In the

Supreme Court of the United States

October Term, 1981

No. 27, Original

THE STATE OF OHIO,

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,

Defendant,

DOROTHY COLE, ET AL.,

Movants for Leave to Intervene.

* * * * * *

In the

Supreme Court of the United States

October Term, 1981

No. 81, Original

COMMONWEALTH OF KENTUCKY,

Plaintiff,

vs.

STATE OF INDIANA AND
LINLEY E. PEARSON
ATTORNEY GENERAL OF INDIANA,

Defendants,

DOROTHY COLE, ET AL.,

Movants for Leave to Intervene.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U.S. District Judge
Lincoln, Nebraska
Special Master

JOE CHRISTENSEN, INC., 1540 Adams Street, Lincoln, Nebraska 68521

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INTRODUCTION

This matter is now before the Special Master by reason of your order of November 30, 1981, reading:

> "The motion of Dorothy Cole, et al. for leave to intervene is referred to the Special Master."

On November 9, 1981, Charles S. Gleason, an attorney of Indianapolis, Indiana, tendered to this Court the motion of Dorothy Cole and 150 others to intervene in the above cases, together with a brief in support of the motion.

A Response in Opposition to the Motion was tendered to the Clerk for filing by the Commonwealth of Kentucky on November 19, 1981, and a Brief of the State of Ohio in Opposition was tendered to the Clerk on November 20, 1981. The State of Indiana in a letter to the Special Master dated December 15, 1981, has indicated its opposition to the motion and its approval of the brief and arguments of Kentucky and Ohio.

This report covers the issues raised by the motion and by the response and opposition thereto, and contains your Special Master's findings and recommendations.

HISTORY OF THE CASES

No. 27, Original, was filed in March, 1966. The Honorable Phillip Forman, United States Circuit Judge for the Third Circuit Court of Appeals, was appointed Special Master in 1966 (*see* 385 U.S. 803). Judge Forman resigned in 1977 due to ill health. Robert Van Pelt was appointed Special Master in No. 27, Original on July 28, 1978, and in No. 81, Original, on May 14, 1979.

The complaint in No. 81, Original was tendered to this Court by the Commonwealth of Kentucky in November, 1978. A brief in opposition was filed by Indiana and its Attorney General, who was named a defendant. On Feb-

ruary 20, 1979, the motion of the Commonwealth of Kentucky for leave to file the bill of complaint was granted.

This Court in 1973, while Judge Forman was Special Master, delivered an opinion in No. 27, Original, authored by Mr. Justice Blackmun with Mr. Justice Douglas dissenting. *See Ohio v. Kentucky*, 410 U.S. 641 (1973).

Following a 1979 report by the undersigned, another opinion authored by Mr. Justice Blackmun was filed in No. 27, Original, with Mr. Justice Powell, Mr. Justice White and Mr. Justice Rehnquist dissenting. *See Ohio v. Kentucky*, 444 U.S. 335 (1980). The majority opinion concluded with this paragraph:

> "The exceptions of the Commonwealth of Kentucky to the report of the Special Master are overruled. The report is hereby adopted, and the case is remanded to the Special Master so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree."

Id. at 341. Earlier in the opinion the Court stated:

> "The Special Master recommends that this Court determine that the boundary between Ohio and Kentucky 'is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792;' that the boundary 'is not the low-water mark on the northerly side of the Ohio River as it exists today;' and that such boundary, 'as nearly as it can now be ascertained, be determined 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. Report of Special Master 16.
>
> We agree with the Special Master."

Id. at 336-37.

It appeared for a time that it was not "reasonably possible" for the parties to determine the boundary "as nearly

as it can now be ascertained" by agreement or "by joint survey agreed upon by the parties."

The Special Master concluded that "hearings conducted by the Special Master" were necessary and by agreement the matter was set for hearing for July, 1981, at the Federal Courthouse in Cincinnati. The parties earlier had agreed that for the greatest convenience of all parties all hearings should be held in Cincinnati.

In April, 1981, the parties, having agreed that more time was needed for preparation, with the approval of the Special Master, reset the July hearing for October 20, 1981.

Just prior to October 20th the States and the Commonwealth involved, hereinafter called "States", after much research by experts, whose resumes indicated to the Special Master great competence in the field of river boundaries and particularly with reference to the Ohio River and its history during approximately the past 200 years, informed the Special Master that they had reached agreement as to the boundaries. On the day the hearing was to begin, namely, October 20, 1981, the parties announced in open court that an agreement had been reached resolving the dispute and that a reasonable approximation of the low water mark on the north side of the Ohio River at the time Kentucky entered the Union in 1792 had been determined.

The complete statements of counsel appear in the transcript of the proceedings of October 20 prepared by a court reporter suggested by counsel for the parties, and has been marked by your Special Master as his filing number 27 in No. 81, Original and as his filing number 22 in No. 27, Original. It will be deposited with the Clerk of the Court when this report is filed.

Mr. Donald H. Balleisen stated in part on behalf of the Commonwealth of Kentucky when this agreement was announced:

"I appear today on behalf of the Commonwealth of Kentucky as special assistant to the Attorney General of Kentucky. I am pleased to inform the court that the Commonwealth of Kentucky has resolved its disputes with the states of Indiana and Ohio, relating to the boundary along the Ohio River.

"The parties in each case are working on the preparation of agreed proposed findings of fact which will be submitted to you for your consideration and recommendation to the Supreme Court.

"As special master after considering the proposed finding[s] and holdings you may hold such further proceedings as you deem proper, and I assume that you will make final findings. If you enter findings of fact in accord with those to be tendered by the parties, the next step will be to prepare a final judgment for submission to the Supreme Court for entry. In the event you enter findings of fact at variance from those submitted, each party specifically reserves the right to file exceptions with the Supreme Court."

Tr. at 8-9. Mr. Balleisen further stated:

"The boundary line to be submitted is essentially the purported boundary line shown on the United States Geologic Survey quadrant maps with certain adjustments which have been agreed upon.

"It is believed that the agreements will result in little or no change in present life on the river and that no land adjacent to the north bank of the Ohio River will move from one state to another."

Id. at 11.

Mr. Michael R. Szolosi, representing the State of Ohio, addressed, among other things, the matter of the agreement reached, saying:

". . . and with certain modifications, the parties have determined that the low watermark boundary line that appears on the United States geological survey topographic maps and with those maps based primarily on surveys of low watermarks compiled by the United States Army Corps of Engineers in 1896 to 1906, and later in 1911 to 1914, that the line portrayed on those maps is a fair and accurate estimate of the 1792 low watermark boundary.

"Now, what are those modifications? First, we have agreed that in no instance will the boundary line be closer than 100 feet to the present shore line along the northwest side of the Ohio River. And, secondly, for at least one quadrant, that applies to the Ohio-Kentucky boundary, that is the Garrison quad sheet, the old Army Corps surveys have never been transferred to the USGS topographic map and that needs to be accomplished yet in the future."

Id. at 13-14. Mr. Szolosi also commented on the work remaining:

"Now, the next question that needs to be addressed, your Honor, is what remains to be done. The parties have requested by letter that the United States geological survey begin to prepare their maps that show this boundary between Ohio and Kentucky and also to prepare a digitized line.

"Now, as best I can express that, a digitized line is a numerical expression for the location of this line working with longitude and latitude and it gives you two coefficients or points, it gives you designations for these points that will be useful to surveyors in attempting to locate this line anytime in the future.

"The process they tell us is an involved one, the maps must be checked for accuracy, there is lab work involved in transferring the maps or map information to a stable based material to begin to achieve the most accurate results. They use computers then to actually provide the digitized line, and then this line will make reference to the state grid systems that are in use in Kentucky and also in Ohio. We anticipate that the work which USGS must do will not be completed before early 1982. And once this work is available, the parties for each state wish to review it and be certain that no unforeseen problems exist.

"Following that review and our receipt of their work, we, as Mr. Balleisen indicated, would begin to prepare proposed findings of fact and a proposed decree which if accepted by you as special master and ultimately by the Supreme Court would finally resolve this litigation which began in 1966."

Id. at 16-17.

Mr. William E. Daily, representing Indiana, concurs in the settlement as is shown by his statement on pages 20-23.

As a result of this agreement, the hearing to begin that day did not take place and your Special Master returned to Lincoln, Nebraska, to await receipt of the maps, proposed findings and decree. The day after your Special Master returned to Lincoln he was called by Mr. Charles S. Gleason, above mentioned. Mr. Gleason stated, in substance, he wanted to intervene in this case, having learned through the news media of the settlement of the boundary controversies. This conversation resulted in Mr. Gleason making the filings with the Court that are the subject of this report.

Your Special Master concluded because of letters between some of the attorneys and because of telephone calls which he received following the submission to him of this matter, that it was advisable to arrange a conference call with all counsel participating. Such was arranged for Thursday, December 10, 1981. It was participated in by Charles S. Gleason and by William E. Daily, each from their separate offices in Indianapolis, by Michael R. Szolosi in Columbus, by Robert L. Chenoweth in Frankfort, and by Donald H. Balleisen in Louisville.

Agreement was reached during this telephone conversation that the matter should stand submitted upon the tendered motion of Dorothy Cole, et al. to intervene, upon the brief of Ohio in opposition thereto, upon the response in opposition to motion for leave to intervene filed by the Commonwealth of Kentucky, upon the letter of William E. Daily adopting in effect the arguments of Ohio and Kentucky and upon a letter of Charles S. Gleason dated December 9, 1981, addressed to the Special Master. The letter of December 9 had not been received or seen by

other counsel or by the Special Master at the time of the conference call. It was therefore agreed that each of the States would have the opportunity to reply to the December 9th letter and attachments thereto on or before December 15, 1981.

Your Special Master will file, along with the court reporter's transcript of the statements made to the Special Master on October 20, the original of Mr. Gleason's letter of December 9 with the attachments thereto and the replies of counsel for the three States in order that the Court will have the same information your Special Master has considered.[1]

THE PROPOSED DECREE

This Court, if it wishes, can withhold determining the right to intervene until the final decree has been submitted to the Special Master and to this Court. On the other hand, it can rule on the issue of intervention now based upon the representations of counsel as to the substance and method of arriving at the proposed decree. Your Special Master believes it is unnecessary to wait until the decree is actually drafted. Proposed intervenors have not suggested waiting. Counsel for the states have clearly stated, and your Special Master believes, that the pro-

1. Mr. Gleason has attached to his letter of December 9 certain documents of which he believes the Court should take judicial notice.

The position of Ohio, Kentucky, and Indiana with reference to these documents is shown by the letters of Ohio and Kentucky dated December 14 and the letter of Indiana dated December 15, and all addressed to your Special Master.

The parties all object to these documents as not being relevant to the question of intervention and raise other defenses covered in the briefs filed.

One exhibit is a report of the Chairman of the Indiana State Highway Commission containing a great deal of interesting information which was material in this case prior to the Supreme Court's decision determining the boundary to be the low water mark as of 1792. There is also a report of August 20, 1971, from a David Givens to Theodore Sendak, one-time Indiana Attorney General, dealing not only with the boundary and the taxation of a deepwater port at Mt. Vernon, Indiana, but also how the balance of an appropriation by the 1965 Indiana general assembly should be used. The third item relates to interstate compacts and further history of the boundary dispute along the Ohio. Unless the Court wants to relitigate the matters previously decided, the documents do not have relevancy at this stage of the proceeding.

posed decree to mark the boundary which the parties are drafting, if adopted by the Court, will not place any land now in Kentucky in either the States of Ohio or Indiana, and will not place any land now in Ohio in either the Commonwealth of Kentucky or the State of Indiana and will not place any land now in Indiana in either the Commonwealth of Kentucky or the State of Ohio.

Since land will not shift from one state to another, your Special Master believes that it is unnecessary for him to make any recommendation as to the title to real estate in any proposed decree, or for this Court to decide such an issue. The courts which now have jurisdiction of such title matters will continue to have such jurisdiction. The decree to be proposed here will not transfer title to any real estate. Counsel for the three States reassure me that any courts, state or federal, open to any proposed intervenor prior to the hearing held by the Special Master at Cincinnati on October 20, 1981, still remain open to such proposed intervenors.

INTERVENTION PROCEDURES

This is not the first boundary dispute in which intervention has been sought. This is such a well-known fact that I shall not list any of the prior cases.

The rules of this Court do not address the issue of how intervention is accomplished.

Rule 9(2) of the Supreme Court does provide:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 24 of the Federal Rules of Civil Procedure governs intervention in district courts. It should, therefore, give

guidance in original actions in this Court. Rule 24 provides:

> "**(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> **(c) Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403."

Counsel for Cole, et al., do not point out in their motion or brief any statute of the United States conferring an un-

conditional or conditional right to intervene. Their motion requests intervention of right under 24(a)(2) by "timely application" alleging their interests are not adequately represented by existing parties.

The States meet the intervenors at the threshold in this request to intervene. Standing is raised by each State as is laches. The States also contend that proposed intervenors' interests are adequately represented, and that, in fact, the proposed decree will not adversely affect proposed intervenors. This report will first examine the timeliness of the motion to intervene, and then the question of what proposed intervenors' interests are and whether those interests are being adequately represented.

LACHES

The issue of laches is important because regardless of whether intervention is by right or permissive, such application must be timely. The record is clear that the first of these actions, No. 27, Original, was filed in March, 1966. No. 81, Original, is over three years old. Two opinions of this court have been written in No. 27, and one opinion has been written in No. 81. Thus, counsel for proposed intervenors could have had knowledge of these cases for many years. Page 16 of the brief of proposed intervenors indicates that the action taken by the U.S. Corps of Engineers, which appears to be the basis for all of intervenors' claims, may have commenced as early as 1935. Counsel has been actively engaged in protecting landowners' interests along the river in numerous other state and federal courts. Several of these cases are listed in proposed intervenors' motion at pages 9-10. Thus, counsel has not recently been approached to represent landowners along the river. If, in fact, there was any real question of how the river boundary should be decided as relates to individual landowners in this case, the appropriate time to intervene would have been long before now.

In the event the court agrees that proposed intervenors' motion is not timely, there is no need to examine the underlying issues or their merits. However, in the event this Court should find the motion timely, this report will go on to discuss the issues raised by proposed intervenors and whether the States representation is adequate.

PROPOSED INTERVENORS' ISSUES

The tendered motion and brief alleges:

> "(a) that they [the proposed intervenors] have an interest relating to the property or transaction involved in the action;
>
> "(b) that disposition of these actions may impair their ability to protect their interest 'as a practical matter'; and
>
> "(c) that their interest is not adequately represented by the present parties."

In the answer and counter-complaint of the proposed intervenors, in connection with their request to present evidence in a factual determination of the physical location of the ordinary low water mark of the Ohio River as of 1792, it is alleged:

1) that the original parties intend as to the location of such water mark to present to the Special Master "erroneous data, irrelevant data, stipulation and/or stipulations based on social-economic-political considerations;"

2) that they will be substantially and irreparably injured by such presentation;

3) that unless enjoined the acts of omission and/or commission will result in the violation of potential intervenors Fifth Amendment Rights;

4) that potential intervenors are entitled to be heard, to object to erroneous data, to object to irrelevant data, to object to stipulation and/or stipulations based on social-economic-political considerations; and to present all rele-

vant data and evidence not otherwise placed before this Court; and

5) that the potential intervenors cannot be adequately compensated by an award of money damages and have no other adequate remedy at law because no other court has jurisdiction to enjoin the conduct of the original parties from misleading the Court.

Proposed intervenors' interest in entering this case seems directly related to other cases concerning the Ohio River brought by some of the proposed intervenors in the Court of Claims and other courts. The Argument section of their Motion bears this out. Beginning as early as the third sentence, the entire discussion of why they should be allowed to intervene in this case refers to other cases involving landowners along the Ohio River. In particular, proposed intervenors refer to *Loesch v. United States*, 645 F.2d 905 (Ct. Claims), *cert. denied* 50 U.S.L.W. 29 (U.S. Dec. 7, 1981). Proposed intervenors' argument with respect to the *Loesch* case states, in part:

> "The United States Court of Claims has erroneously held that the Ordinary High Water Mark on the Ohio River could be correctly determined by 1960 observations and mathematical calculations disregarding the 1911-14 Survey maps . . . .
>
> * * * * *
>
> "The holding in the instant cases by the United States Supreme Court that the Ordinary *Low* Water Mark remains as it was in 1792 is material to the *Loesch* decision. *Loesch* allowed the ordinary *High* Water Mark and thus the Navigable Servitude to be moved at will by the Corps of Engineers without payment of Just Compensation. These decisions taken together put the property owner in an intolerable position 'as a practical matter' effectively wiping his interest 'off the face of the earth' without Just Compensation."

Proposed Intervenors' Motion at 10, 12.

It is to be observed that in the *Loesch* case proposed intervenors, who were the appellants in that case, argued that the navigable servitude should be calculated from the ordinary low water mark on the north shore to the ordinary low water mark on the south shore. Navigable servitudes are not involved in this original action. The decision here will not defeat a claim of navigable servitude.

This is not the *Loesch* case. With all due respect, the Special Master assumes that, certiorari having been denied in *Loesch*, this is not the proper forum to again relitigate those claims. This river boundary dispute between the States does not involve navigable servitudes. It does not involve a transfer of title from one State to another, as proposed intervenors fear. See p. 17-18 of their Motion. Other than these two arguments, intervenors have not indicated in any specific manner how their interests could possibly be affected by the proposed decree.

Proposed intervenors have additionally suggested several issues far outside the scope of the only issue in this case, i.e. the location of the 1792 low water mark on the northerly shore of the Ohio River. For example, they suggest that apportionment of waters of an interstate river be a part of the decree in this case.

> "The reopening of boundary dispute litigation in the instant cases requires the application of what has remained the original and exclusive jurisdiction of the Supreme Court. The Potential-Intervenors cannot be protected except that the rule of law followed by the Special Master consider the issue in the apportionment of waters of an interstate river where the supply exceeds the demands of the users and encroaches upon their property, without Congressional authorization and for the benefit of Citizens of other States not a party to this litigation."

Proposed Intervenors' Memorandum at 20-21. Proposed intervenors would apparently have this court address

every possible issue which could arise from the marking of the boundary.

Another example of how far afield this case could go if it is opened up to intervenors is found at page 8 of their Memorandum. Reference is there made to a statement of the Attorney General of Indiana indicating "it is unclear who will own the rights to the river bottom" within Indiana's jurisdiction and that the State "will exercise control over it unless a private land owner files an official claim." We are only interested in this original action in marking a boundary. The rights to the bed of a navigable river have recently been discussed by the Eighth Circuit in *North Dakota ex rel. Board of University and School Lands v. Andrus, Secretary of Interior*, Case Nos. 81-1441 and 81-1486 (8th Cir. Feb. 12, 1982). This case is cited only because it shows that the lower federal courts will hear such matters. Any rights to the river bottom can still be litigated in the U.S. district court, as was done in the Eighth Circuit case, carried to a proper court of appeals, and to this court on a petition for a writ of certiorari.

In sum, proposed intervenors have failed to specifically allege anything in the proposed decree that will endanger their right, title or interest as property holders. Any future claims they may have can be litigated in the appropriate court, and any past claims cannot be revived as a part of this action.

It is not in the public interest that they take the time of this court, in a boundary case, to present matters which in the first instance should be instituted in lower courts.

ADEQUACY OF REPRESENTATION

This Court on previous occasions has had before it matters relating to intervention. It denied intervention in No. 81, Original, by the Public Service Company of Indiana, Inc. The Court at that time, I believe, concluded in deny-

ing intervention that a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. *See* 7A C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1909, at 528-29 (1972); *see also Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961). Specifically, it had to conclude that Public Service Company's rights would be protected by the Attorney General of Indiana.

New Jersey v. New York, 345 U.S. 369 (1953) (per curiam) controls this case. It was originally brought by the State of New Jersey in 1929 against the State of New York and the City of New York praying for injunctive relief against a proposed diversion of Delaware River water from tributaries within the State of New York. The city was planning the actual diversion of water for its use. The City of Philadelphia filed a motion to intervene asserting a grant to it of a Home Rule Charter and its unquestioned interest in the use of Delaware River water. This was opposed as being in contravention of the 11th Amendment. It was also opposed on the basis that Pennsylvania had the exclusive right to represent the interest of Philadelphia as *parens patriae* and it was argued that it should be denied in any event as a matter of sound discretion. The Court concluded that it would not need to decide the 11th Amendment issue, and then said:

> "For the same reasons, we are not concerned with so much of the '*parens patriae*' argument as may be only a restatement of the proposition that original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens. Cf. *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). The '*parens patriae*' doctrine, however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.' *Kentucky v. Indiana*, 281 U.S. 163, 173-74

(1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

"The case before us demonstrates the wisdom of the rule. The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.

"Our original jurisdiction should not be thus 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. See *Kentucky v. Indiana*, *supra*. Philadelphia has not met that burden and, therefore, even if her intervention would not amount to a suit against a state within the proscription of the Eleventh Amendment (and we do not intend to give any basis for implying that it does), leave to intervene must be denied."

Id. at 372-374 (footnote omitted).

This case alone defeats proposed intervenors claim of standing.

Your Special Master has had good opportunity to observe all counsel for the States in these cases, including private counsel retained by Kentucky and Ohio. If it is

intended by allegation (c) on page 5 of the Motion to Intervene to charge individual counsel with inadequate representation of property owners within each State and within the Commonwealth, then I wish to state my disagreement with such a position. All counsel appear to be making an intelligent effort to represent fairly all parties who will be affected by the marking of the 1792 low water mark.

SPECIAL MASTER'S FINDINGS AND RECOMMENDATIONS

Your Special Master recommends that the motion of Dorothy Cole and 150 others to intervene in these cases be overruled and denied. Your Special Master further recommends that this litigation be left in the hands of the Attorneys General for the Commonwealth of Kentucky and for the States of Ohio and Indiana, including private counsel retained by Kentucky and Ohio.

Supporting these recommendations are the following findings and conclusions of the Special Master:

1. The proposed decree in these cases will not transfer the land of any proposed intervenor from one State or Commonwealth to another.

2. The tendering of the proposed motion is not timely.

3. The interests alleged by the proposed intervenors relate either to past claims which have already been litigated or to future hypothetical injury. Proposed intervenors have not been able to state any damage or injury to their right, title or interest as a result of this particular proposed decree which cannot later be litigated in some other court.

4. The burden is upon the proposed intervenors to show some compelling interest in his or her own right which is not properly represented by the Commonwealth or State. They have failed to do this. Each State and

Commonwealth is deemed to represent all of its citizens. A presumption of adequate representation exists under the facts of this case. Counsel of record for the Commonwealth and the two States in these cases are competent, and have adequately represented the interests of their citizens.

Respectfully submitted,

ROBERT VAN PELT
Special Master
566 Federal Building
Lincoln, Nebraska 68508

March 19, 1982