IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 50 Original

STATE OF VERMONT, a sovereign state, Montpelier, Vermont,
Plaintiff,

—v.—

STATE OF NEW YORK, a sovereign state, Albany, New York
and
INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION TO MONROE COUNTY CONSERVATION COUNCIL'S MOTION TO INTERVENE AS A PLAINTIFF AND FOR LEAVE TO FILE COMPLAINT

TAGGART WHIPPLE
RICHARD E. NOLAN
Attorneys for Defendant
International Paper Company
1 Chase Manhattan Plaza
New York, New York 10005
212—HAnover 2-3400

WILLIAM H. LEVIT, JR.
RONALD V. BRYANT
DAVIS POLK & WARDWELL
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE

Supreme Court of the United States

October Term, 1970

No. 50 ORIGINAL

STATE OF VERMONT, a sovereign state, Montpelier, Vermont,

Plaintiff,

—v.—

STATE OF NEW YORK, a sovereign state, Albany, New York

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION TO MONROE COUNTY CONSERVATION COUNCIL'S MOTION TO INTERVENE AS A PLAINTIFF AND FOR LEAVE TO FILE COMPLAINT

Jurisdiction

Monroe County Conservation Council's motion for leave to intervene as a party plaintiff herein is purportedly based on a theory of jurisdiction ancillary to the original jurisdiction claimed by the State of Vermont in this action.

Question Presented

In a proposed original action should this Court grant leave to intervene as of right to a private group which could not bring an original action in this Court and which fails to meet the requirements for intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure?

Rule Involved

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention of right:

> "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."

Statement of the Case

This motion is made in a proposed original action which the State of Vermont seeks to maintain in this Court against the State of New York and International Paper Company on non-federal claims of nuisance and trespass relating to alleged pollution of Lake Champlain. The background of that action, and the reasons why International Paper Company submits that it is an inappropriate case for the exercise of this Court's original jurisdiction, are set forth in the Company's Brief filed herewith in Opposition to Vermont's Motion.

Monroe County Conservation Council ("Monroe"), a group of private New York citizens located in Rochester (over two hundred miles from Lake Champlain), seeks leave to intervene as of right and to seek affirmative relief against New York State and International Paper Company on the theory that it "is particularly interested in improving our environment and protecting our remaining natural resources anywhere in our nation" (Complaint, par. I) and the unsupported contention "[t]hat the plaintiff Monroe County Conservation Council is the only party representing the interests of the people of the State of New York" (Complaint, par. XXXV).

No claim is made that Monroe County or any of its residents, including Monroe's membership, owns property on Lake Champlain or has been injured in any way other than any alleged injury suffered by the citizens of New York as a whole (Complaint, pars. XXVIII-XXX).

ARGUMENT

I. Monroe Could Not Itself Bring an Original Action in this Court and No Basis Exists for Permitting it to Accomplish that Result By the Device of Intervention.

If Monroe sought to file its complaint in this Court as an original matter, there is little question that this Court would decline to accept the case because its original jurisdiction under 28 U.S.C. § 1251 does not extend to suits by private individuals or groups against their own sovereign state. *Cf. Hans* v. *Louisiana,* 134 U.S. 1 (1890); C. WRIGHT, FEDERAL COURTS § 109 (1970 ed.). Nor could Monroe seek to sue International Paper Company in this Court because of the

limitations imposed by 28 U.S.C. § 1251. Even assuming that Vermont's action is a proper subject for the exercise of this Court's original jurisdiction despite *Ohio* v. *Wyandotte Chemicals Corp.*, No. 41 Orig. (U.S. Sup. Ct., March 23, 1971), there is no rational basis for permitting a group of New York citizens to circumvent well-settled principles of federal jurisdiction by granting it leave to sue in this Court the very state of which its members are citizens as well as a corporation incorporated in and having its principal place of business in the same state. In effect, this would present an original action in which the State of Vermont and Monroe (composed of New York citizens) are seeking common law and equitable relief based on state law against the State of New York and a New York corporation. This would be clearly improper in any action sought to be brought in a federal district court, see *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch) 267 (1806), and is equally improper in original actions in this Court.

The limits on this Court's original jurisdiction are constitutional, and may not be altered by judicial doctrine. The requirement of complete diversity in Article III, Section 2(2) cases has been discussed by this Court:

> "When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while substaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.

> As then, the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file proposed bill must be and is *Denied.*" *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 246-47 (1902).

Constitutional limitations on this Court's original jurisdiction clearly take precedence over the Federal Rules of Civil Procedure, which are not binding on this Court but rather are a procedural guide for use in original actions. *See* Rule 9(2) of the Rules of this Court; *Utah* v. *United States,* 394 U.S. 89, 95 (1969). Nor can such jurisdiction be enlarged, as Monroe erroneously claims, by the doctrine of ancillary jurisdiction. No case has been or could be cited by Monroe to establish the applicability of that doctrine to cases within the original jurisdiction of this Court. Nor is there any reason or overriding public policy to permit intervention in original actions and thereby complicate even further a type of case which this Court has found difficult and cumbersome to handle. *See Ohio* v. *Wyandotte Chemicals Corp.,* No. 41 Orig. (U.S. Sup. Ct., March 23, 1971). We therefore submit that, even assuming Vermont's action to be an appropriate vehicle for the exercise of this Court's original jurisdiction, there can be no proper basis for permitting intervention by Monroe as a party plaintiff.

II. Even Assuming the Applicability of Rule 24, Monroe Lacks the Requisite Interest to Warrant Intervention as of Right

Even assuming that Rule 24(a)(2) were applicable here, Monroe fails to show even the minimal contacts with the Lake Champlain controversy which the Rule requires, nor can Monroe credibly claim any interest different from or greater than the millions of other New Yorkers who may be interested in ecological matters affecting the State.

Rule 24(a)(2), upon which Monroe relies, requires a showing that:

> ". . . 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." F.R. Civ. P. 24(a)(2).

Monroe and its members claim no ownership or other recognized legal interest in Lake Champlain or its environs. Rather their interest is a concern over ecological matters affecting the State and the Nation, a concern shared by most of their fellow citizens. Whatever might be their status as to ecological matters directly affecting Monroe County itself under *Citizens Committee for the Hudson Valley* v. *Volpe,* 425 F.2d 97 (2d Cir. 1970), *cert. denied,* 39 U.S.L.W. 3242 (Dec. 7, 1970), it strains credulity to believe that this group has any unusual or special interest in Lake Champlain, an area considerably removed geographically from Rochester.

Monroe's public concern with the outcome of this case is certainly not the "interest relating to the property" as re-

quired by Rule 24(a)(2). This Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) with respect to intervention as of right under Rule 24(a)(2) "should not be read as a carte blanche for intervention by anyone at any time" because "a direct, substantial, legally protectable interest in the proceedings" is still required for intervention of right. *Hobson* v. *Hansen,* 11 Fed. Rules Serv. 2d 24a.2, Case 6, at 680, 681 (D.D.C. 1968). In *Edmondson* v. *Nebraska,* 383 F.2d 123 (8th Cir. 1967), a claim of possible injury to the applicant's reputation by allegations of collusion and fraud between applicant and a third party in a suit by the government against the third party was held not to be sufficient "legal detriment" to justify intervention of right. In *United States* v. *CIBA Corp.,* 1970 Trade Cas. ¶ 73,319, at p. 89,261 (S.D.N.Y. 1970) the District Court stressed that even after the *El Paso* case, the interest justifying intervention of right in a government antitrust suit "must be substantial, must be at the center of the controversy, and must be shown clearly, in the language of the Rule, to be less than 'adequately represented' by the Department of Justice." Monroe's general concern is clearly distinguishable from the direct and immediate interest of a public official charged with enforcing the law as in *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967), or the interest of a company seeking to intervene in litigation over property to which it claimed legal title, as in *Atlantis Development Corp.* v. *United States,* 379 F.2d 818 (5th Cir. 1967), cited in Monroe's Brief at p. 17.

In seeking to justify intervention as of right, Monroe cites several recent cases (*Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970)) which have expanded

the doctrine of standing to allow groups of citizens to seek review of administrative actions as "aggrieved" parties under the Administrative Procedure Act (Brief for Applicant at 14-16). Not only are such cases irrelevant to intervention as of right under Rule 24(a)(2), but Monroe fails to meet the tests set out in those cases even if they were applicable.

Some of the tests to be used in determining the standing of conservation groups were set forth in *Citizens Committee for the Hudson Valley* v. *Volpe,* 425 F.2d 97 (2d Cir. 1970), *cert. denied,* 39 U.S.L.W. 3242 (Dec. 7, 1970). There plaintiff was composed of "citizens who reside near the proposed Expressway" (425 F.2d at 103). Here the proposed intervenor is composed of citizens who reside over 200 miles from the site of the controversy. There the plaintiff had "substantial membership" in the area (*Id.*). Here, Monroe does not allege that it has members in any of the counties surrounding Ticonderoga Bay. There "[a]ll plaintiffs made a vigorous effort to present their views to the New York Department of Transportation and to the federal officials responsible for granting the disputed permit" (*Id.*). Here, Monroe attempts for the first time to interject itself into this controversy by seeking intervention as of right in this Court. The Federal Conference on the Pollution of the Interstate Waters of Lake Champlain, convened pursuant to Section 10 of the Federal Water Pollution Control Act, has been actively engaged in the improvement of water quality in Ticonderoga Bay for almost 2½ years. This Conference has been attended by dozens of persons representing various agencies, associations, committees and the like. No representative of Monroe, nor indeed anyone from Mon-

roe County, has appeared at any sessions of the Conference. We submit that Monroe's activities in the Rochester area and its claimed interest in Lake Ontario hardly give it standing to intervene in a controversy involving another entirely different geographic region of the State of New York.

A similar attempt to interfere in a controversy not directly concerning a like organization was rejected in *Sierra Club* v. *Hickel,* 433 F.2d 24 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3353 (Feb. 22, 1971):

> "The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an 'interest' in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all . . .
>
> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense . . ." 433 F.2d at 30.

Thus, even assuming that these cases were applicable here, Monroe fails by a wide margin to meet the requirements of direct and obvious interest required by these decisions.

Finally, there is no basis for Monroe's conclusory argument that only it can properly represent the interests of the people of New York and that the elected and appointed officials of the State have neglected their proper duties. While we consider this a matter to which the Attorney General of New York more appropriately should respond, we suggest that if Monroe is dissatisfied with the activities of New York's public officials, it should take appropriate action

through regular political and governmental channels, rather than by improperly seeking to encroach vicariously on the original jurisdiction of this Court.

CONCLUSION

For the reasons stated above, we urge that the Monroe County Conservation Council's motion to intervene as a plaintiff and for leave to file a complaint in this Court be denied in all respects.

Dated: New York, New York
March 30, 1971

Respectfully submitted,

TAGGART WHIPPLE
RICHARD E. NOLAN
Attorneys for Defendant
International Paper Company

WILLIAM H. LEVIT, JR.
RONALD V. BRYANT
DAVIS POLK & WARDWELL
Of Counsel

Certificate of Service Under Rule 33

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 50 Original

STATE OF VERMONT, a sovereign state, Montpelier, Vermont,

Plaintiff,

—v.—

STATE OF NEW YORK, a sovereign state, Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

TAGGART WHIPPLE, attorney for Defendant International Paper Company and a member of the Bar of this Court, certifies that all parties required to be served with Defendant's brief dated March 30, 1971 were served the 30th day of March, 1971, three copies having been mailed this day respectively to the Honorable Deane C. Davis, Governor of the State of Vermont, National Life Drive, Montpelier, Vermont 05602; the Honorable James M. Jeffords, Attorney General of the State of Vermont, State Library Building, Montpelier, Vermont 05602, attorney for plaintiff; the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, 80 Centre Street, New York, New York

Certificate of Service Under Rule 33

10013, attorney for defendant State of New York; and Wayne M. Harris, Esq., 226 Powers Building, Rochester, New York 14614, attorney for applicant for intervention, by depositing the same in a mail box maintained by the United States Post Office at 1 Chase Manhattan Plaza, New York, New York 10005, with first class postage prepaid.

March 30, 1971

TAGGART WHIPPLE

TAGGART WHIPPLE