacted its own permitting system, at which time Virginia would "expect to issue permits to all political subdivisions in

[111] *See* 1933 Md. Laws ch. 526 (VX 69) (MX 41); 1973 Md. Laws ch. 4, § 8-802 (VX 87) (MX 43).

[112] Virginia Interrogatory Responses 4 and 5 (MX 144).

[113] Memorandum from Frederick S. Fisher to Members, Virginia State Water Control Board, at 3 (Aug. 4, 1977) (VX 160).

	the Commonwealth and coordinate all of these [water appropriation] permits between Virginia and Maryland."[114]
• *Permits and Protests*.	• *Permits and Protests*.
– The first water appropriation permit request by a Virginia entity was submitted in 1956 and similar submissions on some 29 subsequent occasions (for 15 users) have been made without objection by any applicant and with knowledge on some occasions by the Virginia Governor or Virginia governmental agencies.[115]	– Even if there were no protests and the acquiescence period were dated from 1956 – the date of the first Virginia entity water appropriation permit application – that, if it stood alone, would provide an acquiescence period of at most 43 years. – In hearings leading to enactment of the Water Resources Development Act of 1976 ("WRDA")[116] (the federal statute that authorized the Potomac River Low

[114] Letter from J. Leo Bourassa to Herbert M. Sachs (Aug. 5, 1977) (VX 161) (MX 101).

[115] Matthew J. Pajerowski, Declaration ¶¶ 8-45 (MX 843) and attachments thereto (MX 849-886, 890, 893, 897).

[116] Water Resources Development Act of 1976, Pub. L. No. 94-587, § 181, 90 Stat. 2939 (Oct. 22, 1976), *codified at* 42 U.S.C. § 1962d-11a (VX 95).

	Flow Allocation Agreement ("LFAA")[117]), Maryland took the position that it owns the Potomac and has the right to allocate water through its permit system. Virginia's position was that it has vested rights in Potomac River water and does not need an allocation permit from anyone to withdraw water.[118] The former director of the Maryland Water Resources Administration stated in a deposition in this case that "there were a number of instances where discussions like that occurred."[119] In order to "leave open the question of whether Virginia entities are subject to Maryland authority,"[120] Maryland and Virginia agreed to statutory text providing that the WRDA

[117] Potomac River Low Flow Allocation Agreement (Jan. 11, 1978) ("Low Flow Allocation Agreement" or "LFAA") (VX 331).

[118] Memorandum from D.F. Jones to E.T. Jensen et al. (Aug. 17, 1976) (VX 145) (MX 98).

[119] Sachs Dep. at 131.

[120] *Water Resources Development Act of 1976, Hearings before the Subcommittee on Water Resources of the Committee on Public Works & Transportation*, 94th Cong., 2d Sess. 363, 438 (Aug. 31, 1976) (VX 92, 338).

	would not "alter any riparian rights or other authority of the State of Maryland, or any political subdivision thereof, [or] the Commonwealth of Virginia, or any political subdivision thereof . . . relative to the appropriation of water from, or the use of, the Potomac River."[121] – At an Army Corps of Engineers public hearing concerning the LFAA, a Virginia State Water Control Board representative testified in 1976: "The Commonwealth of Virginia claims riparian rights to the waters of the Potomac as guaranteed by the Compact and expects those rights to be honored. Virginia has the sole right to regulate the Potomac River riparian rights of its citizens and political subdivisions."[122]

[121] Water Resources Development Act of 1976, § 181, *supra* note 116.

[122] T.M. Schwarberg, Statement of Virginia State Water Control Board presented at Sept. 13, 1977, Public Hearing, Falls Church, Virginia, entitled *Virginia's Position on the Potomac River Low Flow Allocation Agreement* 2-3 (VX 344); Department of the Army, Corps of Engineers, Baltimore District, *Public Meeting Record: Potomac River Low Flow Allocation Agreement* 74 (VX 293).

	The LFAA, dated January 11, 1978, included the statement that nothing in the LFAA would restrict or limit the authority that Virginia may have to issue permits.[123] This provision was included in order "to protect any right that Virginia thought it had with respect to regulating water use," including "issuing permits for withdrawals."[124] – A 1976 letter from the Maryland Attorney General to the Secretary of the Maryland Department of Natural Resources acknowledged the "continuing dispute" among Maryland, Virginia, and West Virginia on the issue "whether or not municipalities located within Virginia and West Virginia are subject to the laws of Maryland when those entities seek to exercise their riparian rights as a user of surface water of the Potomac River."[125] The letter also

[123] Low Flow Allocation Agreement, *supra* note 117, Article 3(C).

[124] Sachs Dep. at 218-19.

[125] Letter from Francis B. Burch and Warren K. Rich to James B. Coulter (June 21, 1976), at 1 (VX 142).

	stated: "the practice [to apply for a Maryland water appropriation permit] . . . has been subject to growing challenge."[126] – A 1976 letter from the Executive Director of the Virginia State Water Control Board to the head of the Maryland Water Resources Administration stated that Virginia had not recognized Maryland's appropriation permit authority "for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownership, rights, and privileges by the Compact of 1785."[127] – The former director of the Maryland Water Resources Administration stated in his deposition for this case that, during the 1970s, he saw several indications from Virginia writers, including the Executive Director of the Virginia Water Control Board, questioning Maryland's permitting authority.[128]

[126] *Id*.

[127] Letter from Eugene F. Jensen to Herbert M. Sachs (July 8, 1976) (VX 143) (MX 96).

[128] Sachs Dep. at 107-08.

	– In 1979, Virginia enacted the Potomac River Riparian Rights Act, directing the Virginia State Water Control Board that "[i]n the event non-Virginia claimants question or seek to abridge the riparian use of the waters of the Potomac River by Virginia riparian owners, the State Water Control Board shall advise and assist such riparian owners in the proper exercise and protection of their rights . . . ."[129]
Waterway Construction Activities in Non-Tidal Waters	Waterway Construction Activities in Non-Tidal Waters
– In 1933, Maryland enacted the Maryland Water Resources Law. Section 5 requires permits for dams and other obstructions in non-tidal waters wholly or partly in Maryland.[130]	– The Maryland Water Resources Law referred specifically to "the State" (i.e., Maryland) and its political subdivisions and was not amended to apply facially to Virginia or its political subdivisions until 1973, when the statute was amended to apply to any "person."[131]

[129] 1979 Va. Acts ch. 307 (VX 99).

[130] 1933 Md. Laws ch. 526, § 5 (VX 69) (MX 41); *cf.* text accompanying note 110, p. 82.

[131] 1973 Md. Laws ch. 4, § 8-803 (VX 87) (MX 43); *cf.* text accompanying note 111, pp. 82-83.

– In 1957, Maryland enacted legislation requiring permits for any conduit, pipe line, wire cable, trestle or other device, structure or apparatus in, under, through, or over the bed or waters of the Potomac River.[132]	– The 1957 Maryland legislation that expressly applied to the Potomac River referred specifically to "the State" (i.e., Maryland) and its political subdivisions and was not amended to apply facially to Virginia or its political subdivisions until 1973, when the statute was amended to apply to any "person."[133]
– Maryland issued its first waterway construction permit for work occurring solely on the Virginia side of the non-tidal Potomac in 1968,[134] and since that time has issued some 15 non-tidal construction permits (for 9 different applicants) for construction extending from the Virginia shore.[135] – No evidence shows that any Virginia applicant ever submitted a waterway construction permit application under protest or with a	– Maryland did not issue its first waterway construction permit to a Virginian for work appurtenant to the Virginia shore that did not extend to the Maryland shore until 1968,[136] which, if it stood alone, would provide an acquiescence period of at most 31 years.

[132] 1957 Md. Laws ch. 757 (VX 74).

[133] 1973 Md. Laws ch. 4, § 8-804.

[134] Amanda Sigillito, Declaration ¶ 3 ("Sigillito Decl.") (MX 1006) and attachment thereto (MX 1007).

[135] *Id*. ¶ 2 and attachments thereto (MX 1008-1024).

[136] *Id.* ¶ 3 and attachment thereto (MX 1007).

claim that Virginia, not Maryland, had jurisdiction.	
Waterway Construction Activities in Tidal Waters – Beginning in 1971, the Maryland Department of the Environment regulated all structures in the tidal section of the Potomac River beyond the low-water mark on the Virginia side of the River, including the issuance of some 300 authorizations for Virginia shoreline projects, and Virginia has acknowledged since the 1970s on "hundreds of occasions" that Maryland has jurisdiction over construction activities taking place below the low-water mark on the Potomac.[137]	Waterway Construction Activities in Tidal Waters – Only 63 of the approximately 300 shoreline construction "authorizations" cited by Maryland for the tidal portion of the River involve the issuance of a Maryland license. The other "authorizations" were either (1) letters from the Virginia Marine Resources Commission that received no action from Maryland in response or (2) determinations that the proposed construction did not require a Maryland tidal wetlands license.[138] – These construction authorizations for tidal waters have been issued for only 28 years, a period that is too short to constitute acquiescence.

[137] Richard J. Ayella, Affidavit ¶¶ 3-19 (MX 149) and attachments thereto (MX 150-497), including a summary of MX 150-497 (MX 498).

[138] Ellen D. Kennedy, Declaration ¶¶ 3-5 (VX 280).

– In 1987, the Maryland Board of Public Works adopted its "Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River" (which became a Maryland state regulation in 1994), asserting Maryland's jurisdiction over Virginia projects from the Virginia shoreline extending beyond the low-water mark in the tidal portion of the River.[139] This policy was shared with representatives of Virginia counties along the Potomac and the Virginia Marine Resources Commission, who suggested no changes to it.	– The 1987 Policy and the subsequently adopted regulation are limited in application in that they exempt from any license requirement private non-commercial piers and other structures on pilings, bulkheads, revetments, boat ramps, landscaping, and vegetative shoreline stabilization projects.
Other Evidence – Attorneys General of Virginia have issued six opinions dating back to 1906 indicating that Maryland's jurisdiction begins at the	Other Evidence – The six letters of Virginia Attorneys General cited by Maryland dealt not with regulation of the building of structures appurtenant to the Virginia shore or with

[139] State of Maryland, *Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River* (1987) (MX 813); Md. Regs. Code § 23.02.04.21 (MX 815).

low-water mark on the Virginia side.[140]	water appropriation but with other activities (e.g., taxation, crimes, and gambling) conducted on such structures. The one opinion that is most nearly on point concludes only that placing fill material beneath a pier extending into the Potomac River would not change the boundary of the River.[141] Another concludes that Virginians have the privilege of building piers so long as navigation is not obstructed, but that the sale of beer on such a pier would be regulated by Maryland.[142]

In sum, other than a single water appropriation permit request in 1956, none of the regulatory activity cited by Maryland began prior to the late 1960s. Relevant cases in which the Court has found acquiescence have

[140] 1906 Report of the Va. Att'y Gen. 87 (July 2, 1906) (MX 123); 1934-35 Report of the Va. Att'y Gen. 147 (June 21, 1935) (MX 124); 1944-45 Report of the Va. Att'y Gen. 91-92 (Sept. 1, 1944) (MX 126); 1948-49 Report of the Va. Att'y Gen. 118 (July 13, 1948) (MX 127); 1952-53 Report of the Va. Att'y Gen. 116 (July 30, 1952) (MX 128); 1966-67 Report of the Va. Att'y Gen. 48 (Apr. 25, 1967) (MX 130).

[141] 1966-67 Report of the Va. Att'y Gen. 48, *supra* note 140.

[142] 1948-49 Report of the Va. Att'y Gen. 118, *supra* note 140.

involved periods of nearly or in excess of 100[143] years of *uninterrupted* activity and acquiescence. Although Virginians may have generally followed Maryland's water appropriation and waterway construction permitting requirements for some 30 to 40 years, that period of time by itself seems too short to constitute acquiescence. In any event, even assuming the forty-year period could be sufficient to constitute acquiescence, it has been punctuated with numerous challenges by Virginia to Maryland's permitting authority (and some acknowledgement thereof by Maryland, as in the Water Resources Development Act of 1976[144] and the Low Flow Allocation Agreement[145] and the negotiations leading to them). Maryland has not made a sufficient showing of "long and continuous . . . assertion of sovereignty over" Virginia's Potomac water appropriation and shoreline construction rights, or of Virginia's acquiescence in that action by Maryland.

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[143] *See supra* note 106 and accompanying text, pp. 77-78. The shortest acquiescence period in any interstate case – forty-one years – was in *Nebraska v. Wyoming*, 507 U.S. at 595. There, Wyoming was foreclosed from challenging in 1986 the Court's recognition of a 1904 water right in its 1945 decree because Wyoming had acquiesced in the performance of that decree for over forty years. Although the time period in *Nebraska v. Wyoming* is similar to the oldest possible claim here under consideration, the similarities end there. In that case, the Court had recognized a Bureau of Reclamation water right in Wyoming for its North Platte Project in the 1945 decree in which the Court, at "Wyoming's suggestion, [had] counted [the amount of the water right] to reduce Nebraska's requirement of natural flows in the pivotal reach." 507 U.S. at 595. Wyoming then acquiesced in that recognition for over forty years before challenging the water right the Court had previously recognized. The equities in that case clearly weighed in favor of foreclosing Wyoming's challenge of a recognized water right in a decree, the substance of which Wyoming had at least in part suggested.

[144] *See supra* note 116.

[145] *See supra* note 117.

Conclusions on the Acquiescence Issue

A review of the evidence submitted by the parties on the question of acquiescence permits only the conclusions that (1) Virginia has not lost any Compact rights above the tidal reach of the Potomac by its alleged acquiescence in Maryland court decisions holding that the Compact applies only to the tidal reach of the River, and (2) no permitting activity by Maryland or alleged acquiescence by Virginia in Maryland's waterway construction and water appropriation permitting systems has given Maryland any regulatory authority over Virginia's exercise of its Compact rights to construct improvements appurtenant to its own shore of the Potomac and to withdraw water.

With respect to the first conclusion, three of the four cases Maryland cites were decided prior to the Black-Jenkins Award, which, in the context of a decision establishing the boundary between the two States, expressly disagreed with one of those cases and expressed the opinion that the Compact applies both above and below the tidal reach. The fourth Maryland court case was decided after *Maryland v. West Virginia*, 217 U.S. 577 (1910), and failed even to mention it. The Attorney General of Virginia, who had no right to appeal that fourth case, nevertheless pointedly disagreed with it in a letter to a Maryland official.

With respect to the second conclusion, assuming without deciding that the doctrine of acquiescence constitutes a valid defense in the unique circumstances of this case – where only the right to regulate specific activities is at issue – Maryland presented some evidence of its exercise of relevant regulatory authority and of acquiescence

by Virginia in its waterway construction and water appropriation permitting systems. However, whatever recognition Virginia has given to Maryland's permitting systems is of too short a duration to give effect to the defense of acquiescence. More importantly, the evidence Maryland has offered is counterbalanced by evidence of Virginia's objections to Maryland's permitting authority. Article Seventh of the Compact, as reinforced by subsequent agreements and decisions, continues to give Virginia "full property" in its Potomac shores with "all emoluments and advantages thereunto belonging." The case for acquiescence would have to be substantially stronger to erase those rights.

On balance, Maryland has not made a strong enough showing to justify holding that Virginia has lost its solemnly agreed to and carefully preserved Compact rights.

RECOMMENDATIONS

For all the foregoing reasons, I recommend that the Court hold:

(1) Article Seventh of the Compact of 1785 between the Commonwealth of Virginia and the State of Maryland, which governs the rights of Virginia, its governmental subdivisions, and its citizens to withdraw water from the Potomac River and to construct improvements appurtenant to the Virginia shore, applies to the entire length of the Potomac River, including its non-tidal reach.

(2) Virginia, its governmental subdivisions, and its citizens may withdraw water from the Potomac River and construct improvements

appurtenant to the Virginia shore of the Potomac River free of regulation by Maryland.

(3) Maryland has failed to establish that Virginia has lost any rights under the Compact of 1785 by its alleged acquiescence in Maryland state court decisions or its alleged acquiescence in permitting action by Maryland.

A Proposed Decree embodying my recommendations is attached as Appendix A.

Respectfully submitted,

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December 9, 2002