ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2337

TITLE JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL., Petitioners
v.
NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

PLACE Washington, D. C.

DATE February 23, 1983

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ALDERSON REPORTING

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,

Petitioners

v. No. 81-2337

NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

Washington, D. C.

Wednesday, February 23, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES

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

ROBERT O. WEFALD, ESQ., Attorney General of North Dakota, Bismarck, North Dakota; on behalf of the Respondent.

C O N T E N T S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Secretary Block against the State of North Dakota.

Mr. Claiborne, you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

ON BEHALF OF THE PETITIONER

MR. CLAIRBORNE: Mr. Chief Justice, and may it please the Court. This dispute is over the bed of the Little Missouri River in western North Dakota, so far as that river lies in that state. This is a river which has been described as a raging torrent in the summertime and a bare trickle in the winter. It is one as to which an explorer with the Lewis and Clark Expedition in 1804, after struggling down it for 45 days, emphatically declared it non-navigable.

Nevertheless, the State of North Dakota now claims that bed on the ground that it was at the time of its admission to the state in 1889 and today a navigable stream. We put out of mind the last 35 miles or so of the stream where it borders or traverses an Indian reservation. That portion of the riverbed is not at issue in this case.

But, for the rest the state claims the whole of the bed saying that that bed as the bottom of a navigable water body inured to the state under the Equal Footing Doctrine at statehood and by virtue of its Organic Act and by confirmation in the Submerged Lands Act of 1953.

The United States, on the other hand, claims substantial

portions of the same riverbed -- perhaps, as much as a third of that riverbed. The federal claim is based on the opposite proposition that the river was not and is not navigable, and therefore did not inure to the state under the Equal Footing Doctrine or Submerged Lands Act.

The United States claims partly as riparian owner of the land immediately on the banks of the river, sometimes the mineral estates, sometimes the surface estates, sometimes both. Some of these are public lands reserved and retained by the United States since the beginning. Some of them are lands reacquired subsequently.

In some cases, the United States claims the bed, but not the riparian land. That occurred because the state, which was graded like most states, Section 16 and 36, the school sections in its Organic Act, determined to reject the submerged portions of those sections and to condemnity lands elsewhere, thereby waiving its claim to the bed in those Sections 16 and 36.

As the evidence of navigability in this case suggests -- and we say it suggests the non-navigability of the river -- it is not surprising that the state made no claim with respect to this bed for the better part of the first century since it was admitted to the state.

QUESTION: How could they have made such a claim, Mr. Claiborne, before the enactment of the Quiet Title Act?

MR. CLAIBORNE: I am saying they never asserted

ownership, Justice Rehnquist, by leasing or by granting patents with respect to portions of the bed, or easements, or taking any other action which indicates their assertion of dominion with respect to that bed.

Indeed, so far as the record shows, North Dakota never asserted in any way any claim of ownership vis-a-vis the United States or vis-a-vis private landowners until at the earliest 1962.

On the contrary, in 1955 when the Bureau of Land Management of the Department of the Interior specifically asked the State Attorney General whether in the State's view, the river was or had been at statehood navigable and accordingly appertained to the State, the express answer came back, "No, this river has not and is not now navigable."

Shortly, thereafter the United States began leasing portions of the bed, treating it as property of the United States. There were some 39 such oil and gas leases by October, 1966, more than 12 years before this suit was filed, approximately 100 since that time.

In 1962, the United States began leasing competitively which required publication and notice, and we say, a further reason why the State should have been aware of the federal claim.

Now, apparently, in that same year, 1962, the State itself granted --

QUESTION: Mr. Claiborne, you said the State should have been aware of the federal claim at that time. Now that is

a whole different position than your statement that the State asserted no interest of its own.

What could the State have done before the enactment of the Quite Title Act, if it did become aware of the federal claim?

MR. CLAIBORNE: According to the State's argument, it could have filed suit, regardless of the Quiet Title Act. We take the opposite position, but --

QUESTION: Well, under your view, what could it have done?

MR. CLAIBORNE: But the State could have granted leases. It could have asserted its ownership without -- even if it were unable to file a suit against the United States, or it could have --

QUESTION: I suppose it could have dispossessed the United States' lessees.

MR. CLAIBORNE: Indeed. And it could at least have notified the United States that it claimed the bed, and invited the United States to file a suit to settle the matter judicially. It did none of any of those things.

QUESTION: My own experience in private practice was that invitations to the United States to file a suit to Quiet Title were not often accepted.

(Laughter)

MR. CLAIBORNE: Justice Rehnquist, our record in this respect may be uneven, but my impression is that the United States

has been rather receptive to overcoming the power of sovereign immunity by itself instituting an action to determine judicially a disputed land claim with states. That has been the history of the Submerged Lands Act since the first California case through the more recent case involving the Atlantic Coast States, United States v. Maine.

All of those suits were those which could not have been brought by the state, but which the United States, though maintaining its ownership, determined it was only right and proper to have tested in this Court.

In this case, had that been the view of the United States, we would have instituted such a suit. In our view, this claim is simply so lacking in merit, it does not justify such an action.

In all events, they were rather indications of the state's disclaimer of ownership after notice. But I will not burden the Court with those details. That is not what this Court is asked to decide.

There is a question that undecided whether sufficient notice was given by the courts below, and if our position prevails the case would have to be returned to the District Court for a determination -- a finding on that question.

At all events, in 1978 the State filed suit asserting its title to the bed and seeking to enjoin the federal officials from, in their words, asserting ownership through the granting of

leases and other activity.

The question is whether that suit was filed too late. Now, although the State sued the Secretary of Agriculture and the Chief of the Forest Service and the Secretary of the Interior, and the Director of the Bureau of Land Management, we asserted in defense to the State's suit that this was in reality a suit against the United States to quiet title to land in which the United States claimed an interest. And, accordingly a suit governed by the federal Quiet Title Act, Section 2409a of the Judicial Code.

The District Court agreed and required the State to amend its complaint to allege that jurisdictional basis.

At this point, the question before the Court was whether the limitations provision of the Quiet Title Act applied. Now, that limitations provision, which is set out in our brief at page 3, is subsection (f) of 2409a. And, it provides as follows: "Any civil action" -- I stress the word "any" -- "under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

QUESTION: When was that enacted, Mr. Claiborne?

MR. CLAIBORNE: In 1972, Your Honor.

QUESTION: What would be the effect as of the date

the thing came into effect in 1972 of a claim, say, by a state or by anybody else against the government, which had, say, accrued in 1952?

MR. CLAIBORNE: Such a claim would be barred because while as originally proposed there was a grandfather clause allowing stale claims to be filed within a short period. Ultimately the Congress agreed with the suggestion of the federal representatives that that would open the doors to too many claims and that rather than have a six-year period it would reach back twelve years. But, there would be no grandfather clause for claims more stale than that.

Now, assuming that statute and that limitations provision of the statute applied, the second question was whether the State knew or should have known of the federal claim more than 12 years before the suit was filed. The State's stance in the District Court and ever since was that the limitations provision was inapplicable and that the State accordingly should focus its attention on the issue of navigability.

The United States, on the other hand, focused on the threshold question, the jurisdictional question, the limitations question, and produced evidence with respect to State knowledge of the federal claim more than 12 years before the suit was filed and argued that accordingly the action should be dismissed.

The District Court agreed with the State holding that the limitations provision was inapplicable under these

circumstances and, therefore, made no finding with respect to whether the State had knowledge, actual or constructive, 12 years before the suit was filed. And reaching the merits, the District Court found that the river was, indeed, navigable, and accordingly that the State had ownership.

On appeal the Court of Appeals for the Eigth Circuit agreed with the District Court on both points, and accordingly affirmed.

We petitioned in this Court solely on the limitations point, not because we concede the navigability of the river, but because we felt that it was inappropriate to burden this Court with a purely fact-bound question of the navigability of this particular river. We argued in all courts, including in this Court, that the courts should not have reached the issue of navigability because they had no jurisdiction, the action having been barred by limitations.

Our argument is entirely straightforward. We say this is an action which is in effect a suit to divest the United States of lands which it claims to own, which is barred by sovereign immunity except only as Congress has waived that bar.

We say this principle applies to states as well as private citizens. We note that in 1972 Congress did waive sovereign immunity in the Quiet Title Act, Section 2409a, in respect of this class of suit, but it did so on express conditions.

And, one of those conditions, subsection (f) of the

statute, is that the suit be filed within 12 years after knowledge, actual or constructive, of the federal claim.

Now, since as the District Court held and the Court of Appeals assumed, rightly, we think, North Dakota must invoke this statute. It must, like any other plaintiff, invoking the benefits of the statute also be bound by the conditions, including the limitations provision.

We see no basis for creating a special exception because North Dakota's claim of title here is constitutionally derived in the sense that the Equal Footing Doctrine is responsible for the State's alleged ownership of the riverbed. Constitutional rights, like any others, can be barred by the failure to assert them within a given time.

QUESTION: What if Congress had enacted no Quiet Title Act here that authorized suit at all? What could the State have done with respect to lands which it claimed under the Equal Footing Doctrine? What, if any, as against the federal government?

MR. CLAIBORNE: We say, Justice Rehnquist, first that so far as that claim was alleged against the United States -- and, of course, I put aside such a claim against private individuals as to which there is no bar -- the sovereign immunity of the United States would have prevented the bringing of such an action.

Alternatively, we say that even if that were not true, since 1972 Congress has provided a leachant procedure for the assertion of such claims by states of others and that the state

has failed to comply with the conditions of that limited procedure.

QUESTION: So, there might have been an eminent domain type of -- Jacobs type of cause of action before 1972, but not afterwards, or Congress would have specified the procedure?

MR. CLAIBORNE: I think that is so. Though, if we had a different situation in which the United States for the first time seemed to be taking the State's sovereign lands, even after 1972, the State would have the option of either suing us under the Quiet Title Act or suing us -- put claims under the Tucker Act.

And, indeed, one of the novelties of this case is that the Quiet Title Act provides that if the United States wishes to keep the property, notwithstanding the judgment is going against it, it may do so. And, to that extent the injunction entered by the District Court is in any event improper.

Now, as I say, constitutional rights, like any other rights, can be barred by the failure to assert them timely. The classical example being rights under the Just Compensation Clause which this Court and other courts have held are barred if not filed within six years.

States are subject to limitations, witness this Court's venerable decision in Louisiana v. United States.

State land claims can be barred altogether by the soverign immunity of the United States. That is true with respect to trust lands that have been granted to the states in its Organic

Act as a number of decisions of this Court indicate, and as the most recent decision of this Court bearing on the subject, California v. Arizona indicates that is true even with respect to the Equal Footing Doctrine lands. In California v. Arizona the Court said explicitly, this suit would be barred but for the Quiet Title Act. And the Court then construed the Quiet Title Act as waiving sovereign immunity, not merely in the district courts but also in this Court. A holding wholly unnecessary if such a claim was in no event stopped by sovereign immunity.

Now, of course, Congress cannot take away what the Constitution has given. Congress cannot take away what Congress itself has given irrevocably.

But there is no taking here in that sense. Congress' failure to lift the bar of sovereign immunity is not a taking. Much less does a limitations provision, condition of such suit, amount to a taking. Rights without a remedy may be rare in the law, but sovereign immunity is a classic example of such rights. All sovereigns, including the State of North Dakota, invoke that Doctrine from time to time.

Here we do not have a right without any remedy. We simply have a limited remedy.

As I have said, the United States by and large has been receptive to paving the way to the judicial resolution of state claims, which were otherwise barred by sovereign immunity, by itself instituting the law suit.

But there is a limit to all good deeds. Here the United States determined not to file its own action, at least not yet, and that is the essence of sovereign immunity, the prerogative not to waive the prerogative.

Now, the practical importance of this question is substantial. If anything needs security, it is land titles. If the State were free after adequate notice and almost a century of default to reopen claims to water bottoms on the ground that at statehood the river was navigable, there would be a spate of litigation.

Indeed, judging from the amicus briefs in this case, filed by some 30 states, there are that many states ready, eager to file stale claims against the United States with respect to submerged lands. They say, potentially 50 million acres are at stake.

That seems to us a strong argument for holding the line against claims that are so stale that after notice they have not been filed for 12 years or more.

For these reasons, we urge the Court to reverse the courts below insofar as they held the limitations provision of the Quiet Title Act inapplicable, to vacate the declaratory judgment with respect to navigability on the ground that the courts had no jurisdiction to reach that issue, and to remand the case to the District Court so as to have it enter a finding with respect to whether or not North Dakota had the requisite notice

of the federal claim more than 12 years before it filed this action.

I reserve what balance of time I have for rebuttal.

CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF ROBERT O. WEFALD, ESQ.

ON BEHALF OF THE RESPONDENT

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

The threshold issue here is navigability. I have to point out a couple of things that should be noted right here. We have a couple of things that the Petitioners have not in this case.

First of all, we have evidence of navigability. Second of all, we have the decision of the District Court and the Eighth Circuit Court of Appeals finding that the Little Missour River is navigable.

Navigability is a threshold question. Without navigability, the State of North Dakota is out of court, period. It is interesting also to note that, of course, when we review the evidence, Brother Claiborne failed to note, that the Corps of Engineers in 1975, which is Exhibit A in the trial transcript, had a study that concluded that the Little Missour River was navigable. There is plenty of evidence.

The characterization of Baptiste who came down the river in 1804, who did in fact make it in a canoe. Teddy Roosevelt in March of 1886 pursued bandits down the Little

Missour River in a boat that he had constructed for that particular purpose. He caught them, and took them to jail.

We want from the government a fair deal, a square deal, as Teddy Roosevelt would have given us. And, that is what we have gotten in the two lower courts in this particular case.

The Little Missouri River is navigable.

QUESTION: Is there any issue of navigability before us?

MR. WEFALD: Only insofar as it relates to the threshold question --

QUESTION: Well how does it relate -- what is the threshold question?

MR. WEFALD: The threshold question is navigability and sovereignty. The two are tied together.

QUESTION: How?

MR. WEFALD: Because --

QUESTION: Does the government challenge that --

MR. WEFALD: Navigability?

QUESTION: Yes.

MR. WEFALD: They assert that the river is not navigable, but they have offered no evidence whatsoever with respect to non-navigability. Their reliance, as Brother Claiborne said at the District Court level, was simply on the question of notice and their statute of limitations --

QUESTION: Wholly to challenge it without any evidence, isn't it?

MR. WEFALD: That is correct.

Now, with respect to the question of navigability and sovereignty, it ties in this way. The District Court found that under the nullum tempus rule that the statute of limitations in the Quiet Title Act, sub f, does not run against the sovereign, in that North Dakota as the other states under the Equal Footing Doctrine is a sovereign with respect to the retained sovereign title of the beds under navigable waters. And, hence, we have to take the two questions together. Just like Judge Vansickle did at the District Court.

QUESTION: You mean you have to decide whether a stream is, in fact, navigable before you can decide whether the statute of limitations runs against the state?

MR. WEFALD: Indeed. In this particular case, the question is state sovereignty. There may well be areas in which a federal statute of limitations would apply to limit or withhold a suit brought by a state. In this particular case, because of the sovereign nature of the claim of the State of North Dakota to its waters under the Equal Footing Doctrine, the court found that the statute of limitations did not run against the sovereign.

QUESTION: The Court of Appeals affirmed the finding as to navigability.

MR. WEFALD: That is correct.

QUESTION: And the government has not challenged that?

MR. WEFALD: That is correct.

QUESTION: So, I would think you would be safe in assuming that we would all assume it was navigable.

MR. WEFALD: I would hope so.

That takes us then to the question of sovereignty.

QUESTION: May I ask a question --

MR. WEFALD: Yes, sir.

QUESTION: May I ask this question if this is what in effect you are arguing that if the State had acquired title not through its sovereign status and the navigability of the river and so forth, but rather by purchase from a private person and so forth, would you conceed the statute of limitations would bar the claim then?

MR. WEFALD: We would have a much more difficult argument with respect to that because our claim would not be under sovereignty -- retained sovereignty --

QUESTION: I see. You are saying the statute does not bar a state claim of this kind although it might bar other state claims.

MR. WEFALD: That is correct. It may very well bar others, but we do not have those particular issues here. We have here today the question of retained sovereignty, and that is what we have.

So, with respect to the question of sovereignty --

QUESTION: Didn't the federal government give up sovereignty on its Act -- Quiet Title Act?

MR. WEFALD: Did the federal government give up sovereignty?

QUESTION: Uh-huh, allowing itself to be sued.

MR. WEFALD: That is correct. It did.

QUESTION: Couldn't it put a condition on that?

MR. WEFALD: The government argues that it could --

QUESTION: Couldn't it?

MR. WEFALD: It did, in fact, in this case put a condition on it. That condition, however --

QUESTION: Why isn't that accurate? Why can't you give up some of your own conditions and the next question, don't you have to abide by the condition?

MR. WEFALD: The answer found by the Court of Appeals and the District Court is that that condition does not apply against a sovereign state claiming a sovereign interest. We agree with that contention, that conclusion, because under the retained sovereignty, the Equal Footing Doctrine, we are the sovereign with respect to the bed of the Little Missouri River, not the federal government --

QUESTION: You mean you are more sovereign than the federal government?

MR. WEFALD: Yes. Their argument is that --

QUESTION: Is that your position?

MR. WEFALD: With respect to the bed of the Little Missour River --

QUESTION: Is that your position that --

MR. WEFALD. Indeed, it is, Your Honor.

QUESTION: -- the state is more sovereign that the federal government?

MR. WEFALD: That is correct. No question about that.

So with respect to the question of sovereignty, the Eighth Circuit Court of Appeals affirmed the decision of the District Court which was that the statute of limitations does not run against the sovereign, i.e. the State of North Dakota acting in a sovereign capacity. We believe that that is the correct interpretation and that as a result of the decision of the Eighth Circuit Court of Appeals affirming the District Court ought to now be affirmed by this particular Court.

With respect to the one comment made by Brother Claiborne about the states that have filed the amicus brief and joined in this issue, the problem that states have is the same problem any sovereign has. But, we cannot allow assets of a sovereign to be dissipated or to be lost through an action of its particular official. That is exactly what the federal government is claiming.

In this particular case, the State of North Dakota cannot afford to have its assets transferred from its public trust lands to the federal government -- exactly the converse to what the federal government arguing. The Petitioners say if this action is affirmed, the federal treasury -- the federal government

will have lost an asset. And, I say that is nonsense because that property has belonged to the State of North Dakota since statehood.

As far as the question of multiple leases go, when we should have known about this, there was not really a problem because we were leasing at the same time the federal government was leasing. Companies were paying us the same time they were paying the federal government, taking dual leases. And, that was common. At least, it was common up to the point when leases were relatively cheap. But, as it became more expensive --

QUESTION: There are not so many dual leases any more.

MR. WEFALD: That is correct. Plus, when it came to the point of paying royalties, they did not want to pay dual royalties.

We think that the record is clear in this case that the State of North Dakota does, in fact, own the bed of the Little Missouri River, that we own it as a sovereign under the Equal Footing Doctrine. And, that by virtue of our sovereignty, the statute of limitations found in sub (f) does not apply to us.

The United States Petitioners admit on page 15 of their brief, they say "It is common ground that if the river was navigable at statehood, the bed belongs to North Dakota." That is our position. They also --

QUESTION: What if there had not been the Quiet Title Act?

MR. WEFALD: We would own it nevertheless. The question is how do you prove up the ownership.

QUESTION: What would you do about it?

MR. WEFALD: I think that we would have a cause of action in federal court without the Quiet Title action.

QUESTION: Against the Secretary?

MR. WEFALD: I think under a line of cases, the Lee, Larson, Malone cases, we would have an action against federal officers.

Take the Larson case in particular, a case in 1949. That one would indicate that they would impose some limitations on the Lee holding, but it did say that insofar as it goes to a question -- a constitutional question, we have a right to access. I think that --

QUESTION: Suppose that is right. Suppose we agreed with you on that. Could this judgment be affirmed on that ground?

MR. WEFALD: We would be happy for affirmance on any ground. On that particular ground --

QUESTION: Would it be proper to affirm it on that ground? Is that issue before us, or was --

MR. WEFALD: I do not believe that issue is squarely before us. The Petitioners have said we are talking about the 12-year statute of limitations. We are satisfied with the holding of the Eighth Circuit Court of Appeals affirming the District Court that the statute does not apply.

QUESTION: What if we disagreed with you on that?

MR. WEFALD: Well, then I would ask you to take a look at the other grounds we have asserted --

QUESTION: Would that be proper at this state?

MR. WEFALD: Certainly because all of these issues have been briefed by all the parties. The entire record is before the Court. Brother Claiborne, notwithstanding his argument about the 12-year statute of limitations, persists in maintaining the question of navigability is still open.

QUESTION: Would there be any statute of limitations? Suppose this were held not to be a suit against the United States, but just against a state officer or against a federal officer to tell him to keep his hands off of --

MR. WEFALD: Right.

QUESTION: -- state property, is there a statute of limitations?

MR. WEFALD: No, I do not believe there is simply because we in this claim are a sovereign, and the statute of limitations does not run against the sovereign. That is how --

QUESTION: There would be no statute of limitations, ever?

MR. WEFALD: Insofar as we are claiming sovereign lands, that is correct, with respect to the ownership of the sovereign lands.

QUESTION: Even though the opposition is the United

States?

MR. WEFALD: That is correct, because in this particular case there can only be one sovereign over the bed of the river. It is either the State of North Dakota or it is the United States insofar as it is a riparian landowner to those places of the river-bed to which it is adjacent.

QUESTION: But you surely are not saying that simply because this is a riparian bed that the State of North Dakota has a sovereignty in the governmental sense over it superior to the United States?

MR. WEFALD: No, it is not a question of the riparian nature. Our sovereignty comes by virtue of the fact that the river is navigable --

QUESTION: But sovereignty is only in the sense that you get those lands at the time you are admitted to the Union --

MR. WEFALD: That is correct.

QUESTION: -- but at the time you were admitted to the Union as when you were a territory, you are still subject to the government of the United States.

MR. WEFALD: There is no question about the fact that the government had -- the federal government has overriding powers in many areas. There is, however, under the Equal Footing Doctrine, the clear constitutional argument that sovereignty with respect to these navigable river beds is retained by the states. And that is for the states alone, and not for the federal

government.

So, under the Equal Footing Doctrine, we, in fact, own the bed of the Little Missouri River.

QUESTION: Mr. Attorney General, may I ask -- Have claims comparable to the dispute between the State and the United States arisen between the State and private riparian owners who may also be claiming parts of the riverbed?

MR. WEFALD: No, sir, not that I am aware. I am aware of no such thing.

QUESTION: Is that because the United States is the riparian owner all along the river, or you just have not asserted any such claims against private owners?

MR. WEFALD: With respect to private owners, we have no particular problem. At least that there is no --

QUESTION: The private owners have a claim to title that parallels the United States' claim. As I understand it, its claim is based -- part of the bed is based on the fact that it is a riparian owner.

MR. WEFALD: That is correct.

QUESTION: Aren't there some private riparian owners?

MR. WEFALD: There are private riparian owners. With respect to private riparian owners, any claim that they can assert is limited by the sovereignty of the State of North Dakota in our ownership of the riverbed. So, they cannot hold it. And we would clearly win as to them in any litigation.

QUESTION: But I am just wondering -- but no such fights have arisen?

MR. WEFALD: None that I am aware of.

QUESTION: I see.

QUESTION: You treat the private claimants of North Dakota just like you say the government is treating North Dakota.

(Laughter)

MR. WEFALD: In United States v. Texas, that 1892 case, the Court clearly held that sovereign immunity applies by a suit brought against an individual. But, they talk about suits between sovereigns and the need for an opportunity for reform. So, United States v. Texas clearly gives to the federal courts an opportunity to hear constitutional questions involving sovereign governments, in this case a claim of sovereign dispute between the federal government and the State of North Dakota.

As to the question of the private owners, there may be some lawsuits going on. If we have any difficulty with them, their lawsuits would be handled in our state courts.

Now, there is, in addition to the question of the statute of limitations run against the sovereign, in addition to the constitutional argument that we have suggested. There is another line of cases, and I believe several of the cases have been cited by the government -- by the Petitioners in their brief on pages 30 to 34, Davis v. Passman, Carlson case. Now, these are cases that follow up on, I think, the Lee, Larson and

Malone line of cases with respect to the ability of a claimant to bring a claim against an official, notwithstanding whether or not there is a particular statutory remedy available.

So, we think there is an adequate basis to get to court with respect to the claim we are making. I guess I would have to emphasize again that if we were to follow the logic of the Petitioners' position here today, North Dakota would have been out of court, would have lost all of its right to sue under the Quiet Title Act, five years before the law was enacted.

In their brief, the United States admits that this is harsh and one-sided on pages 20 and 27. Nevertheless, they assert that this is a valid interpretation. And, we say that is wrong because with respect to our constitutional scheme of government and the retained sovereignty of states, in particular the additional states that came into the Union after the original thirteen under Equal Footing Doctrine, we have to have the ability to protect our sovereign rights and to have a form --

QUESTION: Do you understand the United States' position to be that even if you could have sued Secretary Block or the Secretary of Interior before the Quiet Title Act was passed, and it would not have been held to be a suit against the United States, just assume that. With the passage of the Quiet Title Act -- that the Quiet Title Act erase the possibility of that suit as well as a suit directly against the United States unless brought within 12 years?

MR. WEFALD: I would assume that that would be their position, but their position is, in fact, that there was no access whatsoever prior to 1972. I would assume that would be their position on it. And, of course, that is a position which we would dispute.

QUESTION: But you did present to the Court of Appeals your alternate basis for --

MR. WEFALD: We did, indeed.

QUESTION: -- jurisdiction.

MR. WEFALD: And to the District Court as well.

QUESTION: And the Court of Appeals --

MR. WEFALD: Did not rule on it --

QUESTION: -- did not reach it -- didn't have to.

MR. WEFALD: That is correct.

QUESTION: You are presenting that here as an alternate ground?

MR. WEFALD: That is correct. That is simply argued as an alternate ground. We do not think that this Court has to go that far either because we think the ruling of both the District Court and Eighth Circuit Court of Appeals is correct and ought to be affirmed.

One other point that I would just briefly like to address is the so-called floodgates argument. Brother Claiborne mentions that somehow by affirming this decision we are going to open the doors to a whole host of litigation. I simply do not

think that is true. Perhaps, just exactly the converse may be true, that if we do not affirm this decision there will be a whole host of states scrambling right now trying to identify any conceivable claim that could be made by Petitioners or like people in the federal government, and there would be a whole host of lawsuits filed under the Quiet Title Act trying to beat the co-called 12-year statute of limitations that may very well run as to many of these people in 1984.

I think that a denial, a reveral of this claim, in fact, would increase litigation. There is no sense promoting litigation when, in fact, over the years federal officials and state officials are getting along reasonably well with respect to a particular piece of ground. Let's not generate cases. Let's handle the cases as they come up. And, I think the floodgates argument simply is erroneous in this respect.

In conclusion, I would simply like to note that the State of North Dakata and the 29 amicus states respectuflly requests that this Court recognize a state's right to protect title to sovereign lands against federal officials and/or the federal government. Such a decision would be in accord with over 150 years of case law history recognizing the constitutional Equal Footing Doctrine and in accord with the Submerged Lands Act.

As to that Submerged Lands Act, I would simply note that in 1953 the Congress of the United States clearly expressed the intent and the will of Congress that submerged lands -- that

is the beds navigable rivers -- belonged to the states. It was a specific direction to keep the federal government's hands off them. And, insofar as the Little Missouri River is a navigable river, then in accordance with the intent of the Congress, the federal officials in this case ought not interfere with our ownership of the bed of the Little Missouri River.

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Claiborne?

MR. CLAIBORNE: Mr. Chief Justice, briefly.

REBUTTAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

ON BEHALF OF THE PETITIONERS

MR. CLAIBORNE: First, Justice Stevens gave a better answer in his question to Justice Rehnquist than I did. When Justice Rehnquist said what could the State have done if it claimed the bed of this river before 1978? One answer is it could have sued the private landowners who enjoyed no sovereign immunity and who, I assume, having two-thirds of the river, were likewise granting leases or otherwise exerting ownership over what they thought was their portion of the riverbed. No such suit has, to this date, been filed.

Now, addressing Justice White's query with respect to the alternative basis for affirmance urged by North Dakota, it is fair to remind the Court that North Dakota filed a conditional cross petition of certiorari as to which the Court has taken no

action. Although, we oppose that cross petition on reconsideration in our brief, we urge the Court to consider the issue raised there if that issue is not otherwise available as an alternative ground for affirmance, because it seems to us wasteful and, indeed, perhaps only an advisory opinion if this Court were to hold that if Quiet Title Act applies certain results follow without first deciding whether it is the necessary predicate for this lawsuit.

We have addressed in our brief the question whether this is a suit within the exception of Bowdoin and Malone and the Larson case. That is discussed at pages 17 to 24 of our brief.

We conclude, and I do not have the time to recite it here, that this is not one of those exceptional cases in which one may sue the officer rather than the sovereign on the ground that the officer is acting unconstitutionally. This is not an officer straying on a frolic of his own. This is an officer acting on the basis of the sovereign title of the United States.

QUESTION: Then it is a suit to determine title?

MR. CLAIBORNE: It is a suit to determine title. And the judgment quiets title in North Dakota. But, we do go on, as Justice White suggested in questioning my -- rather the Attorney General -- to say even if this suit did lie, or could have lain, before 1972 as a suit against the officer not barred by sovereign immunity, what Congress sought to do in 1972,

among other things, in passing the Quiet Title Act was to say this area of suits against federal officers is unclear. No one knows with assurance whether in certain circumstances such a suit will or will not lie. We will simplify the law and we will authorize suits directly against the United States with respect to land provided such suits are filed within 12 years.

We say that from that time --

QUESTION: Was the United States made a party here, Mr. Claiborne?

QUESTION: Doesn't the Quiet Title Act require that the United States be made a party?

MR. CLAIBORNE: Well, the Quiet Title Act says the United States may be joined. I take that to mean, must be joined in order for this action to proceed.

The District Court having held that the suit must be -- that the complaint must be amended to allege 2409a, should have further required that the United States be formally joined.

QUESTION: Nobody has objected?

MR. CLAIBORNE: Nobody objected. The United States responded as the United States, and the judgment runs against the United States, and that technical omission is one that has never been raised in this case. But, Your Honor is right that there is a technical defect in that respect.

In all events, at page 29 and the following pages of our brief we address this alternative point that from 1972

onward Congress determined that all such suits, whether or not they would previously lie against the officer, should now be filed under the following conditions -- the limitations provision is not the only condition -- against the United States itself, and we see in that enactment no preservation of any previous alternative, but, on the contrary, a regular arising of a now unique procedure which is more satisfactory than all the skirmishing that had gone before about whether this was properly a suit against the officer or not.

And, on that alternative ground, we urge reversal of the judgment of the Court of Appeals as well.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

We will hear arguments next in State of Michigan against Long.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

JOHN R. BLOCK, SECRETARY OF AGRITULTURE, ET AL., Petitioners

v. NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

#81-2337

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pixie Hammond

(REPORTER)