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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 64, ORIGINAL.

THE STATE OF NEW HAMPSHIRE,
PLAINTIFF,

v.

THE STATE OF MAINE,
DEFENDANT.

Motion to Intervene.

Memorandum in Support of Motion to Intervene.

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Table of Contents.

| | |
|--|----|
| Motion to Intervene | 1 |
| Memorandum in support of motion to intervene | 3 |
| Facts | 3 |
| I. Background | 3 |
| II. The petitioners | 4 |
| III. Effect of the proposed compromise agreement | 5 |
| IV. Additional facts | 7 |
| V. Petitioner's submissions and arguments should this honorable court allow their petition to intervene | 8 |
| Law | 10 |
| I. Petitioners may intervene as of right under Rule 24(a)(2), F.R.Civ.P. | 11 |
| A. Petitioners have an interest relating to the property or transaction which is the subject of the instant case | 12 |
| B. Petitioners are so situated that disposition of the present case will as a practical matter impair or impede their ability to protect their interests | 15 |
| C. Petitioners' interests are not adequately represented by existing parties | 16 |
| II. Petitioners should be allowed to intervene pursuant to Rule 24(b), F.R.Civ.P. | 19 |
| III. Intervention is appropriate even though the principal litigation is between two states | 20 |
| IV. Pleading adopted by petitioners | 21 |

Table of Authorities Cited.

CASES.

| | |
|--|-------------------|
| Atlantic Development Corp. v. United States, F. 2d 818 (5th Cir. 1967) | 379 12 |
| Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) | 12, 13, 17 |
| Columbia River Fishermen's Protective Union v. City of St. Helen's, 160 Ore. 654, 87 P. 2d 195 (1939) | 14 |
| Florida v. Georgia, 17 How. 478 (1854) | 9, 10, 11, 16, 20 |
| Hodgson v. United Mine Workers of America, 473 F. 2d 118 (D.C. Cir. 1972) | 13, 17, 18 |
| Johnson v. Hoy, 151 Ore. 196, 47 P. 2d 252 (1935) | 14 |
| Kaufman v. Societe Internationale pour Participa- tions Industrielles et Commerciales, S.A., 343 U.S. 156 (1952) | 17 |
| Kentucky v. Indiana, 281 U.S. 163 (1930) | 20 |
| McCausland v. Shareholders Management Co., 52 F.R.D. 521 (S.D. N.Y. 1971) | 21 |
| Morris v. Graham, 16 Wash. 343, 47 P. 752 (1897) | 14 |
| New Hampshire v. Maine, 414 U.S. 996 (1973), No. 64 Original | 3, 10 |
| New Jersey v. New York, 345 U.S. 369 (1953) | 20 |
| Nuesse v. Camp, 385 F. 2d 694 (D.C. Cir. 1967) | 12 |
| Oklahoma v. Texas, 253 U.S. 465 (1920) | 20 |
| Oklahoma v. Texas, 254 U.S. 609 (1920) | 20 |
| Rhode Island v. Massachusetts, 12 Pet. 657 (1838) | 9 |
| Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434 (1940) | 15 |

| | |
|---|--------------------|
| Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969) | 12, 13, 16, 17 |
| Textile Workers Union of America v. Allendale Co., 226 F. 2d 765 (D.C. Cir. 1955) | 13, 18 |
| Trbovich v. United Mine Workers, 404 U.S. 528 (1972) | 16, 17 |
| Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472 (1940) | 9, 15 |
| United States v. Reserve Mining Co., 56 F.R.D. 408 (Minn. 1972) | 11, 12, 13, 17, 18 |
| United States v. Simmonds Precision Products, Inc., 319 F. Supp. 620 (S.D. N.Y. 1970) | 13, 18 |
| Whitcher v. State, 87 N.H. 405, 181 A. 549 (1935) | 14 |

STATUTES.

| | |
|--|---|
| United States Constitution, art. 1, § 10 | 9 |
| New Hampshire Constitution | |
| pt. 1, art. 7 | 9 |
| pt. 2, art. 1 | 9 |
| pt. 2, art. 5 | 9 |
| R.S.A. 12 | |
| § 4402 | 6 |
| § 4403 | 7 |
| § 4404 | 5 |
| § 4404(4) | 5 |
| § 4451(1) | 6 |
| § 4451(2) | 6 |
| § 4454 | 7 |
| § 4455 | 7 |

| | |
|---------------|---|
| § 4459 | 7 |
| § 4460 | 7 |
| R.S.A. 211:18 | 4 |
| R.S.A. 211:27 | 6 |

MISCELLANEOUS.

| | |
|----------------------------------|------------------------|
| Federal Rules of Civil Procedure | |
| Rule 24 | 10, 11, 12, 13, 15, 20 |
| Rule 24(a)(2) | 11, 12, 13, 16 |
| Rule 24(b) | 19, 20 |
| Supreme Court Rule 9(2) | 10 |
| 36A C.J.S., Fish | 14 |
| 81 C.J.S., States | 9 |
| Moore's Federal Practice | 12 |

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THE STATE OF NEW HAMPSHIRE,
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v.
THE STATE OF MAINE,
DEFENDANT.

Motion to Intervene.

(1) Petitioners are

(a) The New Hampshire Commercial Fishermen's Association, a non-profit corporation incorporated under the laws of the State of New Hampshire;

(b) Roland Barnaby, David Boies, Edward Carroll, Leon Drew, Steven Driscoll, Michael Flanigan, Peter Flanigan, John Galter, Edward Heaphy, Geno Marconi, Geno Marconi, Jr., Joseph Marconi, Michael Marconi, William Marconi, Robert McDonough, Robert Merrill, Willifred Morrison, John Newick, Frank Peterson, James Robertson, Keith Slingsby, Vincent Tingley, Bail Tucker, Edward Warrington, Mark Warrington, Allan Workman, Harrison Workman, citizens of the State of New Hampshire;

(c) Sen. Eileen Foley, Sen. Robert Preston, Rep. C. Cecil Dame, Rep. Mary E. Cotton, Rep. Richard Ellis, Rep. Elizabeth A. Greene, Rep. Ruth L. Griffin, Rep. Ralph Hammond,

Rep. William F. Keefe, Rep. Richard S. Lockhart, Rep. Ralph C. Maynard, Rep. Joseph A. McEachern, Rep. Paul McEachern, Rep. William Palfrey, Rep. Ednapearl Parr, Rep. Chris Spirou, Rep. James R. Splaine, Rep. Edna B. Weeks, members of the Legislature of the State of New Hampshire.

(2) Petitioners, by their attorney, move for leave to intervene in the above-captioned action on the grounds that they have substantial interests in the location of the lateral marine boundary line between the State of New Hampshire and the State of Maine, that they have substantial rights in the maritime area disputed by the parties which can adequately be protected only if they are allowed to intervene in the action, and that they have substantial rights and obligations which would be impaired by entry of a judgment in accordance with the proposed consent decree submitted by the parties.

Petitioners seek to raise substantial constitutional questions relative to whether this Court is empowered to enter a judgment giving legal effect to proposed compromise agreement between the parties which has not received the consent of the New Hampshire Legislature or the United States Congress. Petitioners also seek to present full submissions of fact, evidence and law relative to the location and configuration of the true lateral marine boundary between the State of New Hampshire and the State of Maine.

Respectfully submitted,

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Of Counsel:

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Facts.

I. BACKGROUND.

On June 6, 1973, New Hampshire instituted the present action against the State of Maine, invoking the original jurisdiction of the Supreme Court. The central issue is the location of the lateral marine boundary between the States of New Hampshire and Maine. The case was assigned to a Special Master. 414 U.S. 996 (1973). At a pre-trial conference, the Special Master suggested to counsel from each state that the parties should endeavor to reach a settlement of the boundary dispute. Negotiations were then entered into by counsel for the parties, and on June 26, 1974, a proposed compromise agreement was announced. The

proposed agreement was thereafter submitted to the Governor and the Executive Council of the State of New Hampshire, who adopted a resolution purporting to authorize the Attorney General and Special Counsel for New Hampshire to present the proposed agreement in the form of a consent decree to the Supreme Court for its approval. Similar action was taken by the Governor and the Executive Council of the State of Maine.

II. THE PETITIONERS.

The petitioners are:

(1) The New Hampshire Commercial Fishermen's Association, (hereinafter referred to as the "Association"), a non-profit corporation incorporated under the laws of the State of New Hampshire, representing the interests of its members who engage in lobster fishing in the maritime area the ownership of which is disputed by the two states;

(2) Roland Barnaby, David Boies, Edward Carroll, Leon Drew, Steven Driscoll, Michael Flanigan, Peter Flanigan, John Galter, Edward Heaphy, Geno Marconi, Geno Marconi, Jr., Joseph Marconi, Michael Marconi, William Marconi, Robert McDonough, Robert Merrill, Willifred Morrison, John Newick, Frank Peterson, James Robertson, Keith Slingsby, Vincent Tingley, Bail Tucker, Edward Warrington, Mark Warrington, Allan Workman, Harrison Workman.

These petitioners are citizens of the State of New Hampshire who engage in lobster fishing in the disputed area. Members of the Association and these individual petitioners possess valid licenses issued by the State of New Hampshire, pursuant to R.S.A. 211:18, to fish for lobsters in waters under the jurisdiction of the State of New Hamp-

shire. Much of their fishing is presently done throughout the area disputed by the two states, in the belief and recognition that the entire area is within the jurisdiction of the State of New Hampshire;

(3) Sen. Eileen Foley, Sen. Robert Preston, Rep. C. Cecil Dame, Rep. Mary E. Cotton, Rep. Richard Ellis, Rep. Elizabeth A. Greene, Rep. Ruth L. Griffin, Rep. Ralph Hammond, Rep. William F. Keefe, Rep. Richard S. Lockhart, Rep. Ralph C. Maynard, Rep. Joseph A. McEachern, Rep. Paul McEachern, Rep. William Palfrey, Rep. Edna-pearl Parr, Rep. Chris Spirou, Rep. James R. Splaine, Rep. Edna B. Weeks, members of the Legislature of the State of New Hampshire.

III. EFFECT OF THE PROPOSED COMPROMISE AGREEMENT.

The effect of the proposed compromise agreement between the Governors and the Executive Councils of the states will be to place a portion of the disputed area within the jurisdiction of the State of Maine. A section of this area which would appertain to Maine is so situated near the mouth of Portsmouth Harbor that it would be necessary for petitioners to traverse Maine waters in order to reach Portsmouth Harbor, and in order to reach their ports on the New Hampshire mainland.

Laws in the State of Maine prohibit the fishing for, or taking of, lobsters or crabs in Maine waters without a license. R.S.A. 12 § 4404. Only legal residents of the State of Maine are entitled to such licenses. R.S.A. 12 § 4404(4). One effect of the proposed compromise agreement will therefore be to exclude petitioners from fishing in areas in which they have traditionally fished, under the belief and recognition that these areas are within the jurisdiction of the State of New Hampshire.

Maine law makes it:

“unlawful for any person to . . . transport, ship or have in possession any lobster . . . which is less than $3 \frac{3}{16}$ inches in length. . . .” R.S.A. 12 § 4451(1).

The minimum size requirement applicable in New Hampshire is $3 \frac{1}{8}$ inches (R.S.A. 211:27), $\frac{1}{16}$ of an inch less than that applicable in Maine. Maine law also imposes a maximum length of 5 inches. R.S.A. 12 § 4451(2). New Hampshire law imposes no maximum limit.

As a result of the proposed compromise agreement, it will become necessary for petitioners to traverse Maine waters in order to reach New Hampshire ports. While thus in Maine waters, petitioners will be subject to the higher minimum size requirement and the maximum size limitation, and the criminal penalties for undersize and oversize lobsters, imposed by Maine law. They will therefore be prevented from possessing and transporting to New Hampshire ports lobsters which were lawfully caught in New Hampshire waters, which conform to New Hampshire size requirements, and which petitioners have heretofore traditionally possessed and transported in the disputed area in the belief and recognition that such areas were not within Maine’s jurisdiction nor subject to Maine law. Petitioners allege that they will, as a result, suffer financial loss amounting to up to 20 per cent of their present incomes from lobster fishing.

While temporarily in Maine waters, petitioners will also be subject to other provisions of Maine law, among them, the following:

R.S.A. 12 § 4402 (prohibiting the removal of lobster meat from the shell for sale without a permit).

R.S.A. 12 § 4403 (requiring a license for the transportation of lobsters beyond the limits of the state).

R.S.A. 12 § 4454 (regulating the shipment of lobster meat).

R.S.A. 12 § 4455 (establishing minimum and maximum lengths for lobster tails).

R.S.A. 12 § 4459 (prohibiting the possession of egg-bearing lobsters without a permit).

R.S.A. 12 § 4460 (regulating the shipment of lobsters).

IV. ADDITIONAL FACTS.

The proposed boundary agreement has been acknowledged to be a compromise agreement by the New Hampshire Governor and Council, Attorney General and Special Counsel. The petitioners did not learn of the terms of the proposed agreement, or of its compromise nature, until its conclusion was announced on June 26, 1974. Since then, the petitioners have engaged in discussions with, and have made representations to, the New Hampshire Governor, Executive Council, Attorney General, and Special Counsel, in an effort to persuade them as to petitioners' contentions regarding the procedural impropriety of the agreement and the lack of substantive merit to the agreement. The petitioners requested a period of sixty days within which they would fully evaluate the applicable law and evidence, and submit a detailed memorandum to the above-stated New Hampshire officials in an effort to persuade them that the proposed compromise agreement is neither procedurally appropriate nor in the best interests of the petitioners or the State of New Hampshire, and that a claim by New Hampshire in the pending Supreme Court litigation to the entire area in dispute, *i.e.*, to the "lights

in range'' line (see Plaintiff's Complaint, Appendix), or the line claimed in Plaintiff's Complaint, par. IV, could be strongly supported by the law and evidence. The New Hampshire Governor, Attorney General and Special Counsel on September 16, 1974, refused petitioners' request for an opportunity to present such a memorandum and decided to proceed by submitting the proposed compromise agreement to the Special Master in the form of a consent decree. Petitioners have therefore decided to ask this Court to allow them to intervene in the present case, and to present to the Court their views regarding the relevant law and evidence.

V. PETITIONERS' SUBMISSIONS AND ARGUMENTS SHOULD THIS HONORABLE COURT ALLOW THEIR PETITION TO INTERVENE.

In order fully and adequately to protect their interests in the present case, petitioners seek to intervene in order to present evidence, submissions and arguments on the following matters. (At this time, petitioners present these matters in abbreviated form in order to advise this Court as to submissions which they expect to present should their petition be allowed. Petitioners understand and expect that they will make full and complete presentations of evidence and legal argument at the appropriate time after allowance of their petition.)

(1) The proposed boundary agreement between the states is, and is acknowledged by the parties to be, a compromise agreement, rather than a recognition of the location of the true boundary as established by legal principles and legal criteria. A compromise agreement as to the boundaries of the state requires the approval of the New Hampshire Legislature. The establishment of boundaries, and the settlement of boundary disputes by agreement, go to the very essence of the inherent sovereignty

of the state. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725 (1838); 81 C.J.S. *States*, §§ 14, 15. The State of New Hampshire, constituted by its people, is the sovereign, and the Legislature is its agent for the exercise of its sovereignty. New Hampshire Constitution, pt. 1, art. 7; pt. 2, art. 1; pt. 2, art. 5; *Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472 (1940). Therefore, only the Legislature can enter into compromise boundary agreements on behalf of the state.

(2) A compromise boundary agreement between two states requires the approval of the United States Congress. United States Constitution, art. 1, § 10. *Rhode Island v. Massachusetts*, *supra*.

(3) The reaching of a compromise agreement in the context of litigation within the original jurisdiction of the Supreme Court is still subject to the above principles. The function assigned to the Supreme Court by the Constitution is to establish the true, legal location of the boundary by applying legal criteria and legal principles. This *judicial function* is the only function assigned it by the Constitution in such cases. The establishment of a boundary by a compromise is a *political* function, assigned to Congress under the Constitution. See *Florida v. Georgia*, 17 How. 478 (1854) esp. at 494-495, and dissenting opinion of Curtis, J., at 511-512; *Rhode Island v. Massachusetts*, 12 Pet. 657 (1838), esp. at 724-727, 730-735, 737-738. States are not given the choice under the Constitution of having their compromise agreements approved by Congress or by the Supreme Court. The Supreme Court cannot ratify such agreements; it can only declare the location of the boundary according to law.

(4) The applicable law and evidence establish the "lights in range" line, or a configuration very close thereto, as the true legal boundary between New Hampshire and Maine.

By their present petition, petitioners seek to, and, if their petition be allowed, expect to, act in the following ways in the present case:

(1) present evidence, submissions and legal arguments for consideration by the Special Master; and

(2) present evidence, submissions and legal arguments to this Court in objection to the report of the Special Master, should petitioners consider it necessary or advisable to do so in order to protect their interests.

Law.

Supreme Court Rule 9(2) provides that in cases before this Court pursuant to its original jurisdiction, the Federal Rules of Civil Procedure “may be taken as a guide to procedure”, “where their application is appropriate.” Petitioners’ request for leave to intervene in the case of *State of New Hampshire v. State of Maine*, No. 64 Original, is based upon Rule 24, F.R.Civ.P. Specifically, petitioners seek an opportunity to present factual, evidentiary and legal submissions to the Special Master and to the Court. Petitioners do not seek to be made parties to the case in the formal sense of the term. Rather, in view of the substantial interests which petitioners have in the outcome of this case, the potential jeopardy to these interests, the reality of which has been demonstrated by the course of the proceedings thus far, and the substantiality of the matters about which petitioners seek an opportunity to address this Court, petitioners request that this court apply Rule 24, F.R.Civ.P., in such a manner as to accomplish the ends for which original jurisdiction is vested in this Court, and in a manner which will attain the ends of justice. See, *Florida v. Georgia*, 17 How. 478 (1854).

It is necessary for petitioners to intervene not only to be able adequately to protect their own interests, but also to enable this Court to obtain a full presentation of the legal issues relative to the procedural propriety of the proposed compromise boundary agreement—issues which go to the very essence of the Court's powers and function in cases such as the present one. It is also necessary for petitioners to intervene to enable the Court to obtain the fullest possible understanding of the complex legal and factual circumstances relating to the maritime boundary between the states. See *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 415-416 (Minn. 1972).

Petitioners' interests can adequately be protected, and petitioners can effectively be bound by a judgment of the Court in this case, without being made parties in the formal sense. *Florida v. Georgia*, *supra*. They therefore request that this Court apply Rule 24 only to the extent compatible with the above-stated goals, and request to be allowed to intervene in the manner indicated.

I. PETITIONERS MAY INTERVENE AS OF RIGHT UNDER RULE 24(a)(2), F.R.Civ.P.

Petitioners submit that they may intervene in the instant case as of right under Rule 24(a)(2), F.R.Civ.P., which allows such intervention:

“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.”

A. *Petitioners have an Interest Relating to the Property or Transaction which is the Subject of the Instant Case.*

Rule 24, and in particular the interest requirement in Rule 24(a)(2), was revised in 1966 in order to inject into this section elements of elasticity and practicality. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 (1967); *Atlantic Development Corp. v. United States*, 379 F. 2d 818 (5th Cir. 1967). Explaining the revision of Rule 24(a), the Judicial Committee commented,

“If an absentee would be *substantially affected in a practical sense* by the determination made in an action he should as a general rule be entitled to intervene. . . .” Moore’s *Federal Practice*, par. 24.01(10). (Emphasis supplied.)

The Court of Appeals for the District of Columbia Circuit has cautioned that one should not “be led . . . astray by a myopic fixation upon ‘interest.’” *Smuck v. Hobson*, 408 F. 2d 175, 179 (D.C. Cir. 1969). Rather, the interest requirement should be viewed in terms of its underlying policies: to resolve a lawsuit by involving as many individuals who are apparently concerned with the subject of the suit as is compatible with efficiency and due process. *Smuck v. Hobson*, *supra*; *Nuesse v. Camp*, 385 F. 2d 694, 700 (D.C. Cir. 1967). The interest test should be considered as having the goal of promoting the inclusion of all individuals concerned with the suit, rather than excluding from the proceedings as many individuals as possible. It should be viewed as an inclusionary, rather than exclusionary, provision. *Smuck v. Hobson*, *supra*; *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 413 (Minn. 1972). As the District of Columbia Court of Appeals has stated:

“The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that

the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard.” *Hodgson v. United Mine Workers of America*, 473 F. 2d 118, 130 (D.C. Cir. 1972).

The practice of the Supreme Court and Federal courts in applying Rule 24 reflects a broad and “inclusionary” view of the interest requirement in Rule 24(a)(2). See, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

In *Hodgson v. United Mine Workers of America*, 473 F. 2d 118 (D.C. Cir. 1972), members of district trade union bodies had sufficient interest to intervene and object to a proposed consent decree in a suit brought by the Secretary of Labor to lift “trusteeships” imposed by the union on the district bodies. See also, *Textile Workers Union of America v. Allendale Co.*, 226 F. 2d 765 (D.C. Cir. 1955) (corporation and union members had interest in upholding minimum wage level); *United States v. Simmonds Precision Products, Inc.*, 319 F. Supp. 620 (S.D. N.Y. 1970) (union members had interest in protection of job security).

In *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969), the interests of parents in their children’s education were sufficient to allow them to intervene as of right in proceedings brought to appeal a lower court decree which allegedly curtailed the freedom of the local school board to exercise discretion in matters of education policy. In *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (Minn. 1972), the recreational, aesthetic and conservation interests of the State of Michigan and of an environmental group were sufficient to warrant their intervention as of right in pollution abatement proceedings.

Petitioners submit that their interests are similarly sufficient to warrant their intervention as of right in the

instant case. The interests of the fishermen in the location of the boundary at issue, and the interests represented by the Association, are clear, definable and significant. The fishermen have, with other members of the public, a common law right to fish in New Hampshire public waters. *Whitcher v. State*, 87 N.H. 405, 181 A. 549 (1935); see *Johnson v. Hoy*, 151 Ore. 196, 47 P. 2d 252 (1935); 36A C.J.S., *Fish*, § 5, pp. 506-507. They possess licenses issued by the State of New Hampshire to fish for lobster in New Hampshire coastal waters, and they in fact catch and/or transport lobsters in the maritime area disputed by the parties. The right to fish in public waters is legally protectable by injunction from interference. *Morris v. Graham*, 16 Wash. 343, 47 P. 752 (1897); *Columbia River Fishermen's Protective Union v. City of St. Helen's*, 160 Ore. 654, 87 P. 2d 195 (1939). These interests of the petitioner-fishermen, and those represented by the Association, could be directly affected by a decree of this Court fixing the boundary between the states in that, should a portion of the disputed area as a result of the decree appertain to Maine (as if the decree is based upon the proposed compromise agreement), the fishermen would be excluded from catching lobsters in areas in which they previously fished, they would be prevented from transporting through certain waters lobsters of sizes which they previously so transported, and they would otherwise be subject to provisions of Maine law to which they were not previously subject. They therefore have a substantial interest both in the property, or maritime area, in dispute and in the transaction which resulted in the proposed compromise agreement which will be submitted to the Special Master, and perhaps to the Court, in the form of a consent decree.

The New Hampshire legislators allege that under the constitution and laws of the State of New Hampshire they are representatives of their constituents for the exercise

of the sovereignty of the State (*Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472 (1940)), and that they have a clear and substantial interest in the boundary and in the territory of the State of New Hampshire. They also have the right and obligation to vote on any compromise agreement with another state affecting such boundary and territory. They therefore have a significant interest in the instant case, and in the proposed compromise agreement which, if given legal effect, would violate their legal and constitutional rights and obligations. In *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940), the Securities and Exchange Commission was held to have sufficient interest in the maintenance of its statutory authority and performance of its public duties to entitle it to intervene to prevent a proposed corporate reorganization, which should have been subjected to its scrutiny, from proceeding without such scrutiny. Petitioners' interests are at least as significant as those found sufficient in the cases cited above to warrant intervention as of right.

Petitioners clearly are concerned with the issues presented in the instant case, and could be substantially affected in a practical sense by a determination of these issues by the court. Under the inclusionary policy of Rule 24, and the broad view of the Rule taken by this Court and the Federal courts, petitioners submit that their interests in the subject matter of the instant case are sufficient to warrant their intervention as of right.

B. Petitioners are So Situated that Disposition of the Present Case Will as a Practical Matter Impair or Impede their Ability to Protect their Interests.

A determination of the location of the boundary line by the Court in the instant case will constitute a final determination of this issue which will effectively bind not only

the parties to the case, but the petitioners as well. *Florida v. Georgia*, 17 How. 478, 493 (1854). Similarly, entry of a decree by this Court in accordance with the proposed compromise agreement will leave petitioners with no other remedy or forum by which to assert and have redress for the procedural impropriety of the compromise agreement. There is no way by which petitioners could contest or appeal a final decision of this Court in the instant case. *Florida v. Georgia*, *supra*.

“[I]f the right to intervene is denied . . . there is no apparent way for [petitioners] to pursue their interests in a subsequent lawsuit. . . . Since this is so, the intervenors have borne their burden to show that their interests would ‘as a practical matter’ be affected by a final disposition of this case. . . .” *Smuck v. Hobson*, 408 F. 2d 175, 180-181 (D.C. Cir. 1969).

Petitioners submit that “[j]ustice . . . requires that they should be heard before their rights are concluded.” *Florida v. Georgia*, *supra*, at 493.

C. Petitioners’ Interests are Not Adequately Represented by Existing Parties.

Rule 24(a)(2) does not require petitioners to establish that their interests are not adequately represented by existing parties. Rather, as this court has recently indicated,

“The requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘*may be*’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538, n. 10 (1972) (emphasis supplied).

Similarly, in *Kaufman v. Societe Internationale pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952), this Court found petitioners' allegations sufficient to show that they *might* have been inadequately represented. See also, *Hodgson v. United Mine Workers of America*, 473 F. 2d 118 (D.C. Cir. 1972); *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969); *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (Minn. 1972).

The interests of the petitioning legislators in the instant case are not represented or protected by the State of New Hampshire. The New Hampshire Governor, Attorney General and Special Counsel have denied the existence of such interests. Their submission to the Court of the proposed compromise boundary agreement, which has not been submitted to a vote of the Legislature, is itself wholly inconsistent with the interests of the legislators. The position adopted by New Hampshire with respect to the procedural impropriety of the proposed compromise agreement is in opposition to the position and interests of the legislators. These petitioners' interests are not only not adequately represented by New Hampshire; they are expressly opposed by that party.

The interests of the fishermen are also not adequately represented by New Hampshire. The actions of an existing party need not amount to bad faith in order to constitute inadequate representation. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 539 (1972); *Smuck v. Hobson*, 408 F. 2d 175, 181 (D.C. Cir. 1969). In *Kaufman v. Societe Internationale pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952), petitioners raised sufficient doubt as to the adequacy of the representation of their interests by alleging that the representatives' claim would prejudice their interests, and that the representatives refused to present petitioners' claims. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S.

129 (1967), representation of the petitioners by the United States was inadequate when the Justice Department agreed to a settlement of the case which was not in accordance with the court's previous decree in the litigation, and which did not adequately protect the interests of the petitioners. Similarly, in *Hodgson v. United Mine Workers of America*, 473 F. 2d 118 (D.C. Cir. 1972), petitioners met their burden of showing that representation of their interests by the Secretary of Labor might be inadequate by alleging that the Secretary of Labor's proposed consent decree would not fully restore and protect petitioners' interests.

“To the extent that this relief [in the proposed decree] falls short of what appellants themselves would reasonably ask, the Secretary's representation of their interest in the remedial phase of the litigation is inadequate.” *Hodgson v. United Mine Workers of America*, *supra*, at 130. See also; *United States v. Simmonds Precision Products*, 319 F. Supp. 620 (S.D. N.Y. 1970).

Other cases have held representation of petitioners' interests by the United States inadequate when the government held positions in the suit contrary to those of the petitioners (*Textile Workers Union of America v. Allendale Co.*, 226 F. 2d 765 (D.C. Cir. 1955)) and when it was uncertain whether the government would present to the court all available law and evidence necessary to decide the issues (*United States v. Reserve Mining Co.*, 56 F.R.D. 408 (Minn. 1972)).

The petitioning fishermen submit that, measured by these standards, their burden of showing that representation of their interests by New Hampshire may be inadequate is certainly met. The proposed compromise boundary agreement which will be submitted to the Court and actively supported by New Hampshire will oust petitioners from

maritime areas in which they have habitually fished, will prevent them from transporting through particular areas and to New Hampshire ports lobsters of certain sizes which they have habitually so transported, and will subject them to provisions of Maine law to which they have not previously been subject. The state has refused actively to present to the Court, or to support, petitioners' reasonable and good faith claims to the "lights in range" line (see Appendix to Plaintiff's Complaint), or the line claimed in Plaintiff's Complaint, par. IV, as the true boundary between the states. The Governor, Attorney General and Special Counsel for New Hampshire have refused to recognize petitioners' contentions that the available law and evidence strongly support this claim, and that it should be pursued by the state in this litigation. Moreover, the New Hampshire Governor, Attorney General and Special Counsel have refused to allow petitioners an opportunity to present to them full factual and legal substantiations of the strength of this claim. The proposed compromise boundary agreement will be actively supported by New Hampshire and Maine before this Court, and it is clear that neither existing party will make adequate or full presentations of evidence or arguments of law in support of the "lights in range" line, or the line claimed in Plaintiff's Complaint, which is claimed by petitioners to be the true boundary line. Since neither existing party will adequately represent or support the interests of petitioners, petitioners submit that they should be allowed to intervene in order adequately to protect their own interests.

II. PETITIONERS SHOULD BE ALLOWED TO INTERVENE PURSUANT TO RULE 24(b), F.R.CIV.P.

Should this Court not find intervention as of right to be warranted under Rule 24(a), petitioners request that

they be allowed to intervene pursuant to the “permissive intervention” provision of Rule 24(b). Petitioners’ claims present questions of law and fact in common with those presented by the existing parties to the instant litigation. Petitioners submit that the circumstances discussed *supra* in support of their claim to intervention as of right demonstrate that the ends of justice would not be served should this case be determined without affording them an opportunity to be heard.

III. INTERVENTION IS APPROPRIATE EVEN THOUGH THE PRINCIPAL LITIGATION IS BETWEEN TWO STATES.

The circumstance that the instant litigation is between two states does not prevent intervention by individual or corporate persons if it is otherwise warranted or justified under Rule 24, F.R.Civ.P. A person may intervene in an action between states if he has a compelling interest in his own right, apart from his interest as a citizen and taxpayer. *New Jersey v. New York*, 345 U.S. 369 (1963); *Kentucky v. Indiana*, 281 U.S. 163 (1930). Petitioners respectfully refer this Court to their submissions, arguments and conclusions in “I”, *supra*, and submit that they amply establish the existence of petitioners’ particular interests separate from their general interests as citizens of New Hampshire.

An individual was granted leave to intervene in a boundary dispute before this court in *Oklahoma v. Texas*, 254 U.S. 609 (1920), and several corporate persons were granted leave to petition to intervene in that case. *Oklahoma v. Texas*, 253 U.S. 465, 470-471 (1920). The United States was allowed to intervene in the boundary dispute in *Florida v. Georgia*, 17 How. 478 (1854).

IV. PLEADING ADOPTED BY PETITIONERS.

In view of the scope of intervention sought by petitioners, *i.e.*, to be allowed an opportunity to present factual, evidentiary and legal submissions and arguments to the Special Master, and to be allowed to present such submissions and arguments in writing and orally to this Court in opposition to the report of the Special Master should petitioners consider it necessary or advisable to do so, and since petitioners do not seek to be made parties to the litigation in the formal sense of the term, they have not considered it appropriate to attach a proposed pleading to their motion. If, however, this Court considers such a pleading to be necessary, petitioners adopt the complaint filed by the State of New Hampshire against the State of Maine on June 6, 1973. See *McCausland v. Shareholders Management Co.*, 52 F.R.D. 521 (S.D. N.Y. 1871).

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