In the Supreme Court of the United States

October Term, 1977

No. 78, Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF ARIZONA and the
UNITED STATES OF AMERICA,
Defendants.

Reply of California to Opposition of Arizona and to Response of The United States on Motion for Leave to File Complaint

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The State of California respectfully files this reply to (1) the Brief in Opposition to Motion for Leave to File Complaint filed by the State of Arizona and (2) the Response of the United States to the Motion for Leave to File Complaint.

I.

THERE IS NO OTHER FORUM IN WHICH CALIFORNIA MAY HAVE ADJUDICATED ITS CLAIMS AGAINST ARIZONA

Arizona contends (Brief in Opposition [cited hereinafter as Br. in Opp.], 1, 3-4) that this action may properly be brought in district court, asserting also that it may consent to suit "and intervene [in that forum] and have all issues adjudicated therein" (*id.*, 5). Arizona errs.

The conferring of jurisdiction over a sovereign state by that state's consent does not appear to be possible. As the United States points out in its Response to California's Motion for Leave to File Complaint (cited hereinafter as U. S. Resp.) at page 2, "there is no forum other than this Court in which the dispute between California and Arizona may be resolved."

This is clearly a dispute between two states in their capacity as sovereigns which is governed by the original and exclusive jurisdiction clause of 28 United States Code section 1251(a)(1)[1] and which cannot be litigated in another forum. See *State Water Control Board* v. *Washington Suburban Sanitary Commission* (D. D.C. 1974) 61 F.R.D. 588, in which the District Court for the District of Columbia denied the motion of the State of Maryland to intervene as a defendant as against Virginia because the granting of that motion would have made the controversy into a suit between two states and thus defeated that court's jurisdiction.[2]

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1. 28 U.S.C. § 1251(a) provides:
"The Supreme Court shall have original and exclusive jurisdiction of:
(1) All controversies between two or more States; . . . ."

2. Citation by Arizona of *W. H. Pugh Coal Company* v. *United States* (E.D. Wisc. 1976) 418 F.Supp. 538, a quiet title dispute between the United States and a private party in which *one* state intervened, is inapposite. That case does not support the argument that a suit between *two* states would be properly brought or maintained in a district court. *Arizona* v. *New Mexico* (1975) 425 U.S. 794 is also inapposite. Not only did Arizona seek to sue in its proprietary rather than exclusively in its sovereign capacity, but a state court action was already pending in which the issues tendered by Arizona were to be litigated (*id.* at 796-97). By contrast, in the instant case there is no possible permissible alignment of the three mutually adverse parties to this action in district court and no forum—other than this Court—in which California may obtain resolution of the questions here presented. See also *United States* v. *Nevada* (1972) 412 U.S. 534, 538.

The question of whether this Court should invoke its original jurisdiction "necessarily involves the availability of another forum where there is jurisdiction over the named parties. . . ." *Illinois* v. *City of Milwaukee* (1971) 406 U.S. 91, 93. Because this is a suit between two sovereign states this Court is the only forum for resolution of the issues presented.[3]

II.

THE UNITED STATES MAY PROPERLY BE JOINED AS A DEFENDANT IN THIS COURT

Conceding that it "would seem to be an indispensable party" to resolution of the issues presented in this "bona fide interstate litigation" (U.S. Resp., 3), the United States nevertheless asserts that it is immune from suit in this Court (U. S. Resp., 2).

The Government's contention rests upon the theory that the waiver of sovereign immunity contained in 28 United States Code (Supp. V) section 2409a(a)[4] is valid only if

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3. The fact that this case may present "complex factual issues" does not mean that the only appropriate forum is a district court as both Arizona (Br. in Op., 4) and the United States (U.S. Resp., 1-2) suggest. Cases on this Court's original docket have frequently involved complex factual questions which, as both defendants know, have in the first instance been committed to a Special Master. E.g., *Arizona* v. *California* (1953) 347 U.S. 986 (order appointing special master); *United States* v. *California* (1947) 334 U.S. 855-56 (order appointing special master). There is no merit to the contention that cases within this Court's original and exclusive jurisdiction should be refused consideration merely because they involve resolution of factual issues. As such cases frequently involve complex factual questions, adoption of such a rule would render meaningless the jurisdictional authority of 28 United States Code § 1251(a)(1).

4. 28 United States Code section 2409a(a) provides:

> "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest other than a security interest or water rights . . . ."

suit is brought in district court, citing 28 United States Code (Supp. V) section 1346(f)[5] (U.S. Resp., 2) and *United States* v. *Shaw* (1939) 309 U.S. 495, 501, in which this Court stated: "Even when suits are authorized they must be brought only in designated courts."

The result for which the United States argues produces a consequence which the Congress cannot have intended. If we accept the argument of the United States there is no forum in which one state may sue both another state and the United States to resolve title questions.[6] Such a conclusion if allowed to stand would have most serious and substantial impact upon those public land states west of the Mississippi River in which the federal government is almost certainly the largest single proprietor of uplands adjacent to state boundaries[7] as it would preclude complete and effective resolution of land disputes among sovereigns. Stated differently, the consequence of the federal government's position is that merely because two states are parties to a dispute with the United States in which the states have

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5. 28 United States Code (Supp. V) section 1346(f) provides: "The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

6. California is not unappreciative of the United States' stated willingness to intervene in this case to solve—albeit partially—the dilemma which results from the federal government's legal position (see U.S. Resp., 3). California cannot however fail to stress that that intervention is significantly limited and that such restriction could make impossible consideration of the validity of the federal government's assertion of the statute of limitations defense as well as other issues which may be presented concerning the area north of the junction of the "Pilot Cut" with the 1947 bed of the Colorado River. See *infra*, at 9 n. 8.

7. This conclusion is derived from the fact of the vast land holdings by the federal government in the west. See Statistical Abstract of the United States (1977) Table No. 368, p. 227.

claims against each other, there is no forum available to them in which full and complete judicial relief can be obtained.

California submits that this dilemma is created by the federal government's erroneous interpretation of 28 United States Code (Supp. V) section 1346(f) and can be resolved by this Court rejecting that construction and interpreting the code section in question as being inapplicable to suits brought by states, i.e., as governing only suits brought by private parties. This result would give full weight to both the congressional waiver of governmental immunity contained in 28 United States Code section 2409a(a) and to the section 1251(a)(1) grant of original *and exclusive* jurisdiction to this Court of causes between states.

Further, the exclusive jurisdiction language of section 1346(f) can legitimately be read as intended only to preclude suits against the United States to quiet title *in state courts* and not as preventing the states from having our day in *any* court.

Thus plaintiff contends that in section 1346(f) the Congress used the term "exclusive" to require adjudication of quiet title claims in a federal—not a state—forum (cf. *Charles Dowd Box Co.* v. *Courtney* (1962) 368 U.S. 502, 508 (concurrent state court jurisdiction exists unless expressly excluded by Congress) and *Porto Rico* v. *Rosaly* (1912) 227 U.S. 270, 275-277 (like words may have different meaning depending on the context; the words "to sue and be sued" do not constitute waiver of sovereign immunity).

The legislative history of the quiet title statute does not address the question of the proper forum for quiet title suits among sovereigns. It does, however, confirm that a principal purpose for section 1346 was to adopt the federal government's view that "it is the better policy to litigate

questions of the government's title in the federal courts. . . ." Letter from the Attorney General to the Speaker of the House of Representatives, October 6, 1971, quoted in House Resolution No. 92—1559, 1972 U.S. Code Congressional and Administrative News, 4547, 4555.

The United States' contention that sovereign immunity is waived only if suit is brought in district court is in some respects analogous to the situation presented in *Minnesota* v. *United States* (1938) 305 U.S. 382. There the United States argued that a statute granting permission to sue the federal government must be construed to permit suits only in the federal courts unless there is an explicit reference to state tribunals. (*Id.* at n. 5.) Just as this Court rejected that contention it should reject the analogous contention made here that, because the Congress did not specifically state that this Court has jurisdiction over quiet title actions between states in which the United States is an indispensable party, the federal government is immune from such suit in this Court. (Cf. *FHA* v. *Burr* (1939) 309 U.S. 242, 245 ("[W]e start from the premise that such waivers by Congress of governmental immunity . . . should be liberally construed.").)

It is wholly reasonably to conclude that the Congress was aware of the exclusive jurisdiction of this Court over causes between states and did not envision any objection to section 2409a actions being filed here when the alignment of the parties so requires, as it does in this case.

III.

THIS DISPUTE OVER OWNERSHIP OF SOVEREIGN LANDS IS APPROPRIATE LITIGATION FOR THIS COURT

Arizona asserts that the questions presented are mere survey problems which will take decades to resolve and which therefore should not be presented to this Court (Br.

in Opp., 6). Arizona and the United States contend that negotiation, not litigation, is the proper way to resolve the differences among the parties; Arizona further contending that California's motion should be denied (Br. in Opp., 6, 7) and the United States suggesting that the Court either hold the motion without action for a reasonable period of time to permit the parties to try to reach agreement or deny the motion without prejudice (U. S. Resp., 3). Plaintiff will dispose of these contentions in reverse order.

First, the facts do not support the assertion that the issues can be resolved by negotiation. For more than four years California has been attempting to secure the cooperation of Arizona and the United States to obtain a negotiated settlement of the issues to the extent possible. California initiated those discussions, made several visits to Arizona to meet with officials of that state and of the federal government, shared its information with both defendants and otherwise urged each of them to join in resolving the problems presented. Neither agency has to date so far as California is aware made any substantial effort to resolve the dispute. Thus this lawsuit follows four years of unsuccessful efforts initiated and maintained by California to resolve this matter by other means. Neither defendant gave this matter any priority until the instant motion was filed. Whether they will now is still not clear.

Although California remains willing to discuss resolution of the issues with the defendants, experience demonstrates that she cannot expect any progress unless formal judicial assistance is available. Should the Court deny or hold California's motion, there will no longer be the impetus which both Arizona and the United States previously advised California was necessary for their respective jurisdictions to devote the resources necessary to resolve the issue presented in this dispute.

Second, the proposed complaint states substantial questions appropriate for resolution by this Court. This Court has in the past exercised its original jurisdiction to decide quiet title disputes involving complex questions of fact. (E.g., *United States* v. *Utah* (1930) 283 U.S. 64; *Utah* v. *United States* (1970) 403 U.S. 9.)

The questions presented are important because they involve not only states in their sovereign capacity, but lands which they acquired by virtue of that sovereignty upon admission to the Union. (See e.g., *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.* (1976) 429 U.S. 363, 370-5.)

Moreover, as California stated in its Statement in Support of Motion for Leave to File Complaint, the uncertainty as to boundaries inhibits effective management of the public lands involved and protection of environmental values as well as rendering unmarketable titles to lands along the Colorado River, (*id.*, at 8-9.) Thus the public interest in resolving the questions presented is substantial.

New York v. *New Jersey* (1921) 256 U.S. 296 (Br. in Opp., 6) is inapposite. There the issues of which New York complained had already been resolved by a stipulation between the United States, which had intervened, and the defendant (*id.*, at 306). Recognizing the posture of that litigation, this Court suggested that New York should wait and see if the stipulation produced the result intended, denying New York's request without prejudice (*id.*, at 313-14), while also noting that "the right of the state to maintain such a suit . . . is very clear" (*id.*, at 301). By contrast, in the present case nothing has been resolved even after four years of effort by California to reach a negotiated agreement.

Plaintiff submits that the present case is an appropriate one for the exercise of this Court's original and exclusive jurisdiction. Cf. *Illinois* v. *City of Milwaukee, supra,* 406 U.S. 91, 93.)[8]

CONCLUSION

For each of the foregoing reasons plaintiff urges this Honorable Court to reject the contentions made by defendants and grant California's motion for leave to file its complaint.

DATED: May 5, 1978.

Respectfully submitted,

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8. The United States alludes to a statute of limitations question presented by a portion of California's proposed complaint (U.S. Resp., 3-4). Plaintiff believes that analysis of the factual merits of such defense should await a more definite statement of its basis and points out that such a defense may be questionable insofar as it (1) precludes a state as sovereign from confirming title to its sovereign lands, or (2) otherwise deprives a state of an incident of its sovereignty, *viz.* the lands which inure to it under the equal footing doctrine.

As a "state's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself" (*Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co., supra,* 429 U.S. 369, 374, citing *Pollard's Lessee* v. *Hagan* (1845) 3 How. (44 U.S.) 212) and as "the title thus acquired by the state is absolute so far as any principle of land titles is concerned" (*ibid.*), the Congress may be without the power to preclude suits by the states to confirm titles to our sovereign lands and federal surveys affecting such lands may be of questionable effect.