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,

MONROE COUNTY CONSERVATION COUNCIL, An
Unincorporated Association,
Rochester, New York
Applicant for Intervention.

REPLY BRIEF TO BRIEFS OF DEFENDANTS OPPOSING MONROE COUNTY CONSERVATION COUNCIL'S MOTION TO INTERVENE AS A PLAINTIFF AND OPPOSING VERMONT'S MOTION FOR LEAVE TO FILE A COMPLAINT.

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The Defendants' arguments in opposition present the following four main points.

(1) Both Defendants argue that Applicant fails to have sufficient interest in the subject matter of the litigation primarily because Monroe County is "geographically distant" from Ticonderoga which is adjacent to the South end of Lake Champlain.

(2) Defendant New York argues that Applicant fails to show that its interests are not already protected by the State of Vermont.

(3) Defendant International Paper Co. argues that Applicant could not itself bring an original action in this Court and thus should not be allowed to intervene in a case where original jurisdiction has already been established.

(4) Defendants argue that Vermont has not presented a justiciable case against the State of New York requiring its presence herein.

APPLICANT'S REPLY TO POINT (1)

Surely the simplistic notion that Applicant can have no interest in Lake Champlain because Monroe County is about 210 miles, as the crow flies, from Ticonderoga must fail.

Rather, the issue is the nature and intensity of the interest that Applicant has in the transaction which is the subject of the action. While Applicant, of course, does have concern with environmental issues in general, as pointed out in paragraph I of its complaint, Applicant has conducted numerous New York *Statewide* activities to evidence beyond doubt its interest in New York *State* environmental issues.

In fact, the breadth of Applicant's Statewide interest in environmental issues has been so widespread as to prompt the national magazine, *Field and Stream* (May, 1970) to recognize that:

> The 20-club, 5,000 member Monroe County Conservation Council is the most active organization of its kind in the state and, perhaps, a model for citizen conservation groups everywhere.

Thus, it is clear that if any conservation group in the State of New York has an interest in a conservation or environmental issue anywhere in the State, it is Applicant.

Because it has established that Applicant is the most active conservation organization in the State the allegation by Defendant International Paper Company that Applicant's interest is not different from or greater than millions of other New Yorkers genuinely interested in the ecological matters affecting the state is clearly erroneous.

Perhaps the most famous recent intervention by a group similarly situated to Applicant was the legal action instituted by the Wilderness Society, Friends of the Earth and the Environmental Defense Fund, all of which are based in Washington, D.C., in their suit against Secretary of the Interior Hickel and their obtaining of a Temporary Injunction enjoining the

issue of permits to build a pipeline in Alaska. The geographical distance between Washington, D.C. and Alaska is many times the distance from Monroe County to Ticonderoga.

APPLICANT'S REPLY TO POINT (2)

Applicant thought it so patently obvious that its interests and the interests of similarly situated New York State citizens in the pollution of Lake Champlain could not be adequately protected by the State of Vermont, that elaboration was not needed.

However, to belabor the obvious, the following is offered.

The boundary between Vermont and New York, roughly cuts through the center of Lake Champlain in a North-South direction. Thus, because of this physical boundary, Plaintiff, the State of Vermont, can only be concerned with the one half of the problem that is within its State. However, the pollution is of all of Lake Champlain including that portion in New York State. Without Applicant's intervention there would be absolutely no one representing the conservation viewpoint as to the New York State half of Lake Champlain.

APPLICANT'S REPLY TO POINT (3)

Defendant places primary emphasis on the case of *Minnesota v. Northern Securities Company,* 184 U.S. 199 (1902) where the Court discussed that complete diversity must be maintained where necessary and indispensable parties are to be joined to a lawsuit. This situation would now come under FRCP 19 and it is still the rule that:

> Where jurisdiction is dependent upon the character of the parties, as in diversity cases, there must be complete diversity, i.e., each plaintiff must be able to sue each defendant, . . . 3A Moore's Federal Practice § 19.04[2] (1969).

But, it is clear that the issue in the instant case is *not* the required joinder of necessary and indispensable parties under FRCP 19 but the different issue of the *voluntary* intervention of a party into a lawsuit under FRCP 24. In voluntary intervention situations, it is clear that there is a different rule than that mentioned above for FRCP 19 and the rule in voluntary intervention situations as stated in Applicant's Brief is:

> Where the right to intervene is absolute no independent ground of federal jurisdiction need be shown to support

the intervention. 3B Moore's Federal Practice § 24.18[1] (1969).

Thus, it is clear that Defendant's emphasis on *Minnesota v. Northern Securities Co.* is misplaced.

While it is true that the Federal Rules of Civil Procedure are only a guide to the conduct of original actions in the Supreme Court "where their application is appropriate" (Rule 9(2) of the Rules of Court) it is respectfully solicited that FRCP Rule 24(a)(2) should be followed by the Supreme Court in the same manner as it has been by many lower Federal Courts to permit intervention in original actions in the Supreme Court without the intervenor having to establish an independent basis of jurisdiction. It is entirely appropriate in the interests of harmony and uniformity in the Federal Judiciary for this Court to follow the rule in its original actions which has been adopted by the lower Federal Courts.

APPLICANT'S REPLY TO POINT (4)

Vermont presents a justiciable controversy requiring defendant, State of New York's presence in order that complete and equitable relief may be granted.

Applicant joins with, concurs in, and incorporates by reference those points raised by plaintiff, State of Vermont, in support of its motion for leave to file its complaint. Further, applicant respectfully submits that the court consider as relevant herein the principles relating to the joinder of persons needed for just adjudication. (Rule 19 FRCP). In discussing principles relating to who should be considered indispensable parties, Mr. Justice Curtis declared:

> Persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience . . .

are indispensable parties. *Shields v. Barrow,* 17 How. 130, 136, (1854). Further, Mr. Justice Curtis, declared:

> . . . if the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach—as if such party be a resident of another state—

> ought not to prevent a decree on its merits. But if the case cannot be thus decided, the court should make no decree.
>
> Id. at 139.

Applicant respectfully submits that complete relief could only be granted in the instant case if the State of New York were a party defendant to the law suit. As has been previously stated, approximately one-half of Lake Champlain lies in the State of New York and the other half in the State of Vermont. Vermont can only be concerned with its portion and how the conduct of defendants has affected and is affecting its property and citizens. Further, in order for any decree to be effective which affects New York's interest, the State of New York must be a party to the action. Any relief granted with respect to Lake Champlain must necessarily affect both the States of Vermont and New York. In addition, Section 429-b of the New York State Conservation Law provides that no person or local public corporation shall excavate or place fill in the navigable waters of the State of New York without first obtaining a permit from the State of New York Water Resources Commission (whose functions have been presently transferred to the department of environmental conservation). Assuming, *arguendo,* that the International Paper Company was ordered to remove the pollutants from Lake Champlain, it would have to obtain a permit from the State of New York which the State of New York could deny leaving plaintiffs with empty relief. Viewing New York's substantial interest in the geographical area involved there is no question that it is indispensable as a party defendant in the adjudication of this matter. The State of New York argues that this suit is bottomed on a mere difference of opinion concerning the manner in which its laws should be enforced. It has cited cases for the proposition that the maladministration of one state's laws to the detriment of a sister state is not a justiciable controversy. But, this court should not be so generous as to construe maladministration to mean no administration whatsoever. Plaintiffs allege that defendant State of New York has permitted and by such permission has knowingly consented to the violation of its "C" Water Classification Standard and contributed to the despoiling of Lake Champlain as much as if a facility of the State of New York was dumping pollutants directly in the Lake. The utter absence of any averments of any meaningful steps taken by

the State of New York throughout the forty-odd years this situation has been allowed to fester tend to prove the correctness of the plaintiff's allegations. Belated, untimely efforts, hastily consummated, under pressure of this action are insufficient to purge the State of its guilt. Those efforts come years too late and accomplish too little. In the area of negligence it has been stated that inaction may constitute negligence where a duty to act exists. 65 C.J.S. Section 18. There can be no doubt that the State of New York has a duty to act to protect the welfare of its citizens. While ordinarily it may be sound policy not to interfere with internal, discretionary decisions of separate sovereign entities, this court should not countenance the utter dereliction of duty that the State of New York has exhibited herein. Government exists for the people. In the American System the courts stand as the ultimate safeguard of personal and property rights. At this stage in the history of our country, it is peculiarly important that this court be sensitive to the real needs and concerns of its country's citizens and be ever vigilant to take whatever steps it feels necessary to correct a wrongful and dangerous situation however arduous and complex such a case may be. The risks that are run in failing to take judicial cognizance of cases of this nature are too high. In a sense our system of justice is on trial here. The time is ripe for judicial intervention and public policy cries out that government be made to be responsible and take effective measures to stop pollution in order that man may survive.

CONCLUSION

For the reasons stated above, there is now made an even clearer showing that Applicant's Motion to Intervene as a Plaintiff and for leave to file a complaint in this Court should be granted and that Vermont's motion for leave to file a complaint should also be granted.

Respectfully submitted,

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APPENDIX A

Pertinent Statutory Provision

New York Conservation Law, § 429(b). Protection of Navigable Waters; excavation or fill; permit

PART III-A—USE AND PROTECTION OF WATERS

§ 429-a. Protection of certain streams; disturbance of stream bed: permit

2. Town projects

A town board may authorize its highway superintendent to alter a creek bed to eliminate private land erosion, subject to consent from, or, in an emergency, due notice to the State Water Resources Commission. Op. State Compt. 69–643.

§ 429-b. Protection of navigable waters; excavation or fill; permit

1. No person or local public corporation shall excavate or place fill in the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to navigable waters as defined by subdivision four of section two of the navigation law and that are inundated at mean high water level or tide, unless a permit therefore shall have first been obtained pursuant to Subdivision 3 hereof. Nothing in this section contained is intended nor shall be construed to limit, impair or affect the memorandum of understanding which any state department enters into with the Commission or the general powers and duties of the Department of Transportation relating to canals or the Department of Conservation relating to flood control.

As amended L. 1968, c. 420, § 64; L. 1970, c. 716, eff. Sept. 1, 1970.

2. A person or local public corporation desiring to make such excavation or fill shall make application to the Commission setting forth the character and extent of the work proposed and such other information as the Commission may require. The application shall be accompanied by drawings, plans and specifications showing the location and details of the proposed work.

3. The Commission, before granting such permit shall ascertain the probable effect on the use of such waters for navigation, the health, safety and welfare of the people of the state and the effect on the natural resources of the state,

including soil, forests, water, fish and aquatic resources therein, likely to result from such channel excavation or fill.

4. The Commission shall review plans and may grant such permit, or may as a condition to the issuance of such permit prescribe modifications of such plan in order to safeguard life or property against danger or destruction and to make such navigable waters safe for use by the public, or it may refuse such permit.

5. The provisions of this section shall be in addition to and shall not affect or replace the provisions of Section 429-a requiring a permit for the alteration of certain streams or the removal of sand, gravel or other material therefrom, except that the Commission may by regulation provide that only one application for permit need be filed in case the relief sought pertains to work in such streams which are also navigable waters of the state.

Added L. 1965, c. 955, § 7, eff. Jan. 1, 1966.