

Opinion #388 answered by this letter.

November 15, 1961



Honorable Lynn M. Ewing, Jr.
Member, Missouri House of Representatives
223 1/2 W. Cherry Street
Nevada, Missouri

Dear Mr. Ewing:

This letter of advice is written in lieu of a formal opinion in answer to your inquiry of October 23, 1961.

The right to make the State a defendant in any suit is governed by a well recognized rule reflected in the following language from *State of Missouri v. Homesteaders Life Association*, 90 F. 2d 543, l.c. 545:

"Generally, a state may sue or be sued only with its consent and in the manner provided by statute".

Section 71.015 RSMo 1959, cited in your letter with reference to annexation proceedings to be brought by the City of Nevada directs that a declaratory judgment action be brought within the scope of Chapter 527 RSMo 1959. If your action should in any way challenge the constitutionality of a statute, ordinance or franchise, Section 527.110 RSMo 1959 requires that the Attorney General of Missouri be served with a copy of the proceedings in order that he may be entitled to be heard. At such point the Attorney General will determine what action he will take under Section 27.060 RSMo 1959 which directs that "he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

It may also be noted that paragraph 3 of Section 71.015 RSMo 1959 directs that the class action be against the

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"inhabitants" of the unincorporated area. A strained interpretation of that statute would be necessary to hold that the State of Missouri is an "inhabitant" of the unincorporated area due to the presence of State institutions in the area.

Under the circumstances it is recommended that the class action contemplated under our declaratory judgment law should not name the State of Missouri as a defendant. If the petition describes generally or specifically State property within the area to be annexed, this office will be in a position to exercise its authority under Section 27.060 RSMo 1959 to appear and interplead if necessary to protect the State's interests.

If, after considering this letter of advice, you still entertain doubts concerning proper procedures to employ in the premises, this office stands ready to assist you further in this matter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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