In the

Supreme Court of the United States

STATE OF CALIFORNIA,

PLAINTIFF,

V.

STATE OF ARIZONA AND THE UNITED STATES OF AMERICA,

DEFENDANTS.

No. 78 Orig.

Washington, D. C.
January 9, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CALIFORNIA, Plaintiff, v. STATE OF ARIZONA and the UNITED STATES OF AMERICA, Defendants.	No. 78 Orig.

Washington, D. C.,

Tuesday, January 9, 1979.

The above-entitled matter came on for argument at 11:41 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALLAN J. GOODMAN, ESQ., Deputy Attorney General of California, 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010; on behalf of the Plaintiff, State of California.

APPEARANCES [Cont'd]:

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States.

RUSSELL A. KOLSRUD, ESQ., Assistant Attorney General of Arizona, 200 State Capitol, 1700 West Washington Street, Phoenix, Arizona 85007; on behalf of the State of Arizona.

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C O N T E N T S

[Afternoon Session - pg. 19]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in California against Arizona and the United States.

Mr. Goodman, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ALLAN J. GOODMAN, ESQ.,

ON BEHALF OF THE STATE OF CALIFORNIA

MR. GOODMAN: Mr. Chief Justice, and may it please the Court:

This case comes to this Court upon the State of California's motion for leave to file complaint against the State of Arizona and against the United States. By our motion we seek to invoke this Court's original and exclusive jurisdiction to finally determine title to sovereign lands along an 11.3-mile reach of the Colorado River.

The lands in issue in this action are sovereign lands, and were at the time of California's admission to the Union within the bed of the Colorado River.

Along the river, as the Court knows, there have been many accretive and evulsive changes. These river movements generated serious confusion and controversy until 1966 when, by an Interstate Boundary Compact, ratified by Congress in that year, the political boundary between the two States was set and permanently fixed forevermore.

QUESTION: Is it agreed, Mr. Goodman, that the lands

in question here are within the political boundaries of California?

MR. GOODMAN: Mr. Justice Blackmun, some of the lands are within California entirely, some of the lands lie astride the Interstate Border, the 8.6-mile southern reach of the river. It has a political border running approximately through the center, but just approximately, it does vary. But the political boundary will not change as a result of this litigation, it will remain the same.

The problem we have here again is who owns how much of the last riverbed does California own, how much of the last riverbed does Arizona own? The United States is a party because the United States is the principal upland owner, it owns the land adjacent to the river. And, as the Court knows, the boundary line between the two States is the middle of the main channel, and in order to fix the main channel we must also know the bank line.

QUESTION: But there's no question, I gather, Mr. Goodman, as to the definition of the lands, it's only as to the ownership of those lands?

MR. GOODMAN: Well, you can --

QUESTION: In other words, you can put on a map exactly what lands we're talking about.

MR. GOODMAN: We have put them on generally, and one of the disputes is over, mainly over which riverbed is in issue

here. There were several main channels of the Colorado River at different times.

QUESTION: And that would change the boundaries of the lands in dispute?

MR. GOODMAN: That would make it a substantial difference as to where the sovereign lands were located. As Your Honor may recall, the test is one of navigability of the water course; and the question now is where was that water course on the date of California's admission in 1850, and where has it moved by non-accretive changes thereafter? So California, in 1972, because of the concern over the problem of location of its sovereign lands, began a study at the request of the State Legislature. Four years was spent on that study, and a set of maps was prepared during the course of the study. And the source of general hazard maps is on his desk right now. We communicated with the U. S. Department of Interior --

QUESTION: You don't have them here, do you?

MR. GOODMAN: They are not part of the record in the action, the exhibits to the complaint describes by metes and bounds, Your Honor, those lands.

QUESTION: But if I may so, it doesn't help me.

MR. GOODMAN: It doesn't help me too much either, Your Honor. It requires some elaboration.

QUESTION: These are questions of title, though, not

boundary.

MR. GOODMAN: That is correct, Your Honor, these are questions of title. The boundary questions are only if one finds the location of the State lands, it's a boundary question; it will not change the political boundaries of the river.

QUESTION: But you're asking -- you want your title quieted?

MR. GOODMAN: That's correct, Mr. Justice White.

QUESTION: Well, usually to quiet title you say what property you're quieting title to.

MR. GOODMAN: We have done that in the exhibits to the complaint, Your Honor. We have taken, as a result of the study which was done in --

QUESTION: Well, I know, but suppose the defendants say that you haven't described the lands correctly?

QUESTION: Depending upon what you said to me as for your reasons.

QUESTION: The navigability of 1850 and so forth.

MR. GOODMAN: Well, they could then respond to the complaint, in that --

QUESTION: Well, what I mean, the question -- I suppose that many questions of fact could arise in this case.

MR. GOODMAN: That is --

QUESTION: It just isn't a question of law involved.

MR. GOODMAN: No, it is not a question of law only, Your Honor.

QUESTION: That's all I wanted.

QUESTION: Well, wait, you answered a question of Mr. Justice White, which was put in terms of your title and you are representing the State of California. Now, were you answering that question in terms of the sovereign's title or the title of some of the citizens of the sovereign?

MR. GOODMAN: We are answering solely on behalf of the sovereign. If I may again respond to --

QUESTION: A very important difference, isn't it? That we keep in mind here.

MR. GOODMAN: These are solely sovereign lands.

QUESTION: The sovereign, the title of the sovereign lands brings us probably clear to an original jurisdiction case, --

MR. GOODMAN: Yes, sir.

QUESTION: -- whereas the title of the individual citizens who claim it brings another question, doesn't it?

MR. GOODMAN: Yes, it very well may, Your Honor.

QUESTION: Are these lands on the Arizona side of the political boundary?

QUESTION: Both.

MR. GOODMAN: Some of the lands are on the Arizona side, in the 2.6-mile upper reach of the river they are

entirely within California; in the 8.6-mile lower reach they sit astride the political boundary.

We know, if I could respond to an earlier question of the Court, that we are in the right ballpark because we discussed with the United States and with the State of Arizona their claims. In fact, the exhibit to the complaint here is based upon aerial surveys done by the United States Government earlier, so we are --

QUESTION: Mr. Goodman, what I was trying to get at -- I'm afraid I don't understand it fully yet -- is there agreement between you, the United States, and Arizona, that you can draw on a map exactly what lands we're talking about, the title to which you want quieted?

MR. GOODMAN: We are, as far as we're --

QUESTION: I mean, can you answer that yes or no?

MR. GOODMAN: The answer to that is no, Your Honor. We have been attempting -- if I could say, we know we're in the Colorado River, we have presented our information to the State of Arizona and the United States, and asked them to agree. They simply would not agree, and that is the reason why we are before the Court today.

QUESTION: Well, what about this land there, do you agree to that?

MR. GOODMAN: They simply will not give us an answer yes or no. Arizona told us that we would have to sue them in

order to get a response.

QUESTION: Well, do you agree that that is the map of the existent?

MR. GOODMAN: Well, this is a map adopted by the California State Lands Commission, which is the basis for the Exhibit A to the complaint.

QUESTION: So you don't want to go behind that, do you?

MR. GOODMAN: I'm sorry?

QUESTION: You agree to that end, don't you?

MR. GOODMAN: Oh, yes, we are quite sure --

QUESTION: Well, does the government agree to that?

MR. GOODMAN: I don't know. I'm afraid, Mr. Justice Marshall, that you'll have to ask the Solicitor General. I do not know whether they agree or not. They have said, in their response, --

QUESTION: Right, I agree with my brothers, I have great problems in deciding when I don't know what I have.

I'm going to decide that a strip of land, which I don't know anything about, and I don't know where the land is, belongs to California?

MR. GOODMAN: Well, I think, should the Court grant the motion and appoint a Special Master, then the Master would take evidence on the subject and the lands would become fixed. We think that we are in the right ballpark, and the parties

can agree -- if I make --

QUESTION: For example, you've got a strip of land here. That I can understand, but you say you don't know where the strip of land is.

MR. GOODMAN: No, Your Honor, California knows where it thinks the strip of land is.

QUESTION: You say you know where you think it is?

MR. GOODMAN: Well, we know where the land is; the problem is created by the meanderings of the course of the river. That is the essential problem in all interstate boundary river cases, --

QUESTION: Sure.

MR. GOODMAN: -- if you will, and the problem is to establish the exact perimeters of that land. This case is no different than an interstate river boundary case in that respect.

QUESTION: Well, your metes and bounds description will vary from Arizona to California, because they use different meridians.

MR. GOODMAN: We have accounted for that, Your Honor, in the description. It's done on the California coordinate system with certain --

QUESTION: The San Bernardino Base Meridian?

MR. GOODMAN: That's exactly correct, Your Honor.

There are two principal issues of a legal nature

before the Court at this time. The first one is whether this case is within this Court's original and exclusive jurisdiction, or whether, as Arizona phrased the question, may Arizona consent to an action in a district court?

The United States and California both agreed on this issue that Arizona may not consent to that jurisdiction. The second issue has made the United STates be sued in this Court for a suit properly brought only in the district court.

Let me turn then to the issue of original and exclusive jurisdiction for the issue of consent.

QUESTION: Well, it's the presence of the United States that causes the controversy really, doesn't it?

MR. GOODMAN: Your Honor, I don't think so. Because, as the Court said, albeit in dicta, in United States vs. Nevada, the presence of the United States as a party is not -- would not change the essential original jurisdiction of the action.

I believe the language is -- at least the Court's language was that: this section has been construed as applicable to suits involving conflicting STate claims by one State against another, regardless of the presence of the United States as a party.

Of course this Court has concurrent, albeit not exclusive, jurisdiction/actions between the State and United States.

Arizona's contention, however, is based, we submit,

upon a misconstruction of the term "jurisdiction". As we define it, it is the authority to hear and adjudicate disputes. And in this particular instance, States and the United States, because of their status as parties, confer that kind of jurisdiction.

The answer -- the basis for our contention is found in Clause 1 of Article III of Section 2 of the Constitution, which does confer those two types of jurisdiction.

QUESTION: Well, are you suggesting that -- are you suggesting that it's because of the Constitution that Arizona and California may not litigate in the district court, even if both of them consent?

MR. GOODMAN: No, Mr. Justice White, I --

QUESTION: That it's just because of statute, across section 1251?

MR. GOODMAN: I recognize that early on this Court held that the Clause 2 of Article III, Section 2, did not preclude suits between States in lower courts; but the Congress, in the first Judiciary Act, continued to this day, provided that -- until 1948, it was -- if a suit, if any State were a party after '48, if the controversy were between two States, that this Court has exclusive as well as original jurisdiction.

The problem with Arizona's contention is that they are confusing, if you will, the question of whether a party can be served with the question of whether a court has power

to adjudicate, to hear and decide the dispute.

QUESTION: Well, what do you do with 1346(f) then? It says that the district courts have exclusive jurisdiction.

MR. GOODMAN: Mr. Justice Rehnquist, the answer to that lies in the legislative history of Section 1346(f). When the section was enacted as part of Public Law 92-562, it began as S.216. At the time of the introduction there was no route exclusive in Section 1346(f); but the Justice Department sent a letter which is quoted -- part of which is quoted in our brief, in the footnote in our motion, which indicates -- which says that the purpose of the addition of the term "exclusive" was to preclude suits in the State Courts. The United States did not want to be named as a party in State courts, but to have its claims adjudicated solely in federal courts.

Thus, the only purpose for the term "exclusive" was to surmount the problem created, for example, or discussed, for example, in Charles Dowd Box Co. vs. Courtney, whereby State courts have concurrent jurisdiction unless it is specifically excluded. That is the sole meaning for the term "exclusive".

QUESTION: Certainly that does not -- your answer does not comport with the use of those terms in Section 28 U.S.C. 1251, which is the Judiciary Act of 1789, where the Congress said the Supreme Court shall have original and exclusive

jurisdiction of, where it was talking about this Court as opposed to lower federal courts.

MR. GOODMAN: I think the term "exclusive" is used in two different respects, Mr. Justice Rehnquist. In 1346(f) the sole purpose of the term is to preclude suits in State courts, and that's borne out by the legislative history.

There is nothing in the legislative history which indicates any intention to preclude this suit (sic) from hearing cases which are within its original jurisdiction.

And let me continue on that point, because it is very important. For a party to construe a 1346(f) as precluding a suit in this Court would be to be denying this Court jurisdiction vested in this Court by the Constitution. It has been clear since Marlboro vs. Madison at least that the Congress does not have the power to either increase or decrease this Court's original jurisdiction. So 1346(f) cannot be read to bar a suit in this Court.

QUESTION: You say as a matter of prudence we ought to construe it that way, even though there is some doubt, in order to avoid the constitutional --

MR. GOODMAN: Exactly. In order to avoid the unconstitutional construction, the legislative history should be relied upon to confer -- to construe 1346(f) constitutional.

QUESTION: Mr. Goodman, if we should deny leave to file, what would California do?

MR. GOODMAN: Mr. Justice Blackmun, I don't think we have any remedy then. We have no other forum in which we can litigate both against the United States and against Arizona.

QUESTION: Well, you certainly could sue the United States alone in California federal court, I take it; and would Arizona come in, then?

MR. GOODMAN: By our understanding of the jurisdictional provision, Your Honor, under Article III, we could not sue both Arizona and the United States in the district court. There is no statute --

QUESTION: That wasn't my question. If you sued the United States alone in California federal court, hasn't Arizona indicated it would come in?

MR. GOODMAN: It has said that it would consent, but my first argument is, Your Honor, that Arizona does not have the power to consent because, No. 1, Article III, Section 2, Clauses 1 and 2 do not permit, and Section 1251(a)(1) provides this Court shall have exclusive jurisdiction in actions between States.

Also to say that --

QUESTION: Well, that's an argument that there would just be no jurisdiction in the district court, because Congress has said there shall not be.

MR. GOODMAN: That's exactly correct, Mr. Justice.

QUESTION: Then you could also sue, could you, sue

Arizona alone in this Court?

MR. GOODMAN: We could sue, if the Court granted leave to, Arizona alone in this Court. However, we need the United States because we cannot fix the center line of the river without knowing -- also having the bank lines determined, and the United States --

QUESTION: Well, could the government come in here optionally?

MR. GOODMAN: Well, they have suggested as much, ans that would be fine with us.

QUESTION: But only as to part of the lands you --

MR. GOODMAN: And that's exactly the problem, Mr. Justice, because we feel the entire area has to be adjudicated.

QUESTION: What the government says is if we take it here, some day they will come in, but limited only to a given segment; is that it?

MR. GOODMAN: That's my understanding of the Solicitor General's brief, Your Honor.

QUESTION: But can't you cover everything with simultaneous suits here and in California federal court?

MR. GOODMAN: Mr. Justice Blackmun, we would not have one judgment binding on all the parties if we tried to do that. That's the problem, we have two separate judgments.

The United States contention, if I could respond to that, is that 2409a of Title 28 and 1346(f) constitute a

waiver of sovereign immunity only as to the district court. From my discussion of the legislative history of Section 1346(f), it's clear to us and we submit that the Court should so hold, that 1346(f) was only intended to bar suits in State courts.

Secondly, we don't think the United States gives sufficient weight to 2409a. That is the section which waives sovereign immunity. Also waive to the sovereign immunity should be literally construed. The United States construction is extremely narrow, and if it's granted, it would mean that there would be no forum in which we could sue both the Federal Government and Arizona.

QUESTION: What you want to be able to do is to bring in, in this Court, both the State and the United States as to all the lands in dispute?

MR. GOODMAN: We want to do it in one action, so we have one enforcible judgment. We are concerned about the -- I would submit, Your Honor, that as a court of equity, this Court has the power to combine the two defendant parties so that we can have one effective decree; otherwise, again we do not have a forum.

And if I may, Mr. Justice Brennan, what is worse, if this Court denies our motion and we have no -- and if we are left to sue against the United States in district court and the United States then disclaims ownership, under 2409a, sub-

division D, the district court must then dismiss the action. It specifically provides that there shall be no jurisdiction. In which case, California and Arizona would be coming back to this Court again. And it would be clearly within this Court's original jurisdiction.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, counsel.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Goodman, you may procsed. I see you've supplied us with these maps now.

ORAL ARGUMENT OF ALLAN J. GOODMAN, ESQ.,

ON BEHALF OF STATE OF CALIFORNIA -- Resumed

MR. GOODMAN: Mr. Chief Justice, and may it please the Court:

That is correct.

QUESTION: Thank you.

MR. GOODMAN: You're vezy welcome, Mr. Justice.

QUESTION: At some point someone will explain the maps to us now, I take it?

MR. GOODMAN: Very well, Your Honor. The Clerk's office was kind enough to make copies of them during the lunch recess.

The Court has before it part of the base sheet of the administrative maps, and what is described on the second and larger page is the chronological history of the movements of the river. Prior to 1946, in the upper left, the Court will see the river was in essentially a natural state. That may be subject to dispute during the course of the litigation. It gradually moved to the point of the fifth map, lower right, inset 5, where the Court -- and it's difficult to see -- the Court may see the political boundaries coming down from almost

the center of that box in a dashed line. It goes through what is described as a pilot channel, and then curves back around to the right, to the Colorado River former main channel. That is the political boundary, roughly down the center of the pilot channel.

This litigation, however, includes the area also north of the pilot channel which is described as Palo Verda Lagoon. That area is entirely within the State of California. The area which is below the intersection of the Palo Verdd Lagoon, in that little V to the south, is the point where the sovereign land title question is astride, the interstate border.

QUESTION: What's the segment that the government says it might be willing to consent to?

MR. GOODMAN: Mr. Justice Brennan, it's the upper segment, it's north of where the Court will see the pilot channel and the Palo Verde Lagoon.

QUESTION: Yes.

MR. GOODMAN: That area to the north is the segment --

QUESTION: Will you point to it on the map, so we can identify it a little more readily?

QUESTION: Up above -- I see.

MR. GOODMAN: It's up above that Y right there.

QUESTION: Yes.

MR. GOODMAN: Now, the government's contention is that there are surveys which are more than 12 years old, and

even if there weren't, by 1346(f) the government can only be sued in the district court. However, as I indicated before lunch, to argue that means that the Congress has removed the jurisdiction from this Court; and that, of course, is contrary to Marbury vs. Madison.

Very briefly, with respect to Arizona's contention, that it can defer jurisdiction, again that is party jurisdiction in the cases which Arizona cites, to the extent that this supports its position, are party jurisdiction questions, and can reserve this defendant in a district court. They cannot go to the question of the power of the Court to hear and decide the case.

And our position is, under Article III, Section 2, that power is vested -- and under 1251(a)(1), that power is vested solely in this Court.

QUESTION: You mean just by the latter section, I take it?

MR. GOODMAN: Yes, sir.

QUESTION: And you don't mean by the Constitution?

MR. GOODMAN: Yes. In response to your earlier question I answered that, and I didn't mean to muddy the waters here --

QUESTION: So if Congress said that two States could litigate in the district courts, they could?

MR. GOODMAN: That's correct. If Congress so said,

but Congress has been very specific in this case. Indeed, that meaning, I think, is borne out by this Court's opinion -- certainly of the dictum of this Court's opinion in Illinois vs. City of Milwaukee and other recent cases, where the Court there is not considering questions between two States, but a State and instrumentalities which the Court found to be local and not State entities.

But the inverse of the situation described there is the one where legal jurisdiction is exclusive because two States are parties. I think it's page 93 of 406 U.S. that that statement appears.

QUESTION: I am loathe to pick up the rest of the tenure of this -- I have debated to disqualify myself in this litigation because of the fact that I was involved in a good deal of private litigation in this area; is this the entire Arizona-California boundary that California seeks to litigate?

MR. GOODMAN: In our request for continuing jurisdiction, Mr. Justice Rehnquist, we do ask the Court to decide that question. We don't think, however, that the Court need decide our request upon the continuing jurisdiction point at this time. I'm aware that Your Honor was involved in some litigations reported north of the Needles area.

QUESTION: Yes.

MR. GOODMAN: Along the border. This dispute is

south of Blythe.

QUESTION: But are the principals --

MR. GOODMAN: The principals are very similar; it will be a factual difference only, I would suspect. The legal principals are very important. They are important not only to the parties here but to other States which have interstate boundary problems resulting from river movements.

QUESTION: My concern was familiarity with some expert testimony as to factual matters,not with legal matters.

MR. GOODMAN: This case is extremely significant, since Pollard's Lessee vs. Hagan it has been clear that questions of sovereign land adjudication are appropriate for this Court's decision. In this particular case, California needs to know the location of its sovereign lands and confirm its title, so that we can (1) protect them from environmental degradation and (2) construct recreational resources. The river has become a tremendous focal point for recreation, and before the State can properly respond to the need, we have to know where our title is, so that it can construct facilities. We can do so after --

QUESTION: Well, is the United States an indispensable party here?

MR. GOODMAN: How are they?

QUESTION: Are they?

MR. GOODMAN: Yes, Your Honor, we --

QUESTION: You think they are?

MR. GOODMAN: -- we cannot litigate the question of the center line without having the United States, because it is the owner of the upland.

QUESTION: And the United States position is that you shouldn't be able to get into any court on this?

MR. GOODMAN: I think that the technical or strict reading would be, yes; they say that they would intervene in this Court. The problem --

QUESTION: But they say they haven't given consent?

MR. GOODMAN: That's correct.

QUESTION: And they say that you're not subject to -- Arizona and you can't litigate in the district court.

MR. GOODMAN: That's correct.

QUESTION: So there's no judicial --

MR. GOODMAN: Our position on that, Your Honor, is that 1346(f) is being read by the United States to deny the purpose.

QUESTION: I understand. Okay.

MR. GOODMAN: I thank the Court very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

The first question before this Court is: Must this case be in this Court?

We very much wish we could answer that question no, partly on the ground that this Court has enough other business than to concern itself with this relatively minor acreage, and it's not a boundary dispute, it's simply a matter of title to land.

And, I may add, so does the Office of the Solicitor General have enough other business.

We would welcome a ruling that accepting Arizona's argument to the effect that this litigation may be appropriately begun in the district court; but unfortunately we have not found the way to that conclusion.

As has already been made clear, the obstacle is not Article III of the Constitution, it's simply the provision of the Judicial Code, Section 1251(a)(1) which seems plainly to confine a controversy between two States to this Court alone, by using the word "exclusive".

It's clear, of course, that the prudence of two States does not require that the case be in this Court; they must be on opposite sides, they must be adversaries. That much

was clearly settled in the Pyramid Lake case, United States vs. Nevada reported in 2412 of the United States Reports.

But here California and Arizona are on opposite sides of the case, and,so far as it appears, do dispute title to at least a part of the land put in question by California's complaint.

It might be argued that because the United States is sought to be made a defendant, one looks not at 1252(a)(1) but rather tat 1252(b)(2), which provides that when the United States and a State are parties the jurisdiction of this Court is merely concurrent.

It seems to us, however, that the presence or retinence of the United States does not change the basic fact, which is that this is a controversy between two States. And, indeed, again, in the Nevada case, this Court adverted to the fact that the parties, the State parties there, were not adverse, and accordingly there wasn't exclusive jurisdiction in this Court. The Court did not notice the presence of the United States as plaintiff, as having any bearing on it one way or the other.

It seems to us that was plainly --

QUESTION: What would the situation be, Mr. Claiborne, if there were no problem between the two States, but you had private action to quiet title, private, on either one side or the other, but with federal riparian rights involved; would

the Federal Government just intervene in that private action?

MR. CLAIBORNE: Mr. Chief Justice, the private parties could, by virtue of 2409a, sue the United States, sovereign immunity having been waived by the Congress, in the appropriate district court, and there would be no problem whatever.

Indeed, that would be the situation even if one State were a defendant. It's only that the two States are disputing title that presents the problem here.

QUESTION: Would Arizona be an indispensable party if California sued the United States in the district court, which it could?

MR. CLAIBORNE: Mr. Justice White, I would have thought, for the same reasons that the United States is an indispensable party, so would Arizona. So long as it declines to accept the Davis Lake Study which California has put before us, which it inferentially or quietly disputes.

QUESTION: Mr. Claiborne, do you read 2409a as waiving sovereign immunity only for suits in the district court?

MR. CLAIBORNE: 2409a itself, Mr. Justice Rehnquist, of course does not say that. But, at the very time when that statute was written, Section 1346 of the Judicial Code was amended under the same legislation, so as to provide that suits under 2409a shall be within the exclusive jurisdiction of the district courts. One can read "exclusive" there differently

than in Section 1251.

It's perfectly plain, I think, as correctly said by the Attorney General of California, that the purpose there -- the suggestion came from the Attorney General -- the purpose was to prevent the government's being sued in a State court.

The question of original cases simply did not occur to the mind of Congress, it seems reasonably obvious.

But, on the other hand, it seems hard to read the word "exclusive" in the same Judicial Code as meaning federal courts generally in one case, and in 1251 meaning a particular federal court.

QUESTION: But if you read "exclusive" in 1246 as meaning exclusive of this Court, there are, to put it mildly, grave constitutional difficulties, are there not?

MR. CLAIBORNE: I would have thought not, Mr. Justice Rehnquist. After all, if it had not been for 2409, nothing in the Constitution waives the sovereign immunity of the United States in the case of a suit by a State. That has always been the constitutional rule that a State could not sue the United States without its consent, and that problem has been resolved over the years by the United States agreeing to be plaintiff or agreeing to intervene.

This waiver statute can constitutionally have its limited purpose of allowing suits only in the district court.

It may be nonsense as a matter of policy, as a matter

of constitutional law there is no problem.

QUESTION: What is the basis for your saying that the United States is an indispensable party in this case?

MR. CLAIBORNE: Mr. Justice White, for the same reason that California has joined us in the first place, that the location and width of the bed, which -- half of which they claim, the old bed of the Colorado River affects federal lands on either side of that area.

I may say this, it may clarify matters a little, California --

QUESTION: Why can't California and Arizona settle their dispute in litigation without having the United States involved?

MR. CLAIBORNE: Well, Mr. Justice White, the first problem is where would they do that, and --

QUESTION: Well, they'd do it here.

MR. CLAIBORNE: But the United States is willing to facilitate matters, at least in part,by intervening, so as to make that possible. We haven't found a way of making it entirely possible without waiving our limitations defense, in effect. That's --

QUESTION: That's why the United States limits this north of the --

MR. CLAIBORNE: I want to make that more clear, Mr. Justice Brennan. North of this Pilot Cut Junction --

QUESTION: Yes.

MR. CLAIBORNE: -- which is the smaller distance to the north on the map, at 2.7 miles, the United States surveyed and said it was approved and published in 1961; that was a survey not as of that date but a survey of where the old bed had been previous to that cut, that is to say 1946 and '7.

2409, in waiving sovereign immunity, has provided that the United States shall not have its title put in issue with respect to any federal claim more than 12 years old.

If we were in the district court we would be invoking that statute of limitations with respect to California's claim as against this north of the Pilot Cut. And we say that this statute doesn't apply in the Supreme Court; but, on the other hand, if we're going to follow the spirit of the statute by agreeing to intervene, we ought also to be entitled to follow the spirit of the limitations provision by invoking the --

QUESTION: Do you think the -- what authority do you need to submit to an adjudication in this Court to settle this title? Does it take some congressional action?

MR. CLAIBORNE: At least. Whether the matter has ever been litigated or not, I'm not aware of it, Mr. Justice White, but it's always been thought that the Attorney General and Solicitor General have authority to --

QUESTION: Himself to waive the --

MR. CLAIBORNE: By becoming plaintiff, and to do that by --

QUESTION: Well, that may be, becoming plaintiff; but you wouldn't have authority just to not raise your sovereign immunity defense here as a party defendant?

MR. CLAIBORNE: Well, it might come to the same thing, Mr. Justice White. It's always been thought proper to do it by formally --

QUESTION: What is the limitation that you would insist on in this Court, to become a third party to this case? What limitation?

MR. CLAIBORNE: Only that we would limit the controversy to that portion of the land south of the Pilot Cut. That is to say, the 8.6 miles as sown on thisplat, on the ground that the federal title north of that has been established by a survey, it's been unchallenged for 12 years and --

QUESTION: Well, is that just -- are there some legal -- are there some legal principles involved in this case, or is it all just a factual fight?

MR. CLAIBORNE: Mr. Justice White, it's difficult to know what's involved in the case at this stage.

QUESTION: Because if there is a major -- if a major part of it is legal principle, why, it would be settled by litigating the segment southof the Pilot Cut.

MR. CLAIBORNE: Well, indeed, Mr. Justice White. That's --

QUESTION: Well, is that clear?

QUESTION: If you were allowed to come in only as to that lower segment, what then is the status of title as to that northern segment?

MR. CLAIBORNE: Well, it -- there remains a difficulty, as to --

QUESTION: Well, how are we ever going to solve how that will be --

MR. CLAIBORNE: I regret to say, as I see it, the result being the United States is indispensable as to the whole of the area, the United States not having waived the sovereign immunity as to the northern segment, the suit could not go forward as between the two States for that northern segment. And that's why I say that our intervention would not only limit our participation in our title, but would limit the lawsuit to the portion below the Cut.

Now, if the principles, or what California seeks to collaborate by the use of this action -- and they haven't explained what they mean by that -- we, for our part, concede that this old bed having been dried by artificial creation of a cut, is governed by the rules of evulsion that one has, if it belongs to his State --

QUESTION: Whose rules?

Whose rules, State or Federal?

MR. CLAIBORNE: I think in this instance they are common, Mr. Justice White.

QUESTION: Mr. Claiborne, if you're right as to indispensable parties, wouldn;t the logic of your position require that we dismiss the case as between the States, even though you don't make any intervention at all?

MR. CLAIBORNE: There is precedent, Mr. Justice Rehnquist, for this Court granting leave subject to an undertaking by the United States, which I now give, to intervene within a specific period of time so as to allow the suit to go forward.

QUESTION: Well, let me ask youthis: Suppose that the United States has sued in the Superior Court of Los Angeles County to quiet title, do you think the United States Attorney in Los Angeles can walk into that court and say he now gives leave for the United States to be sued?

MR. CLAIBORNE: No, Mr. Justice Rehnquist, I would -- I think he would properly be instructed to oppose ultimately to place no appearance.

QUESTION: Do you think the Attorney General can give leave to be sued in the Superior Court of Los Angeles County?

MR. CLAIBORNE: I think he can by way of the intervention, certainly; if they say what jurisdiction --

QUESTION: In the State court?

MR. CLAIBORNE: If there were jurisdiction otherwise.

QUESTION: Well, I know, but I thought what you said earlier -- I've forgotten these numbers -- there just isn't any jurisdiction in the State courts for that.

MR. CLAIBORNE: Well, I perhaps was indulging on an assumption, hypothetical, that I shouldn't. The answer is of course yes, Mr. Justice Brennan. There is no jurisdiction in any State court; and we say there is no jurisdiction in any court but this Court. And, accordingly, of course, he should oppose and not intervene.

That is a matter of who can waive sovereign immunity. But that problem doesn't arise any differently in a State court than it does in a federal court. And leave can be given --

QUESTION: Well, really, I would take it that a suit in a State court, if the Attorney General went in and said, Sure, here we are, serve us, sue us, and you got a judgment against the United States, it still wouldn't be any good.

MR. CLAIBORNE: Well, it might be more respectful to the Court, Mr. Justice Brennan, if he were to appear for the purpose of opposing than to than to --

QUESTION: Well, it would be good until this Court or perhaps the Court of Appeals got holdoof it and said there was no jurisdiction. Officially it would be a valid judgment,

wouldn't it?

MR. CLAIBORNE: Mr. Chief Justice, it would be wasting judicial resources.

QUESTION: Mr. Claiborne, suppose we gave leave to file subject to the United States intervening and the United States intervened, and whatever reservations there were, but within that reservation there was an adjudication which settled the title to some particular land, say the land south of this Cut; I would suppose you would think the title would be settled then? If you intervened and submitted with respect to that.

MR. CLAIBORNE: Exactly so.

QUESTION: Then what becomes of the suggestion that title to land in a suit against the United States or involving the United States is within the exclusive jurisdiction of the district court? Can you waive that too, or --

MR. CLAIBORNE: Mr. Justice White, I don't think 1346(f) ought to be read as saying that the government's title can only be tried in a district court. It's simply that the congressional waiver of sovereign immunity is, by inadvertence we assume, limited to that court.

QUESTION: Well, it says the exclusive jurisdiction, though.

MR. CLAIBORNE: Indeed, and I can't get around those words. But I don't --

QUESTION: It certainly deprives the State courts of jurisdiction, doesn't it?

MR. CLAIBORNE: But this would not, Mr. Justice White, --

QUESTION: You think it deprives the State court of jurisdiction but not this Court, to adjudicate the title to the United States?

MR. CLAIBORNE: I don't think 1346 deprives the State court any more than -- it's only suits under 2409 that are limited to the district court. A suit in this Court is not a suit under 2409, and, accordingly, it may proceed in this Court as many such cases have in years before.

Mr. Chief Justice, perhaps because of what we said in our brief, I should add this one word with respect to our conclusion, our submission with respect to the disposition of the case. We had said in May that perhaps the Court ought to hold this motion or deny it without prejudice to refiling. Time has passed -- I may say that the United States has done very little by way of attempting to investigate or negotiate the settlement. So far as I'm aware, Arizona has done no more; and, accordingly, at this late date, it would be our submission that California is entitled now to have its title tried. And we would accordingly withdraw our suggestion of postponing action, and urge this Court to grant the motion, with the undertaking of the United States that it would inter-

vene within 180 days, so as to allow its title south of the Pilot Cut to be finally resolved.

QUESTION: Mr. Claiborne, before you sit down, one thing I did not understand. If this Court were to construe the word "exclusive" in 1346(f) as just foreclosing an action in State courts but not foreclosing an action in this Court, why would you -- did I correctly understand you to say that the action would not be a 2409 action; and, if so, why wouldn't it be?

MR. CLAIBORNE: Because an action --

QUESTION: I don't understand why you couldn't --

MR. CLAIBORNE: -- an action in which the United States is plaintiff or intervenor is not an action which is governed by 2409. 2409 is simply a waiver statute when the United States is neither plaintiff nor intervenor.

QUESTION: No, but supposing the United States is a defendant, as they seek to name them; supposing we held they could be, why couldn't it still be a 2409 action and you still have your 12-year defense?

MR. CLAIBORNE: Well, if the Court, Mr. Justice Stevens, were to hold that the United States can be sued in this Court because 2409 has waived sovereign immunity for this Court as well as the district court, then --

QUESTION: The only thing that prevents that is the word "exclusive" in 1346(f).

MR. CLAIBORNE: Indeed.

QUESTION: And if we construe "exclusive" as just to exclude State court jurisdiction, aren't all the problems solved?

MR. CLAIBORNE: All the problems with respect to the sovereign immunity of the United States.

QUESTION: And also with respect to your 12-year defense, you still could assert that.

MR. CLAIBORNE: And I may say that we can think of no good reason why the government ought to be subject to suit on its title in a district court and not in this Court.

QUESTION: Well, --

MR. CLAIBORNE: We cannot suppose that Congress was that solicitous of the Solicitor General. It may have been solicitous of this Court's burdens, but there isn't the slightest indication of that in the legislative history. We must assume that they simply overlooked that such suits bringing into play the title of the United States did occasionally, when States were involved, arise originally in this Court.

Whether this Court is free to remedy that omission by Congress is the question.

QUESTION: But the only problem is the word "exclusive" in 1346(f) then?

MR. CLAIBORNE: That's entirely right.

QUESTION: Okay, I just wanted to be sure.

MR. CHIEF JUSTICE BURGER: Mr. Goodman -- oh, excuse me. Yes, Mr. Kolsrud.

ORAL ARGUMENT OF RUSSELL A. KOLSRUD, ESQ.,

ON BEHALF OF THE STATE OF ARIZONA

MR. KOLSRUD: Yes. Mr. Chief Justice, and may it please the Court:

I would like to initially discuss a question and answer posed by the Solicitor General which is the essence of this action. And that is: Must this case be heard only before this Court? And Arizona's position is: No, it must not.

I think the simplest answer to this case is to recognize that 1346(f) can be read as a grant of concurrent jurisdiction by Congress to the district court, regardless of the parties. This has been done, this sort of approach has been taken prior to 1948, when the Judicial Code stated that cases in which a State was a party had to be brought before the United States Supreme Court. That posed quite a few problems in cases where the United States brought an action against a State, and the only jurisdiction was this Court.

There were many places, for example in the Safety Appliance Act in U.S. vs. California, this Court stated that that particular legislation was actually a grant of concurrent jurisdiction in actions by the United States against a State, so that the district court could in fact hear that case.

The same can be done right here in this action. Any case that is brought, any case where the United States has title to property that is brought by any person, the district court should have jurisdiction to hear the case regardless of who the parties are. That would be a grant of concurrent jurisdiction and would also permit this Court to allow those types of cases to go elsewhere.

The actual essence of this case is whether the language in 1251(a)(1) means exactly what it says. It says that jurisdiction must be exclusive in all controversies between two or more States.

This Court's original jurisdiction has been variously interpreted since 1789, the date of the first Judiciary Act. Recently this Court has implied, if not stated in dicta, that there is an element of discretion in the interpretation of 1251(a)(1). Most noteworthy is the recent per curiam decision in 1976 of Arizona against New Mexico. In that case this Court stated that it should interpret 1251(a)(1) in the same manner that the Court would interpret Article III, Section 2, Clause 2 of the Constitution, which is the original jurisdiction grant of power in the Constitution.

Now, if this is correct, that means that there is some discretion in 1251(a)(1), and if that's true, then the only question before the Court right now --

QUESTION: I'm not quite clear what you mean by

"discretion".

MR. KOLSRUD: Discretion to hear -- the words were that this Court would exercise its original jurisdiction only in appropriate cases. So the question is: Is this an appropriate case?

QUESTION: But wasn't the intimation in Arizona vs. New Mexico that it wasn't appropriate because the State really wasn't representing its own interest but rather the interest of a private plaintiff?

MR. KOLSRUD: That was one aspect of the case. The concurring opinion of Mr. Justice Stevens indicated that. However, I think the Court's primary concern was that Arizona was actually -- the issues presented by Arizona were actually being tried in a separate lawsuit in New Mexico by the Salt River Project and other private citizens. Although Arizona was not involved in that case, the issues themselves were being adjudicated in New Mexico.

So it was somewhat different than that.

The point is, is this an appropriate case for this Court? We think not. The nature of this case is a quiet title action. It does not involve the larger issue of jurisdiction, it doesn't involve problems of a State's sovereign powers to regulate the laws within its own boundaries.

QUESTION: And it doesn't involve a boundary dispute.

MR. KOLSRUD: It's not a boundary dispute at all.

QUESTION: Yes.

MR. KOLSRUD: As a matter of fact, it's merely a question of who owns, where do you draw the lines between two landowners in California; that's the factual --

QUESTION: Well, what you're saying is California will have to sue you and the United States in the district court?

MR. KOLSRUD: We're saying California can and should sue both Arizona and the United States in district court in California.

QUESTION: And how do you get waiver of sovereign immunity on the part of the United States?

MR. KOLSRUD: Well, sovereign immunity on the part of the United States as has been waived pursuant to --

QUESTION: By statute.

MR. KOLSRUD: -- 2409a. The question would be about Arizona.

QUESTION: This, then, would be a suit under 2409a, would it?

MR. KOLSRUD: Yes.

QUESTION: But how about -- but, there's also a fight between the two States; what about that dispute? Why isn't that within the exclusive jurisdiction of this Court?

MR. KOLSRUD: It is within the exclusive jurisdiction of this Court under 1251(a)(1); the question is: Is there a

way to get around that and put the case --

QUESTION: Yes, that's what -- you're going to get to that, I take it.

QUESTION: Well, this is what -- this is your discretion argument, isn't it?

MR. KOLSRUD: Yes.

QUESTION: That we have discretion even though it's within our exclusive jurisdiction; that under Arizona v. New Mexico, you're suggesting, we have discretion nevertheless to let the case be decided in the district court suit.

MR. KOLSRUD: Yes, Mr. Justice --

QUESTION: Is that it?

QUESTION: Well, that may be so, but how about the power of the district court?

MR. KOLSRUD: To hear the case of controversy between two States?

QUESTION: Yes.

MR. KOLSRUD: Okay. The power of the district court, I think we have to look at the principles behind Article III. The district court has the power to adjudicate controversies between States, regardless of the subject matter.

QUESTION: That may be, but how about the statute?

MR. KOLSRUD: 1251(a)(1) you're referring to?

QUESTION: Yes.

MR. KOLSRUD: That statute --

QUESTION: I think that as far as the Constitution is concerned, Congress could let two States litigate with each other in a district court; but how about 1251?

MR. KOLSRUD: Well, our argument is this: We can read the statute, we know what it says. Our position is that the reasoning and the policy, the principles behind the idea of a State having to be sued only in the United States Supreme Court don't apply here. Therefore, it's time -- we would prefer -- everybody agrees that we should be in district court.

California would like to be there, the United States would like to be there, Arizona would like to be there. The only impediment is that language in 1251.

QUESTION: Yes.

MR. KOLSRUD: This Court has, in numerous cases, I think in the most, one of the most recent is the Ohio vs. Wyandotte Chemical case in 401 U.S. Now, although that case involved only a dispute by the State of Ohio against citizens of another State, nevertheless the reasoning given by this Court for declining jurisdiction is relevant to this case.

QUESTION: But there it was original but not exclusive.

MR. KOLSRUD: Yes, that's true. But Justice Harlan went through some substantial amount of reasoning and policy arguments behind the Article III grant of jurisdiction, dis-

cussing, first of all, the need for discretion in this Court to decline to accept various cases within the original jurisdiction; and, secondly, the reasons that a State as a plaintiff has the right and authority to bring any case to the Supreme Court.

QUESTION: Do you think Wyandotte is consistent with the subsequent opinion in Illinois vs. Milwaukee?

MR. KOLSRUD: Well, the subsequent opinion in Illinois vs. Milwaukee, the result, I think, is very consistent, yes. And actually some of the language in Illinois vs. Milwaukee would support the idea that a State such as Arizona could waive whatever protections 1251(a) is supposedly affording Arizona, so that we could intervene and have the issue adjudicated in district court.

QUESTION: What legal -- what body of law would govern this litigation? Is there any State law in it, or is it all federal?

MR. KOLSRUD: The quiet title action in California?

QUESTION: Yes.

MR. KOLSRUD: That's the -- generally speaking, the law of the State or the locality would be controlling as far as local -- as property law is concerned. So, in California, the local law of California generally would be applied.

QUESTION: Well, you mean as between the lines of the contending private parties. What about the riparian

federal rights?

MR. KOLSRUD: Well, those we would think as well would be governed by local law.

QUESTION: By State law?

MR. KOLSRUD: Yes, State law. Although that, itself, is another issue, there are some problems that we have with that as well.

QUESTION: Well, if the controlling law would be State law, there certainly is another reason to have some judges ruling on it to know something about that particular State law, I'd suppose?

MR. KOLSRUD: Well, yes, and the judges in the district of California certainly handle quite a few quiet title actions, and are quite competent to handle that sort of a problem. Which is one of the policy reasons under the Constitution that a State should not have to go anywhere but the United States Supreme Court to adjudicate whatever cases they may have. And that, at one time, was that no other court was competent to handle the problem.

In this instance I think the factual problems we have with -- and this case is primarily factual -- can be adjudicated in district court. Now, Arizona has also, we have argued that we can waive whatever protection there is under 1251(a)(1). The analysis and the reasons for that argument are the same as the reasons that this Court had

discretion to decline to hear the case.

As a defendant, the Constitution was to protect -- the idea was to protect the State from compulsory process. The State's prestige and dignity was such that it should not be compelled to be sued anywhere but in the United States Supreme Court.

Well, in this instance, what was actually meant to be a favor is a burden. As a sovereign, we should be able to submit ourselves to the jurisdiction of that court, to have that issue decided, so long as the court has subject matter jurisdiction; and in this case it does.

QUESTION: Well, that's the problem, isn't it, because 1251 does talk about jurisdiction?

MR. KOLSRUD: Yes, 1251 --

QUESTION: And if it said that no district court shall ever have jurisdiction of a suit between two States -- that's really what it says, isn't it?

MR. KOLSRUD: That's what it says.

QUESTION: And you wouldn't think you could consent -- you can't confer jurisdiction to the district court.

MR. KOLSRUD: Well, we cannot confer jurisdiction, but we think the reasons for that do not apply here. Plus there's a question whether the 1251(a)(1) actually itself would bar this suit in district court.

If we look at the Constitution, in Section 2, it

states that the judicial power of the United States shall extend to, first of all, all cases in law and equity arising under the Constitution and statutes, and also all cases of maritime and admiralty jurisdiction. In other words, cases are based upon the cause and the subject matter.

Secondly, Article III, Section 2 states that the judicial power extends to controversy between two or more States.

And then in the next clause, which is the grant of original jurisdiction, the Constitution states that in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. That can be read, and reasonably read, to mean that the original jurisdiction of this Court extends only to controversies between States that involve cases, the subject matter of which are either: under the Constitution, involving questions of federal law; or the other cases, maritime and admiralty.

This case doesn't follow that.

QUESTION: Are you familiar with the case of Ames v. Kansas at 111 U.S. 449?

MR. KOLSRUD: Yes.

QUESTION: How about the language of Chief Justice Waite there that the evident purpose of the clause you're referring to was to open and keep open the highest court of the nation for the determination in the first instance of suits

involving a State or a diplomatic or commercial representative?

MR. KOLSRUD: That would not be inconsistent with what I just stated, I don't believe. The idea that the Court should be open to Ambassadors and States, that would not be foreclosed, it just would not be exclusive.

The exclusivity idea came from Congress in the first Judiciary Act, --

QUESTION: But don't you have to argue that Congress was prevented from doing that by the -- by Article III?

MR. KOLSRUD: Prevent? I'm not sure I understand.

QUESTION: Don't you have to argue that -- not that Article III required Congress to make the jurisdiction exclusive in 1251, but that it prevented it from doing it?

MR. KOLSRUD: The Congress is prevented from making an exclusive --

QUESTION: Yes. By Article III.

MR. KOLSRUD: That could be -- that has been argued, but it's been rejected.

QUESTION: Well, what is your argument that you would make? Perhaps I misunderstood.

MR. KOLSRUD: My argument that I was making is that this is not a case the subject matter of which arises under the Constitution. Although it's a controversy between two States, it is not a case that is arising under the Constitution or the laws of the United States.

QUESTION: And therefore what?

QUESTION: But that's not -- oh, excuse me.

QUESTION: That's contrary to Ames, isn't it? Where it says: keep open the highest court of the nation for determination of suits involving States.

MR. KOLSRUD: Yes, that would -- it would be contrary to Ames, to the extent that it would exclude something other than a case arising under the Constitution.

QUESTION: Wouldn't your argument apply to boundary disputes?

MR. KOLSRUD: Yes, that's another problem with that argument.

[Laughter.]

MR. KOLSRUD: A boundary dispute could possibly be argued as a case arising under the statutes of the United States. I realize that that is -- hasn't been adhered to before, but it is sort of a problem that has to be looked at now, in this case especially.

QUESTION: You say boundary disputes might arise under statutes -- what, admission statutes or what?

MR. KOLSRUD: Yes. When Congress passed the admission statutes. That could be read as a case under the statutes of the United States.

QUESTION: Let me test out what you just suggested in response to a question about the Ames case. Suppose a

truck owned by the State of Arizona is going over into California, as I'm sure they often do, and they run off of an overpass and do a couple of thousand dollars' worth of damage to the bridge. You can postulate any amount you want. That's a suit between two States, potentially, isn't it?

MR. KOLSRUD: A tort action.

QUESTION: Is that in this Court? Do we take that damage case in this Court, under the Constitution, as you see it?

MR. KOLSRUD: We certainly could. Because it would be a controversy between two States.

QUESTION: Well, --

MR. KOLSRUD: Although the action itself would be a -- well, under what I postulated a moment ago it wouldn't be, because it would not be a case arising under the Constitution or the laws of the United States.

I realize that that argument has some problems, but --

QUESTION: Well, in addressing that rather sweeping language that seemed to embrace cases simply because one State was claiming against another, without reference to any federal question or question arising under the Constitution.

MR. KOLSRUD: Well, if you take the words literally, controversies between two States, that would definitely be a controversy between two States.

Although that, the Constitution doesn't really say

that, either. The Constitution states that the judicial power shall extend to controversy between two States, not all controversies between two States. It doesn't exclude any, but it doesn't include them all, either.

This sort of a case ought not be here. It's a factual case, there are not critical sovereign issues; and that itself could be an issue, what exactly we're talking about when we're talking about sovereign lands here. California says they are sovereign lands. Well, there is an argument that the 1966 Compact had an effect on that, and it may not be.

Plus the United States is involved, and we think, under 1346(f) that is a grant of concurrent jurisdiction at the very least, and if it is, then every case, not only this one, but every case where the controversy between two States and the United States is defendant can go to the district court; and that will happen quite often in this litigation.

And finally, I would like to make one more point on this continuing jurisdiction point that California wants this Court to take. There is no controversy right now on the remaining aspects of this river. The only controversy there is right now is the Davis Lake Study. This Court has repeatedly held that unless there is a bona fide controversy, a case, a wrong, some right that's susceptible of judicial determination, then this Court will not take jurisdiction of it because it's not a justiciable -- it's not justiciable under

the Constitution.

So, thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Goodman.

REBUTTAL ARGUMENT OF ALLAN J. GOODMAN, ESQ.,

ON BEHALF OF THE STATE OF CALIFORNIA

MR. GOODMAN: Mr. Chief Justice, and may it please the Court:

Arizona speaks of the possibility that 1346(f) makes 1251(a)(1) a grant of concurrent rather than exclusive jurisdiction, and talks about the pre-1948 Judicial Code.

We submit that Congress's amendment of the Code of 1948 makes the plain language very clear, and that it's the plain language that has to control here; and that's the plain language of 1251.

As Professor James Moore, the Special Consultant to the Revisers of the 1948 Code, stated in his treatise commentary on the Judicial Code: "A large number of changes, many of considerable importance" -- interlineating here -- "have been made. The Code should be construed with this in mind, and where plain language works a change in the former law, this change should be given effect." That's at page 83.

In fact, what occurred in 1948 was there was a change in the prior law. Prior to 1948 the statute provided for exclusive jurisdiction where any State was a party -- this Court in U.S. vs. California, at 297 U.S., construed that as

permitting a grant of concurrent jurisdiction to lower courts. But Congress changed all that in 1948.

Our submission is that that change, in addition to the reasons I gave during my opening, preclude the construction which Arizona advances.

As for whether this is an important case, we submit that it is. These are indeed sovereign lands. We didn't think there was any dispute about that. They are lands which inured to California by virtue of its sovereignty, and to Arizona by virtue of its.

There's no dispute about the importance of those lands. That's been clear since Pollard's Lessee vs. Hagan.

Whether we want to be here or not. We understand that the Court has a tremendous appellate workload, and we read the list of cases which were cited in a concurring opinion recently, this term; that we regret to say that under our construction we have no choice. That's what Congress has said, and there is simply no alternative.

The issues are important for other States as well.

The choice of law question which Mr. Justice White raised is a very intriguing one. Under Nebraska vs. Iowa, 406 U.S., it would appear that as to lands located within each State the law of each State would apply. The question as to the law of the -- the boundary between federal and State lands is particularly intriguing, because, as the Court knows,

the --

QUESTION: How about Bonelli?

MR. GOODMAN: Bonelli, Your Honor, we think doesn't exist after Corvallis.

QUESTION: Well, I know, but how about Corvallis?

MR. GOODMAN: That's exactly -- thank you, Your Honor, I was just -- with respect to Mr. Justice Rehnquist's opinion for the Court in Corvallis, this land inured to the State under the equal footing doctrine by virtue of our sovereignty, and thus it is the Constitution which should determine what rights arise and how those rights are decided as to that federal land.

I think that as to the distinction after --

QUESTION: You mean the choice of law is a constitutional question?

MR. GOODMAN: That's right.

QUESTION: But what if you -- but what if we decide the State law would govern?

MR. GOODMAN: I think, Mr. Justice White, that in this case State law may --

QUESTION: Entirely, the entire controversy.

MR. GOODMAN: Yes. May govern the entire controversy.

The question, the next question that comes is: What is the effect of the source of the State's law, source of grant, upon the United States contention that 1346(f) prevails? Can

the Congress affect or change the grant -- excuse me, can a grant of -- can the inuring of the trust lands to the States be supersede by a grant, by a statute of the Congress?

QUESTION: Let me ask you, just before you sit down, suppose this Court said, Well, the United States doesn't want to come in here, it claims it's indispensable, but we don't think it's indispensable at all. If California wants to go ahead against Arizona in this Court, it may, if it wants to. Would you want to?

MR. GOODMAN: We don't think that we can get effective judicial relief in this Court under those circumstances.

QUESTION: So your answer is no, you'd rather have the case -- you would ask the case be dismissed if the United States isn't in it?

MR. GOODMAN: Well, we have no choice, because we couldn't enforce that decree.

QUESTION: Well, suppose this, suppose we say yes, the fight as between States is here, but California wants to bring a suit against the United States in the district court, it's free to do that; and then we appoint as the Master the district judge that's going to decide the district court case?

MR. GOODMAN: Well, Mr. Justice Brennan, I can only respond to the question, and that is: would we then have one judge or two? I think the answer is we would have two judges.

QUESTION: Well, he'd be wearing a hat with a --

QUESTION: Red ribbon on it.

QUESTION: -- as a Special Master, and he would be wearing his district court hat when he heard the testimony.

QUESTION: Sure there would be two judgments.

QUESTION: Sure, so what?

MR. GOODMAN: Wall, if I may take the Chief Justice's analogy, the judge would be wearing two ribbons, and the colors would be different. And the question on appeal would then again --

QUESTION: Appeal where?

QUESTION: There's no appeal from us in the one case.

MR. GOODMAN: But in the second one, what would I do? I simply don't have an answer to that question. I submit that the only sensible way --

QUESTION: You needn't reply, Mr. Goodman.

MR. GOODMAN: Thank you, Your Honor. -- is for this Court to take this case.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:50 o'clock, p.m., the case in the above-entitled matter was submitted.]

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