IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 8, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

AMENDED MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS, STATEMENT IN SUPPORT, AND REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE ORIGINAL MOTION

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

AMENDED MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS

Now comes the State of Texas, defendant in the above-entitled cause, and moves for an order granting leave to take the oral depositions of Captain Thomas Fenlon of Hunt, Texas, at his residence near Hunt, Texas; and of Robert H. Armiger, 945 Alma Street; Captain Richard Carey, 1165 Roberts Avenue; Richard Carey, Jr., 2396 Victoria Street; and Edgar Granger, 940 Roberts Avenue; all of Beaumont, Texas, at the law offices of Benckenstein, Wells and Duncan, 610 San Jacinto Building, Beaumont, Texas, on early dates to be set by defendant after reasonable notice to the plaintiff as provided in Rule 30(a) of the Federal Rules of Civil Procedure.

Statement in Support

On November 18, 1949, the State of Texas filed its motion for an order granting leave to take the oral depositions of Captain Thomas Fenlon on December 2, 1949, and of Robert H. Armiger and others on December 5, 1949. Since the Court took no action thereon prior to its present recess (November 21-December 5), and it being apparent that because of this recess an order could not be entered in time to permit the taking of these depositions on the requested dates, defendant respectfully submits its amended motion for leave to take such depositions at later dates upon appropriate notice to the plaintiff.

As stated in the original motion, if this suit were pending in a federal district court, the defendant, at this stage of the proceedings, would be privileged, under Rule 26(a) of the Federal Rules of Civil Procedure, to take these depositions "without leave of court." However, since the Federal Rules of Civil Procedure are applicable here by analogy only, defendant asks leave of the Court to take the depositions under the procedure therein set forth.

As further stated in the original motion, witnesses Fenlon, Armiger, Richard Carey, Richard Carey, Jr., and Granger are now 81, 80, 90, 60, and 62 years of age respectively. The age and physical condition of some of these witnesses indicate the importance, if not the necessity, of taking their depositions without delay in order that their testimony may be preserved. In view of the present possibility that these witnesses may not later be available, defendant

desires that the depositions be taken at the earliest practicable date consistent with the health, physical condition, and availability of the witnesses to appear and to testify by deposition. Proceeding in accordance with Rule 30(a) of the Federal Rules of Civil Procedure will provide the necessary flexibility as to the exact date on which a given deposition shall be taken, which appears at this time to be required by the state of health of some of these witnesses, and also will provide due notice thereof to plaintiff.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

December 2, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE ORIGINAL MOTION FOR LEAVE TO TAKE ORAL DEPOSITIONS

On November 30, 1949, the plaintiff filed objections to the granting of defendant's motion for leave to take oral depositions. Plaintiff simultaneously filed a motion for judgment on the pleadings seeking to have the case disposed of without the taking of evidence, but reserving its "right to trial on any issues of fact which cannot be resolved by judicial notice."[1] In opposing defendant's motion to take the depositions, plaintiff relies solely upon the assumption that inevitably plaintiff's motion for judgment on the pleadings will be granted and that no

[1]Motion for Judgment, p. 1.

evidence will be heard unless plaintiff desires to offer it.

Defendant will reply to plaintiff's motion for judgment in due course. The present reply is addressed only to plaintiff's memorandum in opposition to the request for leave to take oral depositions.

Defendant respectfully submits that the denial of its motion for leave to take these oral depositions and the plaintiff's proposed limitation of the facts to those which may be judicially noticed will deprive defendant of this relevant and material proof which it is entitled to present to the Court, for the following reasons:

1. Unless the defendant is permitted to take these depositions, it has no other way properly to develop the facts within the knowledge of these witnesses, and thus will be deprived of the benefit of relevant and material proof in support of certain of its defenses. The testimony of these witnesses is desired on two issues:

(a) The existence and the extent of knowledge and use of subsoil minerals, especially oil, within the area described in the complaint prior to and since the annexation agreement between the United States and Texas. This is relevant to the intent of the parties to the agreement and supports defendant's contention that such subsoil minerals were specifically intended to be reserved to the State of Texas under the terms of the annexation agreement and were not intended thereby to be conveyed to the United States.

(b) The various uses to which the State of Texas has devoted portions of the lands, minerals, and other

things within the area described in the complaint and the open, adverse, exclusive, and uninterrupted character of the defendant's possession of these lands, minerals, and other things. This is relevant to the prescriptive rights of defendant based in part upon open, adverse, exclusive, and uninterrupted possession over lands, minerals, and other things described in the complaint, without interference with any of the constitutional powers of the Federal Government.

2. The time consumed in the disposal of other motions now before the Court may deprive defendant of this evidence altogether. During the pendency of plaintiff's motion for judgment and of defendent's motion for appointment of a special master, and before the issues on the merits can be reached under any due and orderly process, it is obvious that because of the precarious state of health of some of these witnesses, they may become unavailable. In that event, the failure to utilize the present interim for the taking of these depositions will have deprived the defendant of the benefit of relevant and material proof in support of its defenses. On the other hand, it is respectfully submitted that plaintiff's motion for judgment will be neither prejudiced nor delayed by the preservation of this testimony.

Defendant believes its request is reasonable and that the taking of these depositions is necessary. Despite plaintiff's continued implications to the contrary, defendant is not interested in any unreasonable delay of this case. Defendant recognizes the plaintiff's desire that the case be disposed of as speedily as possible. It was partially in the interest of such timely disposition that defendant's motion

was filed promptly after its answer. A more compelling reason, however, was the necessity that the depositions be taken immediately because of the age and physical condition of some of the witnesses.

Therefore, defendant respectfully requests that its amended motion for leave to take these oral depositions be granted.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

December 2, 1949.