

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

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VIRGINIA *v.* MARYLAND

## ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 129, Orig. Argued October 7, 2003—Decided December 9, 2003

Maryland and Virginia have long disputed control of the Potomac River (River). Of particular relevance here, Article Seventh of the 1785 Compact between those States provided: “The citizens of each state . . . shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.” Because the 1785 Compact did not determine the boundary line between the two States, they submitted that question to an arbitration panel, which ultimately issued a binding award (hereinafter Black-Jenkins Award or Award) placing the boundary at the low-water mark on the River’s Virginia shore. Although Maryland was thus granted ownership of the entire riverbed, Article Fourth of the Award further provided: “Virginia . . . is entitled not only to full dominion over the soil to [its shore’s] low-water mark . . . , 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, without impeding the navigation or otherwise interfering with the proper use of it by Maryland.” Congress approved both the 1785 Compact and the Black-Jenkins Award pursuant to the Compact Clause of the Constitution. In 1933, Maryland established a permitting system for water withdrawal and waterway construction within her territory. For approximately 40 years, she issued, without objection, each of the numerous such permits requested by Virginia entities. The Maryland Department of the Environment (MDE) first denied such a permit when, in 1996, the Fairfax County, Va., Water Authority sought permission to construct a water intake structure, which would extend 725 feet from the Virginia shore above the River’s tidal reach and was designed to improve water quality for

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county residents. Maryland officials opposed the project on the ground that it would harm Maryland's interests by facilitating urban sprawl in Virginia, and the MDE held that Virginia had not demonstrated a sufficient need for the offshore intake. Virginia pursued MDE administrative appeals for more than two years, arguing unsuccessfully at each stage that she was entitled to build the water intake structure under the 1785 Compact and the Black-Jenkins Award. Finally, Virginia brought this original action seeking a declaratory judgment that Maryland may not require Virginia, her governmental subdivisions, or her citizens to obtain a permit in order to construct improvements appurtenant to her shore or to withdraw water from the River. The Court referred the action to a Special Master, who issued a Report that, *inter alia*, concluded that the 1785 Compact and the Black-Jenkins Award gave Virginia the right to use the River beyond the low-water mark as necessary to the full enjoyment of her riparian rights; found no support in either of those documents for Maryland's claimed sovereign authority over Virginia's exercise of her riparian rights; rejected Maryland's argument that Virginia had lost her rights of waterway construction and water withdrawal by acquiescing in Maryland's regulation of activities on the River; and recommended that the relief sought by Virginia be granted. Maryland filed exceptions to the Report.

*Held:*

1. The Black-Jenkins Award gives Virginia sovereign authority, free from regulation by Maryland, to build improvements appurtenant to her shore and to withdraw water from the River, subject to the constraints of federal common law and the Award. Article Fourth of the Award and Article Seventh of the 1785 Compact govern this controversy. The plain language of the latter grants the "citizens of each state" "full property" rights in the "shores of Potowmack river" and the "privilege" of building "improvements" from the shore. The notable absence of any grant or recognition of sovereign authority to regulate the exercise of this "privilege" of the "citizens of each state" contrasts with Article Seventh's second clause, which recognized a right held by the "citizens" of each State to fish in the River, and with Article Eighth, which subjects that right to mutually agreed-upon regulation by the States. These differing approaches to rights indicate that the 1785 Compact's drafters carefully delineated the instances in which the citizens of one State would be subjected to the regulatory authority of the other. Other portions of the 1785 Compact also reflect this design. If any inference is to be drawn from Article Seventh's silence on the subject of regulatory authority, it is that each State was left to regulate the activities of her own citizens. The Court rejects the historical premise underlying the argument that

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Article Seventh’s regulatory silence must be read in Maryland’s favor because her sovereignty over the River was “well-settled” by the time the 1785 Compact was drafted. The Court’s own cases recognize that the scope of Maryland’s sovereignty over the River was in dispute both before and after the 1785 Compact. See, e.g., *Morris v. United States*, 174 U. S. 196, 224. The mere existence of the 1785 Compact further belies Maryland’s argument in that the compact sought “to regulate and settle the jurisdiction and navigation” of the River, 1785–1786 Md. Laws ch. 1 (preamble), an endeavor that would hardly have been required if, as Maryland claims, her well-settled sovereignty gave her exclusive authority to regulate all activity on the River. Accordingly, the Court reads Article Seventh simply to guarantee that each State’s citizens would retain the right to build wharves and improvements regardless of which State ultimately was determined to be sovereign over the River. That would not be decided until the 1877 Black-Jenkins Award gave such sovereignty to Maryland. Unlike the 1785 Compact’s Article Seventh, which concerned the rights of citizens, the plain language of the Award’s Article Fourth gives Virginia, as a sovereign State, the right to use the River beyond the low-water mark. Nothing in Article Fourth suggests that Virginia’s rights are subject to Maryland’s regulation. Indeed, that Article limits Virginia’s riparian rights only by Maryland’s right of “proper use” and the proviso that Virginia not “imped[e] . . . navigation,” limitations that hardly would have been necessary if Maryland retained the authority to regulate Virginia’s actions. Maryland’s argument to the contrary is rejected, since the States would hardly have submitted to binding arbitration “for the purpose of ascertaining and fixing the boundary” between them if that boundary was already well settled. Act of Mar. 3, 1879, ch. 196, 20 Stat. 481 (preamble). Indeed, the Black-Jenkins arbitrators’ opinion dispels any doubt that sovereignty was in dispute, see, e.g., App. to Report, p. D–2, and confirms that Virginia’s Article Fourth rights are sovereign rights not subject to Maryland’s regulation, see *id.*, at D–18 to D–19. Maryland’s necessary concession that Virginia owns the soil to the low-water mark must also doom her claim that Virginia does not possess riparian rights to construct improvements beyond that mark and otherwise make use of the River’s water. The Court rejects Maryland’s remaining arguments that the Award merely confirmed the private property rights enjoyed by Virginia citizens under the 1785 Compact’s Article Seventh and the common law, which rights are in turn subject to Maryland’s regulation as sovereign over the River; that the Award could not have elevated the 1785 Compact’s private property rights to sovereign rights; and that the requirement under the Award’s Article Fourth that Virginia exercise her riparian

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rights on the River “without impeding the navigation *or otherwise interfering with the proper use of it by Maryland*” (emphasis added) indicates Maryland’s continuing regulatory authority over Virginia’s exercise of her riparian rights. Also rejected is JUSTICE KENNEDY’s conclusion that, because the Black-Jenkins Opinion rested Virginia’s prescriptive riparian rights solely on Maryland’s assent to the riparian rights granted private citizens in the 1785 Compact, Maryland may regulate Virginia’s right to use the River, so long as Virginia is not excluded from the River altogether. Pp. 7–18.

2. Virginia did not lose her sovereign riparian rights by acquiescing in Maryland’s regulation of her water withdrawal and waterway construction activities. To succeed in her acquiescence defense, Maryland must show that Virginia “failed to protest” her assertion of sovereign authority over waterway construction and water withdrawal. *New Jersey v. New York*, 523 U. S. 767, 807. Maryland has not carried her burden. As the Special Master found, Virginia vigorously protested Maryland’s asserted authority during the negotiations that led to the passage of §181 of the Water Resources Development Act of 1976, which required those States to enter into an agreement with the Secretary of the Army apportioning the River’s waters during low-flow periods. Section 181 and the ensuing Low Flow Allocation Agreement are conclusive evidence that, far from acquiescing in Maryland’s regulation, Virginia explicitly asserted her sovereign riparian rights. Pp. 18–21.

Maryland’s exceptions overruled; relief sought by Virginia granted; and Special Master’s proposed decree entered.

REHNQUIST, C. J., delivered the opinion of the Court, in which O’CONNOR, SCALIA, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined. KENNEDY, J., filed a dissenting opinion, in which STEVENS, J., joined.