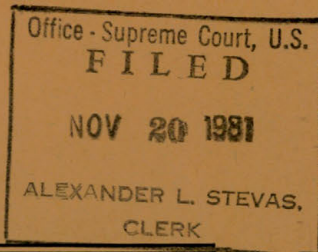


No. 27, Original



In the Supreme Court of the United States

October Term, 1981

STATE OF OHIO,
Plaintiff,

vs.

COMMONWEALTH OF KENTUCKY,
Defendant.

BRIEF OF THE STATE OF OHIO IN OPPOSITION TO THE MOTION TO INTERVENE OF DOROTHY COLE, ET AL.

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INTRODUCTION

On November 6, 1981 various petitioners-intervenors filed a Motion to Intervene in Original Nos. 27 and 81. Rules 9(3) and 42(2)(a), Rules of the Supreme Court of the United States, require that a motion in any action within the Court's original jurisdiction be prefaced by a motion for leave to file. Accordingly, this brief by the State of Ohio assumes the petitioners-intervenors' papers are to be treated as a Motion For Leave To File Motion To Intervene.

QUESTION PRESENTED

Whether the Court should grant petitioners leave to file their Motion To Intervene in Original No. 27.

STATEMENT OF THE CASE

The State of Ohio, in 1966, instituted this action, under the Court's original jurisdiction, against the Commonwealth of Kentucky in order to resolve a long-standing dispute between the states as to the location of their boundary along the Ohio River. The extended history of this case from 1966 to 1980 is recited in detail in the Court's most recent decision in this matter. 444 U.S. 335, 335-337 (1980). In that decision the Court adopted the Special Master's recommendations and report, overruled Kentucky's exceptions and remanded the case to the Special Master so that with the cooperation of the parties he could prepare and submit to the Court an appropriate form of decree. *Id.* at 341.

Following this decision in *Ohio v. Kentucky*, Orig. No. 27, Indiana filed a Motion For Summary Adoption Of The Special Master's Report And Remand To The Special Master in *Kentucky v. Indiana*, Orig. No. 81. The Court granted the motion, 445 U.S. 941 (1980), and similarly remanded that case to the Special Master¹ for the preparation of an appropriate form of decree.

At this same time, the Court received the recommendation and report of the Special Master in Orig. No. 81, filed August 9, 1979, concerning the question of intervention by Public Service Company of Indiana, Inc. (hereinafter "PSI"). The Court denied PSI leave to intervene. 445 U.S. 941 (1980).

On April 1, 1980 the Special Master wrote to all counsel of record in both Orig. Nos. 27 and 81 inviting their suggestions on the manner in which both cases might pro-

1. The Special Master in both Orig. No. 27 and Orig. No. 81 is the Honorable Robert Van Pelt. Each case has been remanded to the Special Master but there has been no consolidation of the cases. Rather, the Special Master, at the suggestion of the parties, has permitted both cases to proceed in tandem to avoid unnecessary duplication of effort and expense.

ceed. By agreement of the parties an informal conference with the Special Master was held on May 7, 1980. Following this conference and the submission of briefs by the parties, the Special Master issued a Memorandum Decision on December 10, 1980 in which he concluded that the scope of any subsequent hearing would be limited to the single issue of where the low-water mark on the northerly side of the Ohio River existed in 1792.

By stipulation, later amended, the hearing was scheduled to commence on October 20, 1981. Throughout 1981 the parties prepared for the hearings. Each state employed a variety of consultants including surveyors, geomorphologists, geologists, hydrologists and a geographer. Discovery techniques were utilized by each party to identify the evidence with which it would be confronted at the hearings.

In September, 1981, and mindful of the recommendation of the Special Master which was adopted by this Court, the parties tentatively agreed to determine the 1792 northerly low-water mark boundary, as nearly as it can now be ascertained, by agreement of the parties and based upon the evidence compiled by the various consultants employed by the parties. This agreement to agree on the evidence to be presented at hearing was officially reported to the Special Master on October 20, 1981 in a hearing conducted in Cincinnati, Ohio.

Although no report has yet been issued by the Special Master, the United States Geological Survey is in the process of preparing maps and computerized data which the parties will present as joint evidence to the Special Master for his review and ultimate recommendation to this Court.

It is only now, at a point when over fifteen years of litigation between these two sovereign states has been virtually concluded, that petitioners first seek leave to intervene.

STATEMENT OF FACTS

The petitioners are individuals or governmental entities, each of whom is a plaintiff in bank erosion litigation now pending at either the trial level or some appellate level including certain cases now pending before this Court on petitions for *writ of certiorari*. Petitioners' Brief, pp. 9-10, Motion. The petitioners contend that they own land which is contiguous to the Ohio River though there is no clear factual recitation from which one can determine whether any of the petitioners own land in Ohio as opposed to other states which derive their boundary from the Ohio River. Petitioners' Brief, p. 5, Motion; p. 13, Memorandum. Petitioners further contend that any decision in this case will affect their property rights including those they hope to litigate before this Court. Petitioners' Brief, pp. 10, 19-20, Motion.

ARGUMENT

I. PETITIONERS HAVE NO COMPELLING INTEREST IN THEIR OWN RIGHT WHICH WOULD GIVE THEM STANDING TO INTERVENE. FURTHERMORE, PETITIONERS ARE BEING ADEQUATELY REPRESENTED BY THE APPROPRIATE OFFICIALS OF THE COMMONWEALTH OF KENTUCKY AND THE STATE OF OHIO.

In *New Jersey v. New York*, 345 U.S. 369, 373 (1953), the Court said:

Our original jurisdiction should not be . . . expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the

burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

The complaint in Orig. No. 27 seeks relief only against the Commonwealth of Kentucky and in no way can result in any Order or Judgment affecting anyone other than that State. The position of petitioners is no different in this case from that of any other citizen, voter or taxpayer of Ohio or Kentucky. The only question before this Court is the location of the boundary. The only effect the fixing of the boundary between Ohio and Kentucky will have on petitioners is that it will determine which State has jurisdiction over territory on the Ohio River.

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 in-

dividual 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 172. [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. *Id.* at 174-5. That is not the case here for the interest of petitioners in the determination of the boundary between Ohio and Kentucky is no different from that of any other citizen or landowner of Ohio or Kentucky.

Petitioners have advanced no reason why the rule of *Kentucky v. Indiana*, *supra*, and *New Jersey v. New York*, *supra*, should be relaxed. Petitioners have not met the burden of showing a compelling interest on the precise issue before this Court that differentiates themselves from other citizens of Ohio or Kentucky and, therefore, the Motion (For Leave To File A Motion) To Intervene should in all respects be denied.

Even assuming petitioners have some distinguishable interests, their interests are being adequately represented by the appropriate state officials. The Special Master, in his report filed August 9, 1979 in Orig. No. 81, reviewed the law as to intervention and in particular the burden which falls on petitioners to rebut the presumption of adequate representation which arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. Report, Orig. No. 81, filed August 9, 1979, pp. 7-10.

Petitioners do not contend with any specificity that either the Kentucky or Ohio officials involved as representatives of those states and their citizens in this proceeding are not acting in the interest of the landowners. Instead there are but two very general assertions that the petitioners' interests are "unrepresented and unrespected" and that "(n)one of the Original Parties to These Actions has taken any measures to protect the interest of the property owners from the unlawful taking without Just Compensation." Petitioners' Brief, p. 19, Motion; pp. 14-15, Memorandum.

Certainly these scant assertions do not meet even the minimal burden of proof of inadequate representation required by law. *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1909 at 528-531 (1972).

In contrast to the situation posed by petitioners' motion, the interests of PSI were outlined in detail in their Motion to Intervene in Orig. No. 81. In denying PSI's motion, the Special Master even acknowledged the substantial nature of those interests. Report, Orig. No. 81, filed August 9, 1979, p. 8. PSI had already expended \$262,000,000 to construct two nuclear power plants at Marble Hill in Indiana. PSI's right to continue with construction in their view depended upon the outcome of Orig. No. 81. Nevertheless, the Special Master noted the lack of any real indication that the state officials would not fully and adequately represent the utility company and thus recommended denial of the motion.

Unlike PSI, no interest has been outlined with any specificity by the petitioners. Indeed, it is not even clear

that there are any Ohioans among the list of petitioners. It is also unlikely that any or all of the petitioners have the sizeable financial interest demonstrated by PSI. As a result, just as the Special Master recommended that PSI's motion for leave to intervene be denied, so too in this matter should the Supreme Court deny petitioners leave to file their motion.

II. PETITIONERS' MOTION IS NOT TIMELY.

The Federal Rules of Civil Procedure, where appropriate, may be taken as a guide to procedure in original actions. Rule 9(2), Rules of the Supreme Court of the United States. Petitioners rely on Rule 24(a)(2), Fed. R. Civ. P. in justifying their request for leave and assert that it is timely under all the circumstances. Petitioners' Brief, pp. 6-7, 17, Motion.

The fact is that this case has been pending since March, 1966. Petitioners have presumably been content with the adequacy of representation until an agreement to resolve the litigation was reached on October 20, 1981 before the Special Master. Inasmuch as the petitioners' real property interests have existed for some time, their efforts at this late hour to seek intervention are most untimely.²

Petitioners contend that the course of action which the parties in Orig. No. 27 intend to follow, and about which they gave notice to the Special Master on October

2. Certain of the petitioners filed a petition for *writ of certiorari* with this Court on October 9, 1981. Petitioners' Brief, p. 10; Case No. 81-700. The case on which *certiorari* is sought involves a money damage claim premised upon allegations that bank erosion is being caused by high dams constructed and operated by the federal government on the Ohio River. Ohio believes the petitioners' motivation in seeking intervention in this proceeding is related to their unsuccessful efforts to date in the bank erosion litigation. Their efforts are, nonetheless, untimely, as demonstrated in Part II of this brief.

20, 1981, deviates from this Court's last decision in this matter at 444 U.S. 335 (1980). The petitioners' argument on this issue is clearly in error.

In adopting the Special Master's report and recommendations, *Id.*, this Court held that the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 should be determined as nearly as it can now be ascertained either (a) by agreement of the parties, if reasonably possible, or (b) by joint survey agreed upon by the parties, or, in the absence of such an agreement or survey, after hearings conducted by the Special Master and the submission by him to this Court of proposed findings and conclusions. *Id.* at 336-337. The parties, after thorough preparation for hearing with a variety of expert witnesses, have concluded that the best means of resolving this matter is to agree on the evidence to be submitted to the Special Master. Thus, the parties are adopting a course of action contemplated by the Special Master in January, 1979 and approved by this Court in January, 1980. If petitioners had any concerns about the propriety of the parties resolving this boundary question by agreement, their motion for leave to intervene should have been filed at the time of this Court's decision rather than almost two years later after agreement has been reached.

III. SUMMARY DENIAL OF PETITIONERS' MOTION FOR LEAVE TO FILE MOTION TO INTERVENE IS PARTICULARLY APPROPRIATE IN LIGHT OF THE POLICY FAVORING PROMPT DISPOSITION OF ORIGINAL ACTIONS.

This case is not an ordinary case; rather it is one within the original and exclusive jurisdiction of the Court.

Const., Art. III, Sec. 2; 28 U.S.C. Sec. 1251(a). As this Court earlier observed in *Ohio v. Kentucky*, 410 U.S. 641, at 644 (1973):

. . . Procedures governing the exercise of our original jurisdiction are not invariably governed by common law precedent or by current rules of civil procedure . . . Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear.

Petitioners seek leave to intervene. The Special Master in Orig. No. 81 has already considered a similar motion by PSI and recommended that leave be denied. This Court agreed. 445 U.S. 941 (1980). There is no distinction to be drawn between the petitioners and PSI that would warrant a further review of this question.

By summarily denying leave to intervene this Court will dispose of an issue that would otherwise only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear. To require briefs before the Special Master, with the attendant possibility of exceptions to his Report, further briefs to this Court, and possibly even oral argument on a question of intervention which has so recently been reviewed by both the Special Master and the Court, would indeed involve needless expense for the litigants. The resources of both states are better directed toward the location of the 1792 northerly low-water mark and any other issues which are pending before the Special Master. Ohio, therefore, respectfully submits that this Court should summarily deny Petitioners' Motion (For Leave To File Motion) To Intervene.

CONCLUSION

Petitioners have wholly failed to set forth any compelling interest in their own right which would distinguish them from the class of all other citizens of the state. They have also failed to suggest any specific inadequacies in the representation by the appropriate government officials of their state(s). Even if petitioners have a distinct interest, their motion is untimely in view of the long history of this litigation, and specifically in view of the fact that at least since this Court's January 21, 1980 decision in Orig. No. 27 petitioners were on notice that the boundary dispute could be resolved by agreement of the parties. Finally, this Court should summarily deny petitioners' motion because summary procedure in this matter is consistent with the object in original actions that the merits be reached promptly in order to avoid delay and needless expense.

Respectfully submitted,

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