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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 27, Original

STATE OF OHIO, - - - - - Plaintiff,

versus

COMMONWEALTH OF KENTUCKY, - Defendant.

No. 81, Original

COMMONWEALTH OF KENTUCKY, - - Plaintiff,

versus

STATE OF INDIANA and
THEODORE L. SENDAK, Attorney General
of Indiana, - - - - - Defendants.

**RESPONSE IN OPPOSITION TO MOTION
FOR LEAVE TO INTERVENE**

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**RESPONSE IN OPPOSITION TO MOTION
FOR LEAVE TO INTERVENE**

I. INTRODUCTION.

The Commonwealth of Kentucky opposes the Motion for Leave to Intervene filed by Dorothy Cole and others. The Movants, who in the main own land along the banks of the Ohio River, are Plaintiffs in various cases brought against the United States for damages for wrongful taking of their property caused by alleged erosion induced by the United States and for damages

for fraud in locating the ordinary high-water mark along the Ohio River, which allegedly decreased the value of the easements given the United States by Movants.

Ohio v. Kentucky, Original No. 27, has been pending in this Court for over fifteen years and *Kentucky v. Indiana*, Original No. 81, is over three years old. At this point in time, the three states involved in these two cases are working on the preparation of agreed Findings of Fact for submission to the Special Master for his consideration. This was publicly announced at a hearing before the Special Master in Cincinnati, Ohio on October 20, 1981. It is hoped that these Findings of Fact, if accepted by the Special Master, will be embodied in a Final Judgment.

This Court has twice ruled in Opinions on various aspects of these cases. In *Ohio v. Kentucky*, 410 U. S. 641, *reh. denied*, 414 U. S. 989 (1973), it was decided that the boundary between Ohio and Kentucky is not the middle of the Ohio River, but the low water mark on the northern side of the river. *Ohio v. Kentucky*, 444 U. S. 335 (1980) ruled that the low water mark which constituted the boundary between the states was the low water mark as it was at the time Kentucky entered the Union in 1792.

It is only after this long history that the present Movants came forth with their Motion to intervene.

II. ARGUMENT.

A. Movants Lack Standing to Intervene and Are Guilty of Laches.

The Complaints in these cases seek relief against the other sovereign states alone. What is sought to be determined is a boundary line and not the location of a low water mark, even though the low water mark may serve as a guide in locating the boundary. The final judgments that may be entered would merely set the boundary and will not determine the low water mark as of any date. These judgments will in no way affect ownership of land or the boundary lines of privately owned land. Such judgment will have absolutely no affect on land in Kentucky. It is most difficult to see how they will in any way affect land in private hands because it places the boundary between Kentucky and Ohio and Kentucky and Indiana not at the present northern low water mark, but at a location not less than 100 feet from the shore line of both Indiana and Ohio. The final judgment will utilize the boundary line as set out on the United States Geologic Survey Quadrant Maps with certain minor acceptions. Balleisen Affidavit, paragraphs 5 and 6.

The only question raised in both *Ohio v. Kentucky* Original No. 27, and *Kentucky v. Indiana*, Original No. 81, is the location of the boundaries between Ohio and Kentucky and Kentucky and Indiana. These cases in no way deal with any issue relating to injury or damage to Movants or their property. The proper parties to cases subject to the original jurisdiction of this

Court involving boundaries and other disputes between states have long been held to be limited to the states themselves. *Kentucky v. Indiana*, 281 U. S. 163 (1930). That case involved a suit by Kentucky against Indiana to enforce a contract between the two states. Kentucky also named as defendants two citizens of Indiana who had filed suit in an Indiana court to enjoin consummation of the contract. In dismissing the individual defendants from the case Mr. Chief Justice Hughes stated:

A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, merely as such, of either state, without a showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the state itself. Otherwise, all the citizens of both states, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard. 281 U. S. at 173. [Emphasis added.]

The Court went on to indicate that the only time it is proper for an individual to be named as a party in an original action between the states is when specific relief is sought against such person. 281 U. S. at 174-5.

This is not the case here for no relief is sought against Movants. The position of Movants is best seen

in the description of the claims of a good number of them found in *Loesch v. United States*, 645 F. 2d 905 (Ct. Claims 1981), *cert. pending*. The Court there stated:

. . . First, plaintiffs maintain that the construction and operation of the dams in question were such as to cause erosion on their lands thereby, in effect, taking their lands and entitling them to just compensation. Second, plaintiffs contend that defendant, acting through the United States Army, Corps of Engineers (the Corps), in obtaining flowage easements from them in connection with the dam projects in question was guilty of fraud and misrepresentation, particularly in the determination of the ordinary high water mark (OHWM), such that the compensation plaintiffs received for said easements was less than they were entitled to receive for what was actually taken from them. . . . 645 F. 2d at 905.

It is obvious that Movants' ownership of property cannot be affected by any judgment that may be entered in these cases. The state in which their land is located will in no way alter title of Movants or the dimensions of their land.

It is also obvious that Movants have been well aware of these cases from their inception and whatever interest they may possess was viable from the date these cases began. Intervention at this late date, even if standing was far less doubtful than here, should be denied.

B. The Actions of Kentucky, Indiana and Ohio to Work Toward an Agreed Findings of Fact Follow the Suggestion of This Court.

The opinion of this Court in *Ohio v. Kentucky*, 445 U. S. 335 (1980), suggested at page 337 that the parties try to agree as to the boundry lines between (a) Ohio and Kentucky and (b) Indiana and Kentucky. While the Court declared that the 1792 low water mark might be located, it admitted that the task could well be difficult. After considerable effort, distinguished experts hired by Kentucky indicated that the location of the 1792 low water mark with any degree of precision would not be possible. Balleisen Affidavit, paragraph 3. Kentucky advised the Special Master that locating the 1792 low water mark was not feasible and that utilization of the boundary line on the United States Geologic Survey Quadrant Maps with minor modifications would best approximate the 1792 low water mark. *Louisville Times*, October 20, 1981, Page 1; *New York Times*, October 21, 1981, Page A20. Without doubt, the United States Geologic Survey Line is as reasonable an approximation of the boundary in 1792 as can be had. Such result can in no way impinge on the rights of Movants.

III. CONCLUSION.

The Movants do not have the requisite standing for intervention in an original action. Their Motion was clearly not timely filed. The Movants' interest in any final judgment in these cases is not different from that

of any other landowner who may have property that abuts the Ohio River. The actions of the three states looking to resolution of these cases of which Movants complain were instituted upon the explicit suggestion of this Court and should not be subject to interference by persons lacking standing.

For the reasons stated herein, the Motion for Leave to Intervene should in all respects be denied.

Respectfully submitted,

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AFFIDAVIT

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AFFIDAVIT

Donald H. Balleisen, being duly sworn, deposes and says:

1. I have been Special Counsel to the Commonwealth of Kentucky in these cases for over three years and I am fully familiar with the facts set out herein. I submit this Affidavit in Opposition to the Motion for Leave to Intervene filed by Dorothy Cole and others. This Affidavit is submitted because I have not as yet received copies of the Transcript of the Hearing held by the Special Master in these cases in Cincinnati, Ohio on October 20, 1981, and

Kentucky desires to cite certain of the remarks made on the record at that hearing.

2. At the hearing on October 20, 1981, I advised the Special Master that the experts advising Kentucky in these cases were Dr. John F. Kennedy, Professor of Hydraulic Engineering in the Energy Engineering Division, University of Iowa, Iowa City, Iowa; Albert Petersen, Professor of Historical Geography, Western Kentucky University, Bowling Green, Kentucky; Dr. D. Joseph Hagarty, Professor of Civil Engineering, University of Louisville, Louisville, Kentucky; David K. Blythe, Professor of Civil Engineering, University of Kentucky, Lexington, Kentucky; and S. W. Wiitla, Consulting Engineer, Iowa City, Iowa.

3. I also informed the Special Master on October 20, 1981 that the experts advising Kentucky were unanimous in their belief that the 1792 low water mark on the north side of the Ohio River could not be determined with any degree of precision and on many reaches of the river, resort would have to be made to approximation and that substantial differences of opinion could exist as to location of the low water mark in 1792.

4. According to the experts relied upon by Kentucky, the difficulty in making an accurate determination of the 1792 low water mark is primarily due to the absence of precise information concerning conditions on the Ohio River in 1792. In addition, the numerous changes on the Ohio River, both natural and man-made, that have occurred over the years has greatly contributed to the difficulty in locating the 1792 low water mark.

5. The basic line upon which the parties have agreed to submit to the Special Master for embodiment into a final judgment is the boundary line between Ohio and Kentucky and Indiana and Kentucky as it appears on the United States Geologic Survey Quadrant Maps, with certain agreed upon exceptions. These exceptions are that at all points

the boundaries should not be less than 100 feet from the north bank of the River and that at certain limited specific points, the boundary will be slightly further from shore to enable all land to remain within the state of its present location. Experts retained by Kentucky have stated that this is as reasonable a determination of the 1792 low water mark as can be expected to be made at this time.

6. The Findings of Fact proposed by the parties to this litigation would not shift any land from its present location within a state to a location within another state.

7. All the above information was placed in the record by me in an oral statement made on October 20, 1981 before the Special Master in Cincinnati, Ohio.

Further your deponent sayeth not.

(s) DONALD H. BALLEISEN
DONALD H. BALLEISEN

COMMONWEALTH OF KENTUCKY }
COUNTY OF JEFFERSON } SS.

Subscribed and sworn to before me by Donald H. Balleisen to me known this 17th day of November, 1981.

(s) M. Dianne Hughes
Notary Public
(Seal) Commonwealth of Kentucky
My commission expires: 3/10/85

CERTIFICATE OF SERVICE

The undersigned hereby certifies on behalf of the Commonwealth of Kentucky that on the 18th day of November, 1981 he caused three copies each of "Response in Opposition to Motion for Leave to Intervene" to be served by United States Mail, First Class, postage prepaid, addressed to Honorable Robert Van Pelt, Special Master, 556 Federal Building, Lincoln, Nebraska 68508; Charles S. Gleason, Esq., Gleason, Hay & Gleason, 8780 Purdue Road, Suite Two, Indianapolis, Indiana 46268, Attorney for Petitioners-Intervenors, Honorable Linley L. Pearson, Attorney General of Indiana, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204, William E. Daily, Chief Counsel, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204, Robert A. Orr, Governor, State of Indiana, State House, Indianapolis, Indiana 46204, James A. Rhodes, Governor, State of Ohio, State House, Columbus, Ohio 43215, William J. Brown, Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, Michael Szolosi, Esq., Szolosi & Fitch, 155 East Broad Street, Columbus, Ohio 43215, Attorneys for State of Ohio.

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