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## Virginia v. Maryland, 124 S. Ct. 598 (U.S. 2003)

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because waters in the canal and in the wetlands conservation area were both “navigable waters of the United States,” the pump station could not be said to “add” any pollutant to the nation’s navigable waters, whether or not it would otherwise constitute a point source. Because SFWMD failed to raise the issue before the courts below, however, the Court declined to address it, leaving it to SFWMD to raise it on remand.

*Owen Walker*

**Virginia v. Maryland, 124 S. Ct. 598 (U.S. 2003)** (holding in absence of express grant of regulatory authority in interstate compact and arbitration award governing Potomac River, each state was free to regulate activities only of its own citizens with regard to use of the river, and Virginia did not lose sovereign riparian rights by acquiescing to Maryland’s regulation).

The Commonwealth of Virginia sought a declaration from the United States Supreme Court that it had a right to withdraw water from and construct improvements appurtenant to the Potomac River free from the regulatory authority of the State of Maryland. Maryland objected to the Special Master’s report recommending that the Court grant Virginia’s requested relief. A majority of the Court overruled Maryland’s exceptions in a 7-2 ruling.

The Potomac forms much of the boundary between Maryland and Virginia as it flows from the Appalachians to Chesapeake Bay. Both Maryland and Virginia claimed ownership of the river under conflicting seventeenth century royal charters. Virginia ceded ownership of the river to Maryland in its 1776 State Constitution, but specifically excepted from cession “the free navigation and use of the Rivers Potowmack and Pocomoke, and all improvements made on Virginia’s shores.” However, in the same year Maryland passed a constitutional resolution rejecting Virginia’s constitutional reservation.

In 1785, Maryland and Virginia appointed commissioners to resolve their differences. The commissioners agreed on the Mount Vernon Compact (“1785 Compact”), which the legislatures of both states ratified. The 1785 Compact provided that the Potomac “shall be considered as a common highway, for the purpose of navigation and commerce . . . and that all laws regulating fishing and navigation shall be made with the mutual consent and approbation of both states.” Further, the 1785 Compact explained “the citizens of each state respectively shall have full property in the shores of Potowmack river [sic] . . . and the privilege of making and carrying out wharves and other improvements, so as not to obstruct navigation of the River.”

The 1785 Compact did not, however, determine the precise boundary line in the river. After nearly a century of conflict, the states submitted the boundary dispute to arbitration. The arbitration

culminated in the Black-Jenkins Award (“Award”), which placed the boundary line at the low-water mark on the Virginia shore of the river. While the Award gave Maryland entire ownership of the river’s bed, it granted Virginia the right to use the river beyond the low-water mark as necessary to the full enjoyment of Virginia’s riparian ownership. Congress subsequently ratified the Black-Jenkins Award in 1879.

In 1933, Maryland established a permitting system for water withdrawals on the Potomac, and has since issued several permits to Virginia entities. In 1996, the Fairfax County Water Authority (“FCWA”) applied for a permit from Maryland to build a water intake structure extending 725 feet from the Virginia shore to improve water quality for Fairfax County residents. The Maryland Department of the Environment (“MDE”) denied FCWA’s application, citing Virginia’s lack of sufficient need for the structure. Virginia then filed a complaint in the United States Supreme Court, invoking its original jurisdiction to hear disputes between states.

The Court initially referred Virginia’s complaint to the Special Master. The Special Master recommended the Court find for Virginia, concluding that (1) the 1785 Compact and Award gave Virginia the right to construct improvements into the river and the right to use the river beyond the low-water mark, (2) neither the 1785 Compact nor the Award gave Maryland authority to regulate Virginia’s activities, and (3) Maryland had no defense of acquiescence by Virginia. Maryland then filed exceptions to the Special Master’s Report.

Reviewing the Special Master’s recommendations, the Court applied canons of statutory interpretation in reviewing both the 1785 Compact and Award. First, the Court held the 1785 Compact’s plain language guaranteed the citizens of each state the right to build improvements regardless of which state was ultimately determined to be sovereign over the river. Maryland argued that the 1785 Compact’s regulatory silence merely confirmed that its authority over the river was well settled before the 1785 Compact. The Court rejected this argument, identifying several cases showing that Maryland’s sovereignty was in fact in dispute.

Next, the Court turned to the Award. The Award held that Virginia had gained ownership by prescription of the soil up to the low-water mark. Maryland again argued that the Award simply confirmed its well-settled ownership of the river. The Court again disagreed, noting that the States would not have entered arbitration if Maryland’s authority was indeed well settled. Therefore, the Court held that the right to use the river beyond the low-water mark was a right of Virginia as a sovereign, and the Award’s plain language did not make this right subject to Maryland’s regulatory authority.

The Court also rejected Maryland’s argument that the Award merely confirmed prior existing common law private property rights which were subject to Maryland’s regulation, finding that the Arbitration proceedings occurred specifically to “ascertain and fix the boundary” between the coequal sovereigns. Further, the Court rejected Maryland’s claim that Virginia could only exercise its riparian

rights “without otherwise interfering with the proper use of [the river] by Maryland,” holding instead that each state had a sovereign right to build improvements appurtenant to the shore without interfering with the other’s proper use.

Finally, the Court considered whether Virginia lost its sovereign riparian rights by prescription and by acquiescing to Maryland’s regulation of the river. To succeed on the affirmative defense of acquiescence, Maryland must show: (1) a long and continuous period of sovereignty over Virginia’s riparian activities, and (2) Virginia’s acquiescence in its prescriptive acts. Further, the period of prescription must be substantial and Maryland must show acquiescence by a failure to protest Maryland’s asserted sovereignty. Applying this standard, the Court concluded that negotiations during the Water Resources Development Act of 1976 (“WRDA”) and Low Flow Allocation Agreement reached by the states pursuant to the WRDA conclusively showed that Virginia vigorously protested Maryland’s claimed authority and explicitly asserted its sovereign rights. Because Maryland failed to prove acquiescence, the Court overruled Maryland’s exceptions to the Special Master’s report and granted Virginia’s requested relief.

Justice Stevens wrote a brief dissent, in which Justice Kennedy joined. Justice Stevens maintained that states may exercise their police powers by controlling the initiation and conduct of riparian uses of water. Because all riparian rights at common law are subject to the paramount regulatory authority of the sovereign that owns the river, Justice Stevens voted to sustain Maryland’s exceptions to the Special Master’s recommendations.

Justice Kennedy also wrote a dissenting opinion, in which Justice Stevens joined. Justice Kennedy found that the 1785 Compact’s plain language showed that Maryland had long held title to both the river and its bed, and the Award did not expand Virginia’s rights beyond those in the 1785 Compact. Further, Justice Kennedy found that a party does not concede that its rights are unclear by arbitration or compact negotiations. First, the 1785 Compact only gave Virginia rights of a riparian owner beyond the low water line. Second, the Award merely recognized Virginia’s limited rights gained by prescription. Therefore, Justice Kennedy also voted to sustain Maryland’s exceptions and deny Virginia’s requested relief.

*Jared B. Briant*