

IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al.	)	Case No. 2014-1933
)	
Appellants	)	On appeal from the Monroe County
	)	Court of Appeals
vs.)	
	)	Seventh Appellate District
BECK ENERGY CORPORATION)	
	)	Case Nos. 12 MO 6
Appellee	)	13 MO 2
	)	13 MO 3
and	)	13 MO 11
)	
XTO ENERGY, INC.)	
)	
Proposed Intervenor)	
)	
-and-)	
)	
STATE OF OHIO EX REL. CLAUGUS	)	Case No. 2014-423
FAMILY FARM, L.P.)	
)	
Relator	)	Original Action in Prohibition
	)	and Mandamus
vs.)	
)	
SEVENTH DISTRICT COURT OF)	
APPEALS, et al.)	
)	
Respondents)	

**RESPONSE OF APPELLANTS CLYDE A. HUPP, ET AL. TO MOTION OF
XTO ENERGY, INC. FOR CLARIFICATION OF ITS RIGHT TO PARTICIPATE
IN ORAL ARGUMENT**

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Appellants respectfully request that the Court deny XTO's motion for "clarification" of its asserted right to participate in oral argument in this appeal. XTO asserts that it is the "party" with the "greatest interest in the outcome of these consolidated actions." Motion for Clarification at 1. Its actions, from the moment it acquired its interest in the Beck leases up to its deadline for perfecting an appeal to this Court, suggest otherwise.

XTO was aware of the *Hupp* litigation in November, 2011, before finalizing its purchase of the "deep rights" under the Beck leases. See Decision and Order on Motion to Intervene, Monroe County Court of Common Pleas, Case No. 2011-345 at 2, 3. However, XTO made no effort to intervene until September 7, 2012, almost ten months later, after the trial court had entered summary judgment on the merits in the landowners' favor. *Id.* See also Brief of Proposed Intervenor-Appellant XTO Energy Inc., 7th Dist. Monroe No. 13 MO 02, May 1, 2013, at 9. Upon belatedly moving to intervene, XTO sought a "do over" of the trial court's merits decision; its fallback position was to assert its right to oppose class certification. See *id.* The trial court denied XTO's motion.

The court of appeals did not retroactively declare XTO a party to the *Hupp* case. That court determined that in light of its decision favoring Beck, XTO's appeal on intervention was moot. *Hupp v. Beck*, 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255, ¶15. The appellate court declined to consider the matter further, leaving intact the trial court's judgment denying XTO's motion to intervene, thereby preserving XTO's status as a non-party. When Appellants filed their Notice of Appeal, XTO should have recognized that its status as a non-party might not be moot in the event this Court accepted this appeal. Nonetheless, just as XTO lay in the weeds

with full knowledge of the landowners' challenge to the Beck leases while the trial court considered the landowners' motion for summary judgment, XTO remained in the background asserting no interest herein until after the time to initiate its own appeal had passed.

Just as XTO made no attempt to intervene in the *Hupp* case until after the trial court's ruling on the merits, XTO now seeks to assume the role of an appellee and participate in oral argument despite having made no timely effort to preserve its interest in these proceedings by instituting its own appeal on the issue of intervention. XTO lacks standing to assume the role of an appellee herein. See *State ex rel. Sawicki v. Court of Common Pleas of Lucas County*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶1. Accommodating XTO's presumptive assertion of its claimed status as a party would set a dangerous precedent that could undermine both the Rules of Appellate Procedure and the Rules of Practice of this Court. Accordingly, Appellants Clyde A. Hupp, et al., respectfully request that the Court deny XTO's motion to "clarify" its purported right to participate in oral argument herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was served by regular U.S. mail on each of the following, on this 19th day of October, 2015.

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