No. 84, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF ALASKA

REPORT OF SPECIAL MASTER ON MOTION OF INUPIAT COMMUNITY OF THE ARCTIC SLOPE AND UKPEAGVIK INUPIAT CORPORATION FOR LEAVE TO INTERVENE

J. KEITH MANN
Special Master

January 10, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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INTRODUCTION

This Interim Report is confined to the Motion to Intervene filed on May 12, 1981, by the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation and referred by the Court to its Special Master on June 8, 1981. 452 U.S. 913.

For the reasons elaborated herein, the Master has concluded that limited intervention should be permitted and submits his recommendations accordingly. *Infra,* pp. 41-42. With the concurrence of all parties, however, it is respectfully suggested that the Court not now review these recommendations, and instead, merely order the present Report filed, allowing the parties, or any of them, to file exceptions if so advised at the conclusion of the case when the Master's final Report is submitted.

This course has recommended itself to the parties and the Special Master so as to avoid delay in the completion of the hearing. The parties have agreed upon a schedule for further proceedings, approved by the Master, which (although it may have to be revised in limited respects) would have to be set aside, causing perhaps a year's postponement, if the Court were to undertake review of the Report on Intervention in this Term. On the other hand, given the very limited scope of the intervention allowed, it is not anticipated that treating the applicants as parties for the remaining proceedings before the Master will impose a substantial additional burden or cause delay.

In these circumstances, it seems appropriate to follow the procedure the Court accepted in *Arizona v. California,* 444 U.S. 1009 (1980). There, the Special Master reported to the Court his intention to permit five Indian Tribes to intervene in the proceedings before him, and the Court declined immediately to review that ruling, notwithstanding the plea of the State parties. This was, however, without prejudice to the right of the State parties to challenge tribal intervention at the conclusion of the case. See *Arizona v. California,* No. 8, Orig., 103 S. Ct. 1382 (1983).

DISCUSSION

The body of this report is organized as follows: first, the background of the litigation and of the motion for intervention is presented; second, Alaska's claim that the State's sovereign immunity bars intervention is considered; third, the implications of the Federal Rules of Civil Procedure are discussed; and finally, the special nature of original jurisdiction lawsuits and the circumstances of this case are examined to determine if an outcome should be reached

different from that suggested by the Federal Rules of Civil Procedure.

I

BACKGROUND OF LITIGATION

In 1979, the Supreme Court exercised its original jurisdiction under Article III, § 2 of the United States Constitution to hear this case, which relates to the location of the northern boundary of the State of Alaska. 442 U.S. 937 (1979). Alaska replied to certain of the United States' claims regarding the "Dinkum Sands" area with counterclaims relating to the Arctic National Wildlife Range and the National Petroleum Reserve-Alaska. After these preliminary pleadings were filed, the Court referred the United States' complaint to the Special Master. 444 U.S. 1065 (1980). Alaska's motion for leave to file the counterclaim was also subsequently referred to the Special Master. 445 U.S. 914 (1980).

In May 1980, the parties submitted to the Master a *Joint Statement of Questions Presented* (hereinafter the *"Joint Statement"*). A hearing was held before the Special Master on July 28 and 29, 1980, at which time testimony was taken on issues regarding Alaska's counterclaims. In September 1980, the parties supplemented the *Joint Statement* with three additional questions.

On May 12, 1981, the Inupiat Community of the Arctic Slope, a federally recognized Indian tribe,[1] and the

[1]So styled in the motion for leave to intervene and complaint in intervention. Alaska disputes the particular status. The original parties, seeking to avoid unintended collateral effect, suggest that the characterization be amended to read "federally recognized Alaska Native group."

Ukpeagvik Inupiat Corporation, a native village corporation, moved for leave to intervene in the case. On June 8, 1981, the Supreme Court referred the motion to the Master. 452 U.S. 913 (1981).

Briefs in opposition to the motion were filed by the United States and by the State of Alaska. The Amoco Production Company, *et al.*, high bidders in a joint federal-state lease sale in the disputed area, filed as *amici curiae* a brief in opposition to the motion. Movants filed a reply brief. Argument was held before the Master at Stanford, California on March 26, 1982, with the above parties and *amici* participating.

In their reply brief, movants adopted an alternative suggestion made by the United States in its brief, *Memorandum for United States,* p. 9, that movants' participation be limited to issues already before the Master but on which no testimony had yet been taken. At the hearing, movants specifically limited their motion to those questions presented by the parties in the *Joint Statement* and the supplement thereto but not heard at the hearing of July 28 and 29, 1980. *Record of Proceedings before the Special Master,* pp. 17-18. (Hereinafter cited as *"Record."*)

As counsel for the United States has observed, this limitation on the scope of the proposed intervention makes moot the claims of the United States, Alaska, and the *amici* that the intervention would raise new issues, or require the Master to reopen the record with respect to Alaska's counterclaims, which were considered at the hearing of July 28

and 29, 1980. *Record,* p. 24. The Master shares the concerns expressed that this litigation not become a pretext for hearing issues outside of the appropriate scope of a suit under the Court's original jurisdiction and that the proposed intervention not delay the progress of the case by requiring additional excursions into areas already explored. The statements of movants in the reply brief and at the hearing were therefore taken as effectively modifying the motion, and the following report is based upon the premise that the motion is limited to intervention with respect to those issues on which testimony has not yet been taken: *viz.,* Questions 2 through 5, 12, and 13 of the *Joint Statement* and the supplement which the parties have filed. Notwithstanding that there may be attempts by one or more of the parties to inject new issues into the litigation, the Master sees no basis for distinguishing this case from the myriad of cases in which limited intervention has been permitted.[2]

We also believe that if the motion as limited is granted, there is no reason that the Master and the Court will not be able to restrict the inquiry to claims already raised by the sovereigns, *cf. Utah v. United States,* 394 U.S. 89, 96 (1969), and therefore within the scope of the Court's jurisdiction already exercised over this matter.

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[2]That such limitations are appropriate is clearly indicated in the Advisory Committee's Note to the 1966 amendment to Rule 24(a): "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." 39 F.R.D. 69, 111 (1966).

II

THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

In its brief, Alaska argues that granting intervention would abrogate the sovereign immunity of states reflected in the Eleventh Amendment to the United States Constitution.[3]

At the hearing, however, Counsel for Alaska acknowledged that all the cases cited by the State in support of its view that intervention is barred by the Eleventh Amendment involved attempts to bring actions, rather than attempts to intervene in matters already properly before the court. *Record,* p. 34.[4]

The scope of the immunity doctrine was well summarized by the Court in *Monaco v. Mississippi,* 292 U.S. 313 (1934). There the Court stated that the extension of the immunity doctrine in *Hans v. Louisiana,* 134 U.S. 1 (1890) (to include suits by citizens of a state against that state) merely reflected the fact that immunity is presumed to exist unless surrendered "in the plan of the Constitution" (citing *The Federalist* No. 81 (A. Hamilton)). The Court illustrated its point by citing cases in which state sovereign immunity

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[3]The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."

[4]Counsel for Alaska also stated that "it is certainly not necessary from the State's standpoint that we get a ruling in the case that sovereign immunity is a bar to this type of intervention. We don't believe that it is essential as a matter of State's rights. . . ." *Record,* p. 35.

was held to bar suits by congressionally created corporations, *Smith v. Reeves,* 178 U.S. 436 (1900), or under the federal courts' admiralty jurisdiction, *ex parte New York (No. 1)*, 256 U.S. 490 (1921), even though the Eleventh Amendment provided no explicit protection against such suits. In no case cited by Alaska has state sovereign immunity been held to bar intervention by a private party in a suit properly before the Court under its original jurisdiction.

In two cases in which a state has raised the sovereign immunity issue with respect to intervention, the Court has explicitly refused to address the issue and has denied intervention on other grounds. In *New Jersey v. New York,* 345 U.S. 369 (1953), Philadelphia had attempted to intervene in 1952 in a suit that had been commenced by New Jersey against New York in 1929, and in which the Commonwealth of Pennsylvania had intervened in 1930. The Court stated, "The view we take of the matter makes it unnecessary to decide whether Philadelphia's intervention in the pending litigation would amount to a '. . . suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State . . .' in violation of the Eleventh Amendment." 345 U.S. at 372. The Court relied instead on the *parens patriae* doctrine to hold that Philadelphia's interests were adequately protected by Pennsylvania's presence in the suit.

In the *Utah* case, the Special Master had denied an attempt by Morton Salt, *inter alia,* to intervene in a dispute over the Great Salt Lake. The Master's decision was based on Utah's sovereign immunity claim. The Court stated, "[W]e affirm the Master's decision . . . for reasons which

are somewhat different from those advanced in the Master's Report. . . ." "We do not find it necessary to reach the ground adopted in the Report." *Utah v. United States,* 394 U.S. 89 at 91-92 (1969). Instead, the Court denied intervention because a stipulation entered into by the parties to the suit so limited the issues as to eliminate Morton's direct interest in participation.

In addition to the two cases cited above, in which the Court refused to reach the issue, the Court has never erected a sovereign immunity bar in cases in which a state has objected to intervention but has not explicitly raised an Eleventh Amendment claim. *See, e.g., South Dakota v. Nebraska,* 434 U.S. 948 (1977) (intervention by South Dakota citizens permitted over South Dakota's objections).

Furthermore, the Court rejected an Eleventh Amendment claim in *Maryland v. Louisiana,* 451 U.S. 725 (1981). Although not speaking directly to Louisiana's Eleventh Amendment argument that seventeen private pipeline companies should not be permitted to intervene in a suit challenging Louisiana's "first-use" tax on natural gas, the Court noted "those companies have a direct stake in this controversy, and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. See *Oklahoma v. Texas,* 258 U.S. 574 (1922)." 451 U.S. at 745, n. 21.

Finally, in *Arizona v. California,* 103 S. Ct. 1382 (1983) (No. 8 Orig.), the Court rejected Arizona and California's

attempt to interpose an Eleventh Amendment objection against the motion of several Indian tribes for leave to intervene. The Court distinguished *New Jersey,* 345 U.S. 369, on the ground that the *parens patriae* doctrine adopted therein was inapplicable to cases involving Indian tribes. Citing *Maryland v. Louisiana,* the Court concluded that "the Tribes do not seek to bring new claims or issues against the states. . . . Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." 103 S. Ct. at 1389 (1983).[5]

In light of the earlier cases, and prudential considerations reflecting a desire to use most economically the limited resources of the federal judiciary, we conclude that the Eleventh Amendment does not pose an absolute bar to intervention by private parties in lawsuits brought under the Court's original jurisdiction. There are certainly limits to the scope of complaints in intervention which can be

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[5]We note also that Judge Tuttle, as Special Master in that case, dealt extensively with this issue in his *Memorandum and Report on Preliminary Issues, August 28, 1979.* In recommending intervention over the Eleventh Amendment objection, Judge Tuttle stated that "[O]nce a state is brought properly within federal jurisdiction—in this case by the bringing of a suit by another State—the Court may hear at least certain claims against the state"; and "The Supreme Court, once it has exercised its original jurisdiction over a suit involving sister states and the United States, may entertain the ancillary claims of non-sovereign litigants even though standing by themselves these claims would not be within the Court's original jurisdiction, *Texas v. Louisiana,* 416 U.S. 965 (1974), or even within federal jurisdiction, *Oklahoma v. Texas,* 258 U.S. 574, 581 (1922)." Tuttle, *Memorandum and Report on Preliminary Issues, August 28, 1979* at 23, 21.

heard in the absence of an independent basis for federal jurisdiction; there are also special considerations which limit the sorts of claims the Court may wish to hear under its original jurisdiction. We find, however, that these limits are separate and distinct from Alaska's Eleventh Amendment claim, which the Master rejects.

III

THE FEDERAL RULES OF CIVIL PROCEDURE

Supreme Court Rule 9.2 states that the Federal Rules of Civil Procedure are to be used as a "guide" to procedure in original actions before the Court "where their application is appropriate." Actual practice by Special Masters has varied, however, from rigorous analysis (*see, e.g., Arizona v. California,* No. 8 Original, *Memorandum and Report on Preliminary Issues, August 28, 1979*), to casual reference (*see, e.g., South Dakota v. Nebraska,* No. 72 Original, *Report of Special Master of June 8, 1977*), to complete disregard (*see, e.g., Texas v. Oklahoma,* No. 85 Original, *Report of Special Master of January 23, 1981*). We interpret Rule 9.2 to indicate that application of the Federal Rules of Civil Procedure is appropriate unless there are overriding concerns arising out of the nature of the Court's original jurisdiction or out of the special circumstances of the case which mandate a different treatment from that which the Federal Rules would suggest. In other words, while there is no "intervention of right" in original jurisdiction proceedings, in the absence of overriding considerations, deference should be paid to the Rules.

Rule 24 provides for intervention on the following grounds:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (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: . . . (2) when the applicant's claim or defense and the main action have a question of law or fact in common. . . . 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.

A. Permissive Intervention under Rule 24(b)

As Alaska correctly observes in its brief, "Permissive intervention ordinarily must be supported by independent jurisdictional grounds . . . ." *Brief of the State of Alaska, p. 14.* Professors Wright and Miller comment as follows on the subject:

> . . . [T]hat there must be independent jurisdictional grounds for permissive intervention under Rule 24(b), was sound law prior to 1966 and should continue to be the rule today, as indeed the courts have held [citing cases from the 1st, 3d, 4th, 7th, 8th, and 9th Circuit Courts of Appeal, and numerous District Court cases]. . . . The rule of complete diversity would be virtually obliterated, and the federal courts would be burdened with the decision of so many matters that are properly the business of the state courts, if so tenuous a connection as the existence of a common question of law

> or fact were enough to dispense with ordinary requirements of jurisdiction and permit litigants to have their independent claims or defenses tried in federal court though, absent intervention, they would not have been able to do so. . . .
>
> There were a few cases that said that independent jurisdictional grounds are not required even for permissive intervention. Those cases rely primarily on a broad statement by the Supreme Court, made long before the civil rules introduced the distinction between intervention of right and permissive intervention, and perhaps best understood only in the light of the case in which it was made. With so many decisions to the contrary, those few cases cannot be regarded as authoritative.

Wright & Miller, *Federal Practice & Procedure,* Civil § 1917 (1972).

Movants clearly could not claim independent jurisdictional grounds for their appearance in an original action before the Supreme Court. They themselves advance no such claim.

It could be argued that the "independent jurisdiction" requirement need not apply in original jurisdiction cases; indeed the concerns giving rise to the requirement seem to apply more directly to the setting of the district courts.[6] The oft-stated concern of the Court about unwarranted expansion of original jurisdiction, however, suggests the conclusion that in the absence of an independent jurisdic-

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[6]Such a conclusion might be inferred from the dictum of the Court in *Arizona v. California* that the intervenors in that case ". . . at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." 103 S. Ct. at 1389. The Court allowed intervention on other grounds, however, and did not fully develop the analysis.

tional basis (intervention by a state or by the United States), intervention under Rule 24(b) is unavailable.

In the absence of such an independent jurisdictional basis, it is not necessary to explore the substantive implications of Rule 24(b) for the case at hand.

B. Intervention of Right under Rule 24(a)

1. *Timeliness of the Motion.* Although both the United States and Alaska alleged in their briefs that the motion for intervention is untimely, having been filed nearly two years after the suit began, the limitation on the scope of intervention agreed to by the movants cures any problem which might have existed.

The federal courts have indicated that especial liberality is to be applied with respect to timeliness under Rule 24(a). *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir. 1978), *McDonald v. E. J. Lavino,* 430 F.2d 1065, 1073 (5th Cir. 1970), *Diaz v. Southern Drilling,* 427 F.2d 1118, 1126 (5th Cir. 1970), *Walpert v. Bart,* 44 F.R.D. 359, 360-361 (D. Md., 1968).

Furthermore, the mere passage of time is not sufficient to make a motion untimely. *Legal Aid Society of Alameda Co. v. Dunlop,* 618 F.2d 48, 50 (9th Cir. 1980), *Diaz v. Southern Drilling,* 427 F.2d at 1125, *Finch v. Weinberger,* 407 F.Supp. 34, 41 (N.D. Ga., 1975). A showing of prejudice or other special circumstances, in addition to the mere passage of time, is necessary.

By eliminating the possibility that matters already heard would have to be reopened, the limitation on the scope of

intervention accepted by the movants in their Reply Brief resolves the issue of any prejudice which could have arisen by intervention at this late date.[7] In the absence of prejudice, and given the limitations to which movants have agreed, timeliness is not an issue here.

2. *Nature of Movants' Interest.* Movants claim that they hold unextinguished sovereign rights over portions of the territory that is the subject of this lawsuit between the United States and Alaska. They are prosecuting those claims in another forum, *Inupiat Community v. United States,* Civ. Action No. A81-019 (D. Al.) filed 1/19/81, *motion by defendants for judgment on the pleadings* granted 10/1/82, *Notice of Appeal* filed 11/29/82. Under the terms of the Alaska Native Claims Settlement Act (hereinafter "ANCSA"), 43 U.S.C. §§ 1601-1628, native claims "within Alaska" were extinguished. Movants assume *arguendo* that ANSCA is valid and that offshore areas that are deemed to be within Alaska's territorial water are within the meaning of the phrase "within Alaska" as it is used in ANCSA.

Given these assumptions, movants claim that their interest in the disputed territory, and their ability to advance that interest in the District Court and Court of Appeals, will be damaged to the extent that this case results in the awarding of territory to Alaska, because of the extinguishment provisions of ANCSA; in other words, to the extent

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[7]The parties and *amici* also have expressed concern that intervention might retard the progress of the litigation. While it is our belief that intervention can occur without causing any undue delay in the case, we note that concern with delay (as opposed to untimeliness) arises only under Rule 24(b) and thus is not explicitly relevant to the Rule 24(a) analysis.

the United States prevails here, more territory will be available for native claims in an alternative form. Movants argue that the effect of ANCSA, combined with Alaska's claims in this lawsuit, constitute sufficient practical impairment or impediment to their ability to protect their interest to warrant intervention under Rule 24.

The parties and *amici* respond to these claims with two principal arguments. *Amici* argue that the complaint as filed in the District Court, and which is the basis of the interest for whose protection intervention is sought, and in which judgment was granted on the pleadings, is "patently without merit." *Amici* conclude that therefore "the complaint in intervention lacks the 'seriousness and dignity' to deserve filing before the Court." (*Brief of Amoco Production Company, et al.,* pp. 7-8.)

The United States and Alaska do not go quite so far. Counsel for the United States argued at the hearing that granting intervention might "be seeming to give substance to the claim [of the movants] and thereby . . . trespassing on the proceedings before the District Court. . . ." "[G]ranting intervention might imply a holding [that movants' underlying claim is valid] . . . and prejudice the district court proceedings." To deny intervention would result in "remaining entirely neutral as to the viability of these claims. . . ." *Record,* p. 25.

Counsel for Alaska reiterated the point. "Granting intervention . . . as a necessary predicate requires almost a finding that their interest is substantial. . . ." "Denying intervention would avoid that problem of giving tacit recognition to their interest." *Record,* pp. 31-32.

The bulk of precedents under Rule 24 go in a diametrically opposite direction from the view advanced by Counsel for the parties and for *amici.*

Beginning with *Atlantis Development Corp. v. United States,* 379 F.2d 818 (5th Cir. 1967), numerous cases have held that it is not appropriate for a court to inquire into the legitimacy or scope of the interest at stake in a motion for intervention and that *stare decisis* itself may provide a significant enough impediment to the enforcement of interests to warrant intervention.

Atlantis is so strikingly similar in its factual setting to the instant case that it merits a close look. In *Atlantis,* the Atlantis Development Corp. sought to intervene in a suit by the United States against, *inter alia,* Acme Development Corp. over title to various offshore coral reefs. Atlantis claimed that it in actuality owned the reefs on which Acme had attempted a construction project, and its claim was therefore adverse to both Acme's and the United States'. Particular attention should be paid to the following from Judge John R. Brown's opinion:

> The Government would avoid all of these problems [of intervention] by urging us to rule as a matter of law on the face of the moving papers that the intervenors could not possibly win on the trial of the intervention and consequently intervention should be denied.
>
> . . . [I]t is, of course, conceivable that there will be some instances in which the total lack of merit is so evident from the face of the moving papers that denial of the right of intervention rests upon a complete lack of a substantial claim. But it hardly comports with good administration, if not due process, to determine the merits of a claim . . . by denying access to the court

> at all. This seems especially important when dealing with interests in the outer Continental Shelf. . . . If in its claim against the defendants in the main suit, these questions [regarding U.S. jurisdiction over the Continental Shelf] are answered favorably to the Government's position, the claim of Atlantis for all practical purposes is worthless [because *stare decisis* would make it impossible for Atlantis effectively to raise its claim against the U.S. in another court].

379 F.2d at 827-828.

It is worthy of note that the movants would be bound by more than *stare decisis* with respect to land adjudicated to be Alaska's in this case, because under ANCSA the intervenors would have no claim at all. The *Atlantis* court concluded that "*stare decisis* may . . . supply that practical disadvantage which warrants intervention of right." 379 F.2d at 829.

Atlantis has been widely followed both with respect to the level of inquiry into the nature of the interest asserted and with respect to the holding that *stare decisis* provides the necessary impediment to warrant intervention. Regarding the latter, *see Nuesse v. Camp,* 385 F.2d 694, 702 (D.C. Cir. 1967), *Martin v. Traveler's Indemnity Company,* 450 F.2d 542, 554 (5th Cir. 1971), and *Francis v. Chamber of Commerce of United States,* 481 F.2d 192, 195 n.8 (4th Cir. 1973). In *Corby Recreation Inc. v. General Electric Company,* 581 F.2d 175, 177 (8th Cir. 1978), the court stated, "The inhibiting effect of *stare decisis,* coupled with assertion [by the intervenor] of an interest nearly identical to and perhaps in conflict with that alleged by *Corby* in the main action, furnishes the practical disadvantage required

for intervention as a right." (Citing *Francis, Nuesse,* and *Atlantis.*)

With respect to the nature of the interest required to justify intervention, in *Corby* the court also asserted that "[T]he well-pleaded allegations of [the intervenor's] complaint [must be] accepted as true," citing *Kozak v. Wells,* 275 F.2d 104 (8th Cir. 1960). 581 F.2d at 177.

In the *Kozak* case Justice (then Judge) Blackmun had written for a unanimous three-judge panel:

> For purposes of judging the satisfaction of these conditions [of Rule 24] we look to the pleadings, that is, to the motion for leave to intervene and to the proposed complaint or defense in intervention, and, absent sham and frivolity, we accept the allegations in those pleadings as true.
>
> "The question of a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on motion to intervene, at least in the absence of sham, frivolity, and other similar objections." *Otis Elevator Co. v. Standard Construction Co.,* D.C.D.Minn., 10 F.R.D. 404, 406.
>
> "For the purposes of a motion to permit intervention, all allegations in the pleading, which the intervenors propose to serve when they are made parties to the action, must be deemed to be true." *Kaufman v. Wolfson,* D.C.S.D.N.Y., 137 F. Supp. 479, 481.
>
> *Clark v. Sandusky, supra,* at page 918 of 205 F.2d; *Dalva v. Bailey,* D.C.S.D.N.Y. 158 F. Supp. 204, 207. Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with ultimate results on the merits.

275 F.2d at 109.

A Florida District Court had occasion to reexamine the issue of the permissible degree of inquiry into the merits of an intervenor's allegations in *Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D.Fla. 1978). Florida Power sought to block the State of Florida from intervening in an antitrust suit over oil purchases. In response to Florida Power's contention that the state lacked the requisite "interest" to justify Rule 24 intervention, the Court wrote,

> The Court is not without guidance. Such is provided by the Fifth Circuit's decision in *Atlantis Development Corp. v. United States,* 379 F.2d 818 (5th Cir. 1967). There the party opposing intervention urged the Fifth Circuit Court of Appeals to rule on the basis of the moving papers that the intervenors could not possibly win at trial—in effect, to examine the complaint as would be done under Rule 12(b)(6), Fed.R.Civ.P. This the Fifth Circuit refused to do. [Quoting the passage quoted at pp. 16-17, *supra.*]
>
> Thus, regarding whether the complaint states a claim, the Court's obligation in circumstances such as these is limited to determining whether "total lack of merit is . . . evident from the face of the moving papers . . . ." *Id.*
>
> The State presents a number of claims in its intervening complaint; the Court cannot say that any of them on their face exhibit such a "total lack of merit."

78 F.R.D. at 443.

The cases discussed above represent but one view of the "interest" question, however. A second line of cases has developed along an alternative line. These basically turn on a distinction between those interests which are "direct" and those which are "contingent." The very nature of such

an inquiry is antithetical to the approach of *Atlantis* and its progeny.

The seminal case in this line is *Kheel v. American Steamship Owner's Mutual Protection & Indemnity Assn.*, 45 F.R.D. 281 (S.D.N.Y. 1968). In *Kheel* the court stated, "Movants, who are but five out of 120 negligence claimants, do not assert that they have proved their claims or reduced them to judgment." "The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention." 45 F.R.D. at 284.[8]

Clearly the emphasis placed by *Atlantis* and following cases on *stare decisis* as an impediment to vindication of an interest is irrelevant to the reasoning of *Kheel*. In *Atlantis* and its progeny, the fact that an additional lawsuit would

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[8]*Kheel* was favorably cited in *Liberty Mutual Insurance Co. v. Pacific Indemnity Co.*, 76 F.R.D. 656 (W.D.Pa. 1977). The Liberty Mutual court wrote,

> The courts have agreed that the interest required must be a "direct, substantial, legally protectable interest in the proceedings," *Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.D.C. 1968). . . . The interest must be a "present substantial interest as distinguished from a contingent interest or mere expectancy," [citation]. "[A]n interest, to satisfy [Rule 24(a)] must be significant [and] must be direct rather than contingent [citation]."
>
> Analysis of cases involving interests factually similar to [the instant case] reveals that an interest contingent upon a favorable result in an *associated* lawsuit is not an interest sufficient to require intervention under Rule 24(a).

76 F.R.D. 656, 658 (1977).

Liberty Mutual involved an attempt of a state court personal injury plaintiff to intervene in a federal diversity suit between insurance companies attempting to sort out their respective obligations under overlapping insurance policies.

be required to vindicate the interest, and the fact that *stare decisis* would affect that subsequent litigation, was the basis for permitting intervention. In *Kheel,* the fact that a subsequent lawsuit would be required, and the implied "contingent" nature of the claim asserted in the petition for intervention, became the basis for denying intervention.

There seems to be no sure way to distinguish those cases in which the *Atlantis* logic is to be applied, and those to which *Kheel* is more applicable, although the *Kheel* court made much of the fact that only legal issues remained at the time intervention was sought. Indeed, we find no case in which a reconciliation of the two approaches is attempted. In *Atlantis,* Judge Brown did indicate that the *stare decisis* rule might be most appropriately applied when the subsequent claim might be against one of the parties to the original action, as in the instant case, and might stand on the same bases as one of the original claimants. Judge Brown surmised that in such a case "[t]he Court before whom the potential parties in the second suit must come [to petition to intervene] must itself take the intellectually straightforward, realistic view that the first decision will in all likelihood be the second and the third and the last one." 379 F.2d at 829. Because of the unique circumstances of ANCSA, that reasoning applies here perhaps to an even greater extent than it did in *Atlantis.*[9]

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[9]As Counsel for the United States conceded at the hearing "[a] decision by the Supreme Court of the United States fixing the boundary, I think, in the real world sets a precedent which would effectively bar any further evidence on that question. . . . [i]f the United States were not adequately representing their interests as far as the interest of the Intervenors, it would be right to allow them to speak for themselves." *Record,* p. 29. (*See infra* p. 22, regarding the issue of adequacy of representation.)

There are literally dozens of cases of proposed interventions which have been decided on the "interest" question. As Judge J. Skelly Wright wrote in *Nuesse,* "we know of no concise yet comprehensive definition of what constitutes a litigable interest for purposes of standing and intervention under Rule 24(a)." "[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." 385 F.2d at 700.

While we have noted the rejection by the District Court of movants' claim, in the absence of a final judgment in that matter we are not in a position fairly to conclude that those claims are "totally without merit" as *amici* would have us do, or represent "sham or frivolity" as Judge Blackmun suggested in *Kozak* would be necessary. On the basis of the precedents, we believe that an analysis under Rule 24 leads to the conclusion, contrary to the assertions of Counsel for the parties and for *amici,* that a denial of intervention for lack of an interest is a greater statement on the merits than is permitting intervention. We do not share the suggestion that permitting intervention will somehow improperly influence proceedings before another tribunal. If such were the case, however, the remedy lies with an appeal of that court's decision, not with an improper resolution here of the petition for intervention. We conclude that movants adequately meet the "interest" test of Rule 24(a).

3. *Adequacy of Representation.* Under the analysis thus far presented, Rule 24(a) would mandate intervention "unless the applicant's interest is adequately represented by existing parties." As noted earlier, for the United

States, as well as for movants, this issue is at the crux of the motion.[10]

Movants concededly seek the same result in this lawsuit as does the United States: a minimization of the territory that is deemed to be Alaska's, and that therefore would be, from movants' perspective, unreachable because of ANCSA.

Movants nevertheless attack on several grounds the ability of the United States to represent their interests adequately. Included among these are that movants and the United States are in an ultimate sense adversely situated with respect to the ownership of the territory; that the United States may wish to settle the dispute in a manner adverse to movants, to save litigation costs, because of various international law concerns not directly relevant to this case, or because of a desire to eliminate movants' ability to prosecute their claims in another forum; and that as a matter of law the United States is an unsuitable representative for Native-American petitioner-intervenors.

Rule 24(a), as noted, requires that intervention be permitted when certain specified conditions are met "unless the applicant's interest is adequately represented by existing parties." Prior to 1966, the Rule had required intervention "when the representation of the applicant's interest by existing parties is or may be inadequate."

Numerous cases have concluded that the 1966 amendment to the Rule shifts the burden of persuasion to the party

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[10]See statement of Deputy Solicitor General Claiborne cited at n.9 *supra*.

opposing intervention and is designed to make intervention more freely available.[11] *See, e.g., Nuesse,* 385 F.2d at 702.

The Supreme Court, in *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972), took a slightly different approach and stated that the Rule's requirement "is satisfied if the applicant shows that representation of his interest 'may be' [paraphrasing the pre-1966 version of the Rule] inadequate and the burden of making that showing should be treated as minimal." 404 U.S. at 538, n. 10.

The mere fact that a petitioner-intervenor seeks the same result in a lawsuit as a party, or seeks to prosecute a claim against the same defendant, does not result in and of itself in a finding of adequate representation. In *Trbovich,* for instance, the Secretary of Labor had brought suit to set aside an allegedly improper union election. Trbovich, a union member, moved to intervene "(1) to urge two additional grounds for setting aside the election, (2) to seek certain specific safeguards with respect to any new election that may be ordered, and (3) to present evidence and argument in support of the Secretary's challenge to the election." 404 U.S. at 529-530. The Court reasoned from the statute that the interests of Trbovich and the Secretary were "related, but not identical," 404 U.S. at 538, and permitted intervention.

Justice Blackmun, as a Circuit Court judge, wrote in a classic formulation that inadequacy of representation may be shown "by proof of collusion between the representative

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[11]We note there have been dissenting voices on the subject. *Edmunson v. Nebraska ex rel. Meyer,* 383 F.2d 123 (8th Cir. 1967) and *In the Matter of American Beef Packers Inc.,* 457 F. Supp. 313 (D.Neb. 1978).

and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in the fulfillment of his duty." *Stadin v. Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962), *cert. den.*, 373 U.S. 915 (1963).[12]

The *Stadin* formula has been used as a "strict test" to be applied when "the interest of the applicant and existing plaintiff are precisely identical" in the suit in which intervention is sought, but differ in terms of ultimate objectives. *See Pierson v. United States,* 71 F.R.D. 75, 78 n.5 (D.Del., 1976), *Walden v. Elrod,* 72 F.R.D. 5, 10 (W.D. Okla., 1976), and *United States v. I.B.M.,* 62 F.R.D. 530, 537-538 (S.D. N.Y., 1974). These courts would limit the *Trbovich* "minimal burden" test to cases in which the petitioner-intervenor and the alleged representative have adverse interests in the very suit in which intervention is sought. The distinction between identity of interest in the lawsuit in which intervention is sought, and "ultimate" identity of interest, is crucial to the analysis.

One perspective takes a very narrow view of identity. In *Atlantis,* the court stated, "On the basis of the pleadings [and the court then cited *Kozak* and *Stadin,* regarding the need to accept the pleaded allegations as true], Atlantis is without a friend in this litigation. The Government turns on the defendants and takes the same view both administratively and in its brief here toward Atlantis. The defendants, on the other hand, are claiming ownership in and the

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[12]Judge Blackmun's opinion was written before the 1966 rule change, reducing or shifting the burden of proof with respect to showing inadequacy.

right to develop the very islands claimed by Atlantis." 379 F.2d at 825.

The existing defendants in *Atlantis* were in fact advancing the very same arguments that Atlantis wanted to; Atlantis was permitted to intervene precisely because a Government victory over the defendants would have, by *stare decisis,* made it difficult for Atlantis to advance similar claims against the Government in a subsequent lawsuit.

The logic of *Atlantis* has been followed in several subsequent cases. In *Diaz v. Southern Drilling,* the court stated:

> [A]ppellant asserts that the rights of the Government are adequately protected by the existing parties to the main action. We disagree. Appellant is correct in stating that the Government is adequately represented as to the issue of Trefina's recovery from Southeastern. Trefina entered the suit with the sole purpose of effecting this recovery. Nonetheless, the argument is lacking in merit. Appellant ignores the fact that no existing party to the suit views the Government's tax lien favorably. Certainly Trefina does not. When the supposed representative actually represents an interest adverse to the intervenor, the representation is obviously not adequate.

427 F.2d at 1125.

In the *Corby* case, cited earlier, the court stated, "Western and Corby assert seemingly conflicting damage claims, and Western alleges that Corby was negligent and breached its lease by under-insuring the property. Such adversity of interest meets the . . . 'minimal' requirement of showing that representation of the potential intervenor's interest may be inadequate [citing *Trbovich*]." 581 F.2d at 177. Intervention was therefore permitted.

In *New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976), the United States intervened as plaintiff on its own behalf as owner of the Santa Fe National Forest, and in a fiduciary capacity on behalf of four Indian Pueblos, in a suit brought originally by New Mexico in an attempt to have the Pueblos' water rights declared subject to New Mexico's system of water rights adjudication. From the sketchy details provided in the opinion it would appear the United States was advancing the same claim on both its own behalf and on behalf of the Pueblos: that *none* of the water involved was subject to state law. The Commissioner of Indian Affairs had recommended that the Pueblos retain private counsel, but the United States objected. The Court of Appeals stated:

> The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel are competent and able but they concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos. In such a situation, adequate representation of both interests by the same counsel is impossible.

537 F.2d at 1106.

In three of the above-described cases (all except *Aamodt*), the factor which blocked "adequate representation" was based on the difficulty of enforcement of the interest in a subsequent lawsuit, coupled with an evaluation of the importance of allowing those affected by a decision to speak for themselves. Within the cases themselves, no conflict of interest existed. In *Atlantis, stare decisis* was deemed to bar for all practical purposes a subsequent suit by Atlantis if Atlantis' alleged representatives were to lose their own suit. A similar problem was cited in *Corby,* 581

F.2d at 177, as well as the fact that Corby itself had indicated that it did not feel it could adequately represent the intervenor's interests.

The view that adequacy of representation may be dependent on whether the parties are *ultimately* adverse to each other thus seems to grow out of the view that subsequent lawsuits may not be readily available to enforce any interest that exists.

On the other hand, some courts have refused to acknowledge the need for (or unavailability of) a subsequent lawsuit as a basis for finding inadequacy of representation.

MacDonald v. United States, 119 F.2d 821 (9th Cir. 1940), involved a suit by the government against a railroad regarding ownership of subsurface minerals within the railroad's right-of-way. MacDonald claimed that as holder of a homesteading patent, he in fact was the owner of the minerals, and sought to intervene. The court stated:

> Subdivision (a) of Rule 24, permitting intervention as a matter of right, provides, so far as pertinent here, that the application shall be granted "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Both conditions must be shown to exist. There is no reason to believe that the government's representation of MacDonald's interest is inadequate here, or that it was inadequate below. For that matter, both here and below, he presented an elaborate brief on the merits of the case and was heard thereon as fully as though he had been allowed to intervene. On the whole, the government would seem to have a vastly greater interest in the success of its suit than the intervener.

119 F.2d at 827.

It is clear that the court was not impressed with the fact that by *stare decisis* the intervenor would have been unable to press his claim against the railroad if the United States should lose its suit, because it found that "for the purpose of the suit the two interests were identical." 119 F.2d at 827.

The *MacDonald* court's approach was seemingly adopted in *International Tank Terminal Ltd. v. M/V Acadia Forest,* 579 F.2d 964 (5th Cir. 1978). The court stated, "It is clear from our summary of the interrelationships among the five companies involved here that the appellant and the defendants have the same objective in the present suit. The possibility that future arbitration might occur in which the interests of the defendants and the [intervenor] might clash does not demonstrate the necessary adverse interest in the present suit." 579 F.2d at 968.

The decision in *International Tank* relies upon *Virginia v. Westinghouse,* 542 F.2d 214 (4th Cir. 1976). The operative language in *Virginia,* cited by the court in *International Tank,* is, "When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented. . . ." 542 F.2d at 216. We are therefore left with the task of determining what is meant by the term "ultimate objective." A close reading of *Virginia,* which involved an attempt by the Commonwealth of Virginia to intervene in Virginia Power's uranium pricing suit against Westinghouse, shows that the *Virginia* court looked at "ultimate interest" in a sense that went beyond the existing lawsuit. *International Tank* would thus appear to be a misreading of *Virginia.*

The *MacDonald* and *International Tank* view is urged upon the Master by the parties in this case who oppose intervention. The *Atlantis, Diaz, Corby,* and *Aamodt* view stands in stark contrast.

It seems clear that *Atlantis* and the cases which follow it were decided as they were because (1) the courts looked to the ultimate relationship of the intervenor and the representative, rather than to their relationship "for purposes of the suit"; and (2) these courts would impose a virtually irrebuttable presumption of inadequacy when the intervenor would be effectively and permanently blocked from asserting his interest if the representative were to lose his lawsuit. One cannot deny, however, that *Atlantis* and *MacDonald* reach opposite conclusions in similar factual settings. The Master believes that the *Atlantis* court's view more accurately represents the law.

Notwithstanding the irreconcilability of *Atlantis* and *MacDonald,* a genuine issue nevertheless remains with respect to the applicable standard when a petitioner-intervenor and its "representative" have identical interests in the pending lawsuit, but are adverse in an "ultimate" sense.

We find appealing the resolution proposed by the courts cited on page 25, *supra:* when the parties are adverse in the pending lawsuit, the "minimal burden" test of *Trbovich* applies; when the parties are adverse only in an "ultimate" sense, Judge Blackmun's test in *Stadin* applies. Judge Edelstein has referred to this test as the "outcome-interest" test, and it certainly would seem to explain decisions such as *Atlantis* and cases which followed it. *U.S. v. I.B.M.* 62 F.R.D. at 538.

Professor David Shapiro takes a similar view in an oft-cited 1968 article, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721 (1968). Professor Shapiro did not directly address the distinction between adversity in the context of the existing lawsuit and "ultimate adversity," but approached the matter somewhat obliquely:

> [A]dequacy of representation is a very complex variable indeed. At one extreme, when the applicant is seeking to assert his own separate claim for relief against one of the parties, it is not really an issue at all. At the other extreme, when the applicant is making no claim of his own but is seeking to assert the same position as one who is already a party and whose interests precisely coincide with his, the issue of adequacy should be, as Mr. Justice Stewart suggests, limited to questions of competence, collusion, and bad faith. But between these poles lies a substantial area where the question of adequacy is closely tied to that of interest. In these cases the applicant wants not to make his own claim but to support or supplement the position of one of the parties *whose stake in the proceeding differs from his,* though there may be no conflict of interest between them. The court's judgment in such cases should be influenced in part by the extent of the applicant's interest—do considerations of fairness strongly suggest that he be heard on a matter of this importance to him—and in part by the contribution that he can make to the court's understanding of the case in the light of his knowledge and concern.

81 Harv. L. Rev. at 748 (emphasis added, footnotes omitted).

The analysis suggested by Professor Shapiro and by the *I.B.M., Pierson,* and *Walden* courts cited above can be readily applied to the instant case.

As noted above at p. 23, both movants and the United States have a similar object with respect to the case at bar: minimization of the territory adjudged to be Alaska's. Thus, they lack adversity of interest in the pending lawsuit, and the three-part *Stadin* test must be applied.

The first part of the test concerns "collusion." We find movants' claims on this score unconvincing. The fact that the parties made an agreement for a joint lease sale of mineral rights and for judicial resolution of the dispute does not make a case of collusion. Nor do we find a shred of credible evidence that the United States would collaborate with Alaska in order to prevent movants from pursuing their claims. Accordingly, we reject any attempt to prove inadequacy of representation on the basis of collusion.

The third element of the *Stadin* test—nonfeasance—is likewise clearly inapplicable here, as the United States is present, and makes every indication that it intends to pursue its claims.

The second element in the *Stadin* test—adversity of interest—is by far the most complex. It has already been established that with respect to the ostensible goals of the United States and movants there is no adversity of interest within the context of the case at bar. The issue then, to follow Professor Shapiro's prudential concern, is whether intervention is warranted because their interests are sufficiently adverse in the ultimate sense, and the movants' interest sufficiently important to them that they be allowed to speak for themselves.

In the present case, both the United States and the movants have adverse claims to the same territory. Movants and the United States are currently opposing parties in a lawsuit in another forum regarding that territory. The United States concedes that "if the United States were not adequately representing their interests . . . it would be right to allow them to speak for themselves."[13] Yet movants argue vigorously that they have evidence to present to bolster the claims of the United States in this forum, but which they contend the United States will not use because the United States' case against movants before another tribunal might be damaged by presentation of that evidence.

We think these allegations meet the test. The claims of movants, accepted *arguendo* as valid, and the type of adversity of interest that is alleged, fall well within the requirements laid out in numerous cases cited and quoted above, including *Atlantis, Diaz, Corby,* and *Aamodt.*

This view is bolstered by the Court's recent conclusions in *Arizona v. California.* The Court stated, in permitting intervention over the States' objections, "The Tribes' interests . . . have been and will continue to be determined in this litigation since the United States' action *as their representative* will bind the Tribes to any judgment. Moreover the Indians are entitled 'to take their place as independent qualified members of the modern body politic.' " 103 S. Ct. at 1389. (Citations omitted, emphasis added.) If the Indians' right to intervene is vindicated when the United States has sued as trustee, as in *Arizona v. Cali-*

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[13] *See* note 9 *supra.*

fornia, it ought to be vindicated when the United States is suing solely on its own behalf.

Alaska argues that when the Government is allegedly adequately representing the interest of a petitioner-intervenor, a special burden is imposed to overcome a presumption of adequacy. *Brief of the State of Alaska* p. 13. This principle was described by Justice Stewart, in his dissent to the Court's grant of intervention in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company,* 386 U.S. 129 (1967), as follows: "It has been the consistent policy of this Court to deny intervention to a person seeking to assert some general public interest in a suit in which a public authority charged with vindication of that interest is already a party." 386 U.S. at 149-150. With but one exception, all of Justice Stewart's citations, however, are to public interest cases involving antitrust, civil rights, environmental protection, or utility regulation statutes.[14] We find the doctrine inapplicable to the case at bar, in which the Government is a party to protect its property interests rather than to assert a general public interest, and in which intervention is sought solely to preserve private rights.

We conclude that movants' claims are not adequately represented by the United States and that movants therefore meet the requirements of Rule 24(a).

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[14]The exception is *MacDonald v. United States,* 119 F.2d 821, the facts of which are inapposite to the rationale described by Justice Stewart. Professors Wright and Miller, whom Alaska cites as the source of their claim on this score, cite the same cases as had Justice Stewart, including the apparently misplaced reference to *MacDonald.* Wright and Miller, *Federal Practice and Procedure* Civil § 1909 (1972).

IV

SPECIAL STANDARDS FOR INTERVENTION IN ORIGINAL JURISDICTION CASES

Supreme Court Rule 9.2, as noted above at page 10, suggests that the Federal Rules of Civil Procedure should serve as a guide, where appropriate, to procedure in original actions. We have noted further that actual practice with respect to intervention in such cases has varied widely.[15]

The parties and *amici* raise several general policy arguments against permitting intervention in this case which are more related to the nature of original jurisdiction than to the specific requirements of Rule 24 which have been addressed above.

Several of the issues considered herein have been addressed with respect to analysis of Rule 24. Here we consider arguments that a special, more stringent, standard should apply to these issues in the context of intervention in cases brought under the Court's original jurisdiction. These arguments, if valid, might lead to a conclusion that application of Rule 24 to the instant case is not appropriate and that the motion for leave to intervene should be denied. Each of these arguments will be considered in turn.

First, both Alaska and *amici* argue that the underlying claim of petitioner-intervenor lacks the "seriousness" and "dignity" that are requisite for filing original actions in the Supreme Court, citing *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972).

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[15]See cases cited at p. 10, *supra.*

The cited case dealt with efforts to bring an action, not merely to intervene, however. The Court stated that

> [T]he question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

406 U.S. at 93-94.

In the present case, the underlying claims are in fact being litigated in another, more appropriate forum; and intervention is sought solely to support the United States' position as to territory which movants might not be able to claim in any other forum because of ANCSA. As noted above, the United States itself undercuts the contentions of Alaska and *amici* with its acknowledgment that if it were determined that "the United States were not adequately representing . . . the interest of the Intervenors, it would be right to allow them to speak for themselves." *Record,* p. 29. We are not inclined to prejudge the legitimacy of the underlying claims by denying intervention here.

Furthermore, the concern expressed in *Illinois* regarding the "increasing duties with the appellate docket" is clearly inapposite in this case. Movants do not seek a new filing before the Court, and do not seek to litigate their underlying claims before the Special Master.

Second, Alaska, the United States, and *amici* all argue that the existence of movants' lawsuit in another forum eliminates the need for intervention. We believe this argu-

ment is not suited to the present posture of the case, in which movants only seek to present evidence to support the claims of the United States, in order to protect their interests in territories which may become subject to ANCSA to the extent Alaska prevails in this action. To the extent Alaska prevails here, movants are *barred* from prosecuting their claim elsewhere.

Third, Alaska, the United States, and *amici* all urge that especial attention be paid to *Utah v. United States,* 394 U.S. 89, in which the Court denied Morton Salt's petition for leave to intervene in a boundary dispute between the United States and Utah which was before the Court under its original jurisdiction. (See Part II, p. 7 above)

Morton had sought to intervene on the basis that its own interests in land surrounding the Great Salt Lake could be undermined if the suit were to proceed without its participation. The Court responded that its original jurisdiction is to be invoked "sparingly," and that there was "no compelling reason requiring the presence of Morton." 394 U.S. at 95.

The Court based its conclusion on the existence of a stipulation entered into by the parties which mooted any effect the suit might have had on Morton's interests. The Court rejected Morton's substantive challenge to the validity of the stipulation and concluded that ". . . we decline to permit intervention for the sole purpose of permitting a private party to introduce new issues which have not been raised by the sovereigns directly concerned." 394 U.S. at 96.

In *United States v. Alaska,* no such stipulation has been entered into; indeed, since any such stipulation would in

effect waive the mandatory provisions of a duly enacted statute, ANCSA, such a stipulation would in all likelihood be invalid. Furthermore, movants in *United States v. Alaska* have agreed to restrict themselves to issues already before the Master and to raise no new issues. Given these differences between the cases, analogy to *Utah v. United States* is far-fetched.

Fourth, Alaska argues that others may seek to intervene if movants are granted permission to do so. *Brief of the State of Alaska,* p. 5. *Amici* oil companies have indicated that they would consider moving to intervene if movants are granted their request. *Brief of amici curiae,* p. 1.

The Court in *Utah v. United States* referred to the possibility of multiple intervention, stating that permitting Morton to intervene might require the admission of "any of the other 120 private landowners who wish to quiet their title to portions of the relicted lands, greatly increasing the complexity of the litigation." 394 U.S. at 95-96. The Court reached that conclusion only after deciding that the existence of the stipulation voided any compelling reason for intervention and on the assumption that intervenors would raise new issues regarding their own claims. The instant case has been distinguished with respect to these characteristics.

Given the restrictions to which movants have agreed, as presently informed the Master does not believe that the mere fact of their presence in the case would give rise to grounds for participation by others, either by those similarly situated to movants or by those adverse to them. In-

sofar as that is to become a problem, it will be sufficient to abide the event.[16]

In contrast to the arguments raised by those opposing intervention, this Master finds himself drawn to the words of Chief Justice Taney in *Florida v. Georgia,* 58 U.S. (17 How.) 478 (1854). Writing for the Court, he stated that with respect to original jurisdiction, it is the "duty of the Court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this,

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[16]The Special Master notes the concerns of *amici* and others regarding possible collateral effect on individuals or entities which may not be parties to this case, but which may be engaged in litigation over issues which are involved in the matter before the Special Master. It is observed that the doctrine of collateral estoppel applies only to those who are parties to the matter in which findings of fact are made, and that *amici* therefore could not be bound in other litigation if the Special Master were to make a finding of fact without the level of scrutiny which *amici* might feel was warranted. See Wright, Miller, and Cooper, *Federal Practice and Procedure,* Jurisdiction § 4416 (1981).

Nonetheless, the Special Master will undertake two steps to alleviate any concern which might have arisen. First, in the Final Report the Special Master will specifically recite that, pursuant to the doctrine of collateral estoppel, findings of fact are intended to bind only the parties to this litigation and not those who have not been able to participate. Second, at the request of *amici* or any of the parties, with respect to all issues in which intervenors participated pursuant to this Order, a draft Report stating the findings of fact, conclusions of law and recommendations of the Special Master may be circulated to the parties and to *amici curiae* Amoco Production Co. et al.; *amici* shall be permitted to draw the Special Master's attention to any unintended or unjustified effects that such findings, conclusions or recommendations might have in other litigation on individuals or entities not party to this litigation, and to file with the Special Master a brief with respect to those effects. All parties will have adequate time to respond to any such brief.

it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be obtained." 58 U.S. at 491.

In this case it is in the greatest national interest to clear title to this area once and for all, to ensure a stable and appropriate development of its resources, for reasons vital to our domestic economy and international strategic needs.

At the same time, movants raise claims to those areas which could be permanently extinguished, at least in part, depending on the outcome of this case. The "ends of justice" require that they be permitted to speak for themselves, and be heard, and present the evidence which they claim to possess and that otherwise would not be put in the record. Their participation should be strictly limited according to the terms of the Recommendations and Order that follow, and should continue so long as they can credibly allege an underlying interest in the subject matter of the controversy.[17]

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[17]It is the Master's intention to minimize to the extent possible any duplication or delay that might result from movants' participation in the case—a desire presumed to be shared by Counsel. Coordination between the United States and movants in the presentation of evidence is to be expected. To invoke the example of Judge Tuttle, serving as Special Master, ". . . the order of proof and examination" by the United States and the movants should be "structured in a logical sequence which avoids duplication or accumulation," and where they are not so arranged or presented, Alaska in particular will be entited to object. See *Arizona v. California*, No. 8 Original, *Memorandum and Report on Preliminary Issues, August 28, 1979*, p. 16.

RECOMMENDATIONS

For the reasons just stated, the Special Master recommends:

1. That the Motion to Intervene filed by the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation be granted, to the extent and subject to the limitations hereafter stated;

2. That the intervention shall be restricted to Issues 2 through 5 identified by the original parties in their Joint Statement of Questions Presented and Contentions and Issues 12 and 13 of the Supplement thereto, and any related further issues bearing on the seaward boundary of the submerged lands of the State of Alaska which, at the request of one or both of the original parties, the Special Master shall agree to hear; in addition, intervenors may present evidence on matters already heard by the Special Master, to the extent that the Special Master receives new evidence on such matters, and such new evidence involves a new theory on which such matters may be decided, and not merely elaboration, extension or explanation of evidence already received;

3. That, with respect to those issues as to which intervention is granted, the intervenors shall be restricted to supporting, in whole or in part, the right, title and interest of the United States with respect to the lands or waters in dispute between the original parties; except in accordance with this paragraph, the intervenors shall not be permitted to advance in these proceedings any claim of right, title or interest they may have with respect to the lands or waters in dispute between the original parties; no evidence

supporting such a claim shall be received; and no such claim shall be the subject of any finding of fact, conclusion of law, or recommendation in this case.

As stated at the outset, the Special Master, with the concurrence of the parties, recommends that the Court defer review of these recommendations until the conclusion of the case and the submission of the final Report, reserving to the parties the right to file exceptions thereto at that time if so advised.

Respectfully submitted,

J. KEITH MANN
Special Master

Stanford, California
January 10, 1984