

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. CALIFORNIA
and CALIFORNIA STATE BOARD OF
EQUALIZATION

CASE NO: 91-2003

PLACE: Washington, D.C.

DATE: Tuesday, February 23, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 UNITED STATES, :
4 Petitioner :
5 v. : No. 91-2003
6 CALIFORNIA AND CALIFORNIA :
7 STATE BOARD OF EQUALIZATION :
8 - - - - -X
9 Washington, D.C.
10 Tuesday, February 23, 1993
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:17 a.m.
14 APPEARANCES:
15 KENT L. JONES, ESQ., Assistant to the Solicitor General,
16 Department of Justice, Washington, D.C.; on behalf of
17 the Petitioner.
18 ROBERT D. MILAM, ESQ., Deputy Attorney General of
19 California, Sacramento, California; on behalf of the
20 Respondents.
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1 P R O C E E D I N G S

2 (11:17 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in number 91-2003, the United States v. California
5 and the California State Board of Equalization.

6 Mr. Jones, you may proceed.

7 ORAL ARGUMENT OF KENT L. JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice, and may it please
10 the Court:

11 This Federal common law action for money had and
12 received was brought by the United States to recover \$11
13 million in public funds paid to the State of California as
14 taxes by the manager of the Naval Petroleum Reserve. The
15 manager is a Federal contractor who operates under an
16 advance-funding, cost-reimbursement arrangement with the
17 United States.

18 The State taxes were assessed with respect to
19 purchases of personal property made by the manager in the
20 name of the United States. The United States contends
21 that the taxes were erroneously and unlawfully assessed.

22 The courts below did not reach the question of
23 the legality of the State tax. They acknowledged that the
24 United States has a Federal common law right to recover
25 unlawful payments of State taxes, but they held that the

1 Federal cause of action was inapplicable in this case
2 because the United States had not pursued administrative
3 tax refund procedures available under State law and had
4 not brought its judicial challenge to the State tax within
5 the 90 days provided by State law.

6 In our view, and in the unanimous view of six
7 other courts of appeals, the Federal common law right of
8 the United States to recover public funds that have been
9 unlawfully obtained is not subject to compliance with the
10 State procedures applicable to State law tax refund suits.

11 QUESTION: Mr. Jones, is -- should we make a
12 distinction in the kinds of unlawfulness that may be
13 appropriate predicates for that common law action?

14 There was nothing unlawful in the sense of being
15 either criminal or mistaken or tortious. The unlawfulness
16 here, on your view, is simply an unlawfulness in the sense
17 that if the taxability issue were litigated as far as it
18 could be litigated on the merits, the United States would
19 win and California would not.

20 But should we distinguish between those two
21 senses of unlawful? And if we do, are you in trouble
22 under the common law action?

23 MR. JONES: Well, there is no basis, or
24 rationale even, for distinguishing in that sense, Justice
25 Souter. The common law action for money had and received

1 was designed by this Court to protect the United States.
2 to prevent and remedy unlawful takings of public monies.

3 Whether -- or the way that it seems most direct
4 to state it is that under Federal common law, if Federal
5 funds have been taken without lawful justification, they
6 must be returned. It is for the person who has taken the
7 funds to establish the lawful basis.

8 In this case, the State of California proposes
9 that the lawful basis for its taking of the funds is the
10 State tax law. Our position is that the State tax law
11 does not provide a lawful basis. We would take the same
12 position with respect to other takings of public property
13 with respect to which we think there is no lawful
14 justification.

15 QUESTION: Well, Mr. Jones, who's the taxpayer
16 here?

17 MR. JONES: Well, as California uses that term,
18 the taxpayer is the Federal manager of the Naval Petroleum
19 Reserve.

20 QUESTION: Who do you say is the taxpayer here?
21 You don't think the Government's the taxpayer, do you?

22 MR. JONES: In -- there's two ways to answer
23 that; one is factually and the second is conceptually.
24 Factually, the court of appeals said, and was correct in
25 saying so, that these taxes were paid with Federal funds.

1 That's at page --

2 QUESTION: Well, Federal funds reimbursed the
3 contractor here.

4 MR. JONES: Actually, it was something more than
5 that. As you would see looking at page 142 of the joint
6 appendix, this is actually Federal funds that were paid
7 directly to the State. There was -- this is an advanced
8 funding arrangement of the type the Court discussed in the
9 United States v. New Mexico case. These --

10 QUESTION: Well, in United States v. New Mexico
11 do you think we thought the United States was the
12 taxpayer?

13 MR. JONES: I don't know if -- if that question,
14 framed that way, was before the Court. What was at issue
15 in United States v. New Mexico was whether the immunity of
16 the United States from State taxes applied.

17 QUESTION: Uh-huh.

18 MR. JONES: And what the Court held in that --

19 QUESTION: And we said it didn't.

20 MR. JONES: The Court held that it did not apply
21 in that case.

22 QUESTION: And the United States is in no better
23 position here, I assume, than in New Mexico.

24 MR. JONES: Well, we are in a better position
25 here. Our contention is that there is no lawful basis for

1 the State tax to be applied to us. The -- we're not
2 contending --

3 QUESTION: But you don't claim any sovereign
4 immunity either.

5 MR. JONES: We're not --

6 QUESTION: Either for yourself or for the
7 contractor.

8 MR. JONES: We are not contending the tax is
9 unconstitutional.

10 QUESTION: Exactly.

11 MR. JONES: However, as -- just to inform the
12 Court and not because it's instrumental in our argument,
13 the State's tax is shaped with constitutional constraints
14 in mind. The State has crafted a tax that applies only to
15 Federal contractors and applies to them differently than
16 it would to other types of contractors, and it does so to
17 meet the requirements of the Constitution.

18 But our position is that the State tax is
19 unlawful as a matter of State law. That is another way
20 it's --

21 QUESTION: Yeah, but maybe you're just in the
22 position of -- of being subrogated to whatever the right
23 of the taxpayer was. If the taxpayer is the -- the
24 contractor, then maybe the United States stands -- stands
25 in those shoes for purposes of litigating this question,

1 as a matter of State law.

2 MR. JONES: Well that, of course, is the State's
3 position.

4 QUESTION: Yeah.

5 MR. JONES: And I acknowledge that there is a
6 bit of a chicken and an egg problem here.

7 QUESTION: Yeah.

8 MR. JONES: And -- and it's a little glib to say
9 it, but nonetheless I think there's an element of truth;
10 it's a Federal chicken and a State egg, and under the
11 Supremacy Clause the chicken prevails. And in our view,
12 the chicken is the common law right that this Court has
13 recognized in -- consistently, that the United -- that
14 anyone who takes Federal funds has to have a lawful
15 justification.

16 QUESTION: But in much different circumstances,
17 Mr. Jones. I don't think any of the cases that you rely
18 on involve a simple case where the claim was that the --
19 the tax was illegal under State law.

20 MR. JONES: This is the first time this issue
21 has come to this Court, but it's been in the courts of
22 appeals for decades.

23 QUESTION: Well, presumably that's why it's here
24 now.

25 MR. JONES: That's correct. This is the first

1 time this Court has had to decide whether a lawful
2 justification exists when the State has taken our funds
3 under an -- made an unlawful -- an illegal assessment of
4 our funds.

5 QUESTION: Well, when your funds have been paid
6 to the State by your agent.

7 MR. JONES: That is correct, and that was
8 exactly the context of the Bayne case in 1876, where a
9 Federal officer had Federal funds, he misappropriated
10 those funds and transmitted them to a third party. This
11 Court allowed the United States to recover directly from
12 the third party the funds that had been unlawfully
13 obtained by that party.

14 Here too, the Court has to assume, on the record
15 of this case, that the State tax is unlawful, that the
16 State has -- has no lawful justification for the taking of
17 the funds.

18 QUESTION: No, but we certainly cannot assume
19 that the funds were unlawfully taken from the United
20 States.

21 MR. JONES: I'm sorry, I couldn't hear you.

22 QUESTION: I mean in -- in the Bayne case the
23 funds were unlawfully taken by the Federal officer from
24 the United States, they were misappropriated, as I recall.
25 So the United States stood, in seeking a quasi-contractual

1 remedy, in a very stronger position than the United States
2 stands here.

3 MR. JONES: Well, except that here the -- this
4 case falls with -- does fall within the confines of this
5 Court's prior decisions in that the funds were paid under
6 protest and under threat of penalty. This is not a case
7 where the taxpayer voluntarily made the payment and then
8 came back years later and said by the way, I don't think I
9 should have been required to.

10 What the Court has held is that when -- when the
11 taxes have been paid under protest and under threat of
12 penalty, that it is not regarded as a voluntary payment
13 and that it can -- the Federal Government, the common law
14 action applies to recovery of the funds.

15 QUESTION: What -- so you've got -- you've got
16 the better of me on that legal point. What's your best
17 case for that proposition?

18 MR. JONES: Well, I think Bend v. Hoyt addresses
19 that subject. I am relatively sure City of Philadelphia
20 v. Collector does.

21 QUESTION: Is it incorrect to say that the State
22 is indebted to the contractor?

23 MR. JONES: Well, under California law, the
24 contractor is what is called the taxpayer. I am just
25 talking now about California -- the way California

1 describes the situation, and the United States is called
2 the real party in interest.

3 California says that the real party in interest
4 is not allowed to bring a suit to recover the refund, only
5 the taxpayer may. As a result, the United States has no
6 remedy under State law. California does not recognize any
7 claim of the United States.

8 The only exception that the California courts
9 have described to that standing rule is when, as a matter
10 of State law, the taxpayer is required by law, as a
11 condition of receiving the refund, to pass the refund
12 through to the real party in interest.

13 QUESTION: If -- if this case had proceeded with
14 the contractor's claim being adjudicated and there was a
15 final judgment in the California courts as to the
16 contractor and that judgment was in favor of the State,
17 adverse to the contractor, would you still have the right
18 to maintain this suit?

19 MR. JONES: We would then have the problem that
20 the Court, I believe, addressed in the Montana case about
21 collateral estoppel. And I think it's relevant to point
22 out -- and we would be bound if we had participated in the
23 litigation and -- and --

24 QUESTION: Which you did here, incidently, did
25 you not?

1 MR. JONES: Well, but the -- the State court
2 litigation here did not proceed to conclusion.

3 QUESTION: Well, you did at the administrative
4 level.

5 MR. JONES: Well, I don't -- I don't think it
6 can be said that we participated in any manner at the
7 administrative level; we had no right to. The contractor
8 made that protest.

9 QUESTION: Didn't you pay the -- didn't you pay
10 the attorneys, or am I incorrect about that?

11 MR. JONES: Well, under our contract we had a
12 duty to reimburse them for the costs. But I believe
13 that -- that -- the joint appendix, and I don't recall the
14 page -- the counsel who was representing the contractor
15 said quite clearly he had no authority to represent the
16 United States. He was there --

17 QUESTION: Well, could you have stopped your
18 contractor from settling this case? It didn't go to
19 the -- it didn't go to conclusion and decide the very
20 issue that -- that the contractor had raised.

21 MR. JONES: The settle -- the settlement of the
22 claim presents a different issue than -- than collateral
23 estoppel. The United States, in our view, has an
24 independent Federal cause of action that the contractor
25 cannot settle.

1 QUESTION: Well, could you have -- could you
2 have forbidden the -- your contractor from settling that
3 case and -- and instead, litigating it to its conclusion?

4 MR. JONES: Could we have forbidden them from
5 settling it? I, frankly, don't know the answer. And it's
6 normal in --

7 QUESTION: Well, if you could, you just -- you
8 just blew it, that's all.

9 MR. JONES: Well, this case wasn't settled in
10 that respect below. What was done in the State courts was
11 that the State acknowledged that a certain portion of its
12 taxes were improper; the remaining portion was still being
13 disputed.

14 The record reflects that the contractor then
15 advised the State that they had decided to dismiss the
16 contractor's claim and that the United States would then
17 commence a suit in Federal court. Now, the court of
18 appeals didn't seem to be aware of that. It sort of made
19 it sound like we made a tactical decision --

20 QUESTION: Yes.

21 MR. JONES: -- To settle something and then
22 sneak it away.

23 QUESTION: Exactly.

24 MR. JONES: But at least --

25 QUESTION: We take our facts, generally, as

1 found by the court of appeals. We don't relitigate facts
2 here.

3 MR. JONES: Well, the court of appeals didn't
4 find anything on that. It's just reading between the
5 lines, it seemed to be the tenor of the court's --

6 QUESTION: But it -- but it was dismissed
7 without prejudice, wasn't it?

8 MR. JONES: It was dismissed without prejudice
9 and at page 97 of the joint appendix there's a letter
10 between counsel that makes it quite clear that the State
11 was aware that the United States was going to pursue the
12 claim in Federal Court.

13 Claims of the United States involving public
14 funds inherently implicate an important national interest.

15 QUESTION: Oh, let me just press one -- one more
16 question here. On your theory that the United States is
17 the primary party here, do you think that the
18 California -- that the Federal contractor had standing to
19 proceed with its litigation in State court, claiming the
20 money?

21 MR. JONES: Because it was in State court, under
22 the State rules it had standing. The State rule is
23 that --

24 QUESTION: But under your theory here, it
25 wouldn't.

1 MR. JONES: Well, I believe there's -- there's
2 two separate causes of action. California law recognizes
3 a cause of action for the putative taxpayer, and allows
4 them standing to pursue it only in State court. This
5 Court has recognized a Federal common law cause of action
6 for the United States, which we think is a separate cause
7 of action that, under 28 USC 1345, falls within the
8 plenary jurisdiction of this Court. There is no dispute
9 we are the real party at interest, that these were paid
10 with Federal funds; all of the elements of the Federal
11 common law cause of action have been met.

12 I would just like to take a minute to explain
13 what I think is the background of that action, although it
14 may be apparent by now. As the Court held in the
15 Chesapeake & Delaware Canal Company case, even when
16 commercial transactions such as stock dividend payments
17 are involved, when the United States seeks to recover
18 public funds it is, quote, acting in its governmental
19 capacity as much as if it were collecting taxes.

20 The Court has thus consistently concluded, as it
21 stated in Clearfield Trust, that it is for the Federal
22 courts to fashion the rules governing the rights and
23 duties of the United States in its financial and
24 proprietary transactions.

25 QUESTION: Well, Mr. Jones, might there not be,

1 in that situation, one rule for actions by the United
2 States against private parties who may have kind of
3 absconded with Government funds, as it appears to have
4 been the case in Bayne, and another rule where the State
5 is -- where the Government is simply protesting a
6 collection that has already been made by a State of taxes?

7 MR. JONES: Well, the only orderly way in which
8 we can protest that collection is to subject ourselves to
9 the risk of penalties and compulsory process at State law,
10 or to bring -- to make the payment in an orderly fashion,
11 as this Court has -- has held in -- in the Courts I
12 cited -- in the cases I cited to Justice Souter.

13 QUESTION: Well, did any of those involve
14 proceedings that involved the collection of State taxes as
15 opposed to private individuals?

16 MR. JONES: Actually, the common law rule has
17 its roots in those two cases I cited that involve suits to
18 recover Federal taxes. This Court has held -- held at
19 common law that individuals could recover Federal taxes
20 from the United States, even though they had been
21 voluntarily paid, because it was the orderly thing to do,
22 I suppose.

23 QUESTION: Was there any other process for doing
24 so at that time?

25 MR. JONES: There was no statutory remedy at

1 that time, although I suppose that the taxpayer could have
2 resisted the assessment and not voluntarily --

3 QUESTION: Well, could -- under the California
4 rule, you could not have intervened in the proceedings
5 that your contractor had instituted.

6 MR. JONES: California cases seem to assume we
7 can intervene. We could -- but we would --

8 QUESTION: They assume you could.

9 MR. JONES: Yes. They assume that we could
10 intervene, and there's no authority, really, that answers
11 that question. But I also assume, because there isn't
12 any -- any case law to the contrary, that we could
13 assume -- we could intervene, but we would be intervening
14 in a State court proceeding.

15 QUESTION: Yes.

16 MR. JONES: We would be intervening in a
17 proceeding that would make the Federal claims subject to
18 State law procedures, to the State statute of limitations,
19 and to State court adjudication of the claim. And those
20 results are inconsistent with this Court's recognized need
21 for uniform rules to govern the claims of the United
22 States, in particular with 28 USC 2415, which provides a
23 6-year statute of limitations for claims by the United
24 States arising under contract, express or implied, in law.

25 Requiring us to proceed in State court as an

1 intervenor would also conflict with 28 USC 1345, under
2 which Congress has given the Federal courts plenary
3 jurisdiction over claims by the United States.

4 QUESTION: Plenary and exclusive?

5 MR. JONES: Well, exclusive through the removal
6 procedure -- not expressly, Chief Justice Rehnquist, but
7 pragmatically exclusive through the removal procedure.
8 The United States is entitled to have its claims
9 adjudicated in Federal Courts. Congress has determined
10 that.

11 QUESTION: But -- but when you talk about
12 removal, you're talking about the United States as a
13 defendant, then.

14 MR. JONES: Well, the United States has -- has
15 the option in every case to have its claims heard in
16 Federal court. No party has the option to require the
17 United States to have its claims heard anywhere else.

18 QUESTION: Well, but what may be the rule as to
19 the United States as a defendant may be quite different
20 than the rule as the United States as a plaintiff. I
21 mean, if -- if the United States is to -- is to be sued by
22 someone claiming that the -- the Government owes it money,
23 Congress may quite likely have provided that the suit is
24 to be heard in Federal court, either through removal or
25 through having been brought there in the first place. But

1 I don't see that says much about the legitimacy of the
2 Government's claim to recover taxes in a State proceeding.

3 MR. JONES: Well, 28 USC 1345 gives the Federal
4 court jurisdiction over all, and that's the statutory
5 word, all causes of action, suits, or proceedings
6 commenced by the United States. It is as broad and
7 plenary a jurisdiction as Congress has provided. Congress
8 obviously intended that the claims of the United States
9 would be adjudicable or adjudicated in Federal courts.
10 There is no basis under the Federal common law remedy for
11 requiring the Federal cause of action of the United States
12 to be adjudicated in State court.

13 I should make emphatic what I -- I said
14 indirectly about the statute of limitations. The Court
15 has held on several occasions that the Federal claims of
16 the United States, and in particular the Federal common
17 law action for money had and received, is not subject to
18 State statutes of limitations. In 1966, Congress enacted
19 a statute that expressly provides for every action for
20 money damages brought by the United States for contracts
21 implied at law to be given a 6-year Federal statute of
22 limitations.

23 The Federal statute of limitations applies
24 directly to the quasi-contractual claim of the United
25 States. The statute legislatively fills the gap created

1 by this Court's decisions rejecting State law rules of
2 limitation for the Federal claims.

3 QUESTION: Does that apply even if the United
4 States is subrogated to the claim and proceeds in a
5 subrogation capacity?

6 MR. JONES: If the -- I take it the premise of
7 that question is there are two causes of action. The
8 United States has its Federal cause of action; the United
9 States also, under the State's theory, could be subrogated
10 to the State law cause of action.

11 The answer to your question turns on the
12 character of the State statute of limitations, at least
13 that's what the Ninth Circuit has held in a series of
14 cases not at issue here today. The Ninth Circuit has
15 suggested that when the State statute incorporates the
16 limitations period as an element of the cause of action,
17 then compliance with the State statute of limitations is
18 necessary to give rise to the cause of action.

19 We think it apparent -- although that issue
20 isn't presented here, we think it apparent that this State
21 statute of limitations does not incorporate compliance
22 with the State period as an element of the cause of
23 action. To the contrary, what the State statute of
24 limitations says is that failure to bring suit within 90
25 days will be deemed to constitute a waiver of the State

1 claim, so it is a traditional or more traditional State
2 statute of limitations.

3 So the short answer to your question is if we
4 had proceeded under State law, we would not be subject to
5 the State statute of limitations, the 6-year Federal
6 statute of limitations would apply, but the case hasn't
7 been presented on that basis in the lower courts.

8 The State's argument takes a somewhat different
9 tack. They don't join the contention that we should be
10 required to exhaust a nonexistent remedy. They instead
11 contend that we should be required to resort to the State
12 process. For the reasons I've already described, that
13 conflicts with well established rules requiring Federal
14 rules to govern Federal actions.

15 But I should also point out that it would make
16 the public right of the United States to recover public
17 funds turn on the perseverance of Federal contractors who
18 ultimately have no stake in the outcome, and who operate
19 under an enormous variety of tax procedures in literally
20 thousands of local taxing jurisdictions.

21 In Clearfield Trust the Court concluded that
22 because United States transactions proceed upon such a
23 vast scale, the Federal right should not be subjected to
24 the exceptional uncertainties imposed by the vagaries of
25 the State law rules.

1 Finally, I do want to address the Court --

2 QUESTION: Yeah, but businesses do that all the
3 time. I mean they have less money than the United States.
4 I don't understand why that is such a big imposition.

5 MR. JONES: I think the Court has --

6 QUESTION: The United States is -- is claiming
7 exemptions, or whatever, under State laws, to follow those
8 procedures.

9 MR. JONES: I think the Court has recognized
10 that the claims of the United States differ both in
11 quality and quantity in that respect. The United States
12 as the sovereign, should not be subjected to State law
13 rules that limit Federal rights. I think the Court looks
14 at it from that perspective.

15 I believe it is also true that it is -- it is
16 comparing apples and oranges to compare even a large
17 corporation with the pervasive and extensive reach of the
18 Federal Government throughout every city, county, and
19 State.

20 QUESTION: But the so-called Federal right here
21 is simply a claim under California law.

22 MR. JONES: Chief Justice Rehnquist, it is a
23 claim under Federal law. It is a claim that the State has
24 taken money without lawful justification. It is a claim
25 under Federal common law.

1 QUESTION: Yeah, but the basis for that claim
2 lies entirely in California State tax law, doesn't it?

3 MR. JONES: I would put it the other way. I
4 would state -- say that the basis for the State's defense,
5 the basis for the State's assertion that, in fact, it took
6 the monies lawfully, lies in its claim under State law.
7 That is a claim that we -- we disagree with and that the
8 Court, for purposes of this case, must assume is
9 incorrect. For purposes of this case, the Court must
10 assume the State tax is unlawful and that --

11 QUESTION: Well who -- who'd better decide that
12 case, the California courts or the Ninth Circuit, as to
13 whether a California State tax is unlawful or not,
14 under -- under California State law?

15 MR. JONES: Well this -- there certainly has
16 never --

17 QUESTION: For California courts are better
18 equipped to speak on that than the Ninth Circuit.

19 MR. JONES: There's no question that the Federal
20 courts have competence to decide these questions of State
21 law. The question, it seems to me, the prudential one
22 that you're framing, is whether the -- as a matter of
23 comity or abstention, the State courts should decide these
24 Federal claims.

25 The comity doctrine, as applied in fair

1 assessment, stems from the Anti-Injunction Act and -- and
2 the conclusion that Congress didn't intend jurisdiction to
3 reach State tax rules. But the -- but the Anti-Injunction
4 Act, by this Court's decision in Department of Employment,
5 does not apply to the United States. And to the contrary,
6 Congress gave the Federal courts plenary jurisdiction.

7 QUESTION: You're asking us here to extend
8 previous holdings of the Court to a situation involving
9 collection of State taxes. And it seems to me that you've
10 -- you've got to answer questions like which would be the
11 preferable court system to decide the question, just as a
12 matter of policy since the prior cases don't support what
13 you're seeking to do here.

14 MR. JONES: Well, Chief Justice Rehnquist, we
15 think the case -- this Court's cases do support it. And
16 as a matter of -- and as a policy matter -- the two policy
17 sources that I can refer the Court to -- this Court has
18 plenary jurisdiction over claims of the United States; it
19 doesn't have that kind of jurisdiction for anyone else.

20 And secondly, the Anti-Injunction Act does not
21 apply to the United States. In the Department of
22 Employment case, this Court sustained a holding that the
23 United States could enjoin a State tax and recover
24 damages.

25 QUESTION: Well, what if you -- what if you got

1 into court on this suit that -- that you think the Federal
2 court can hear, and it suddenly happens that a Supreme --
3 a decision of the Supreme Court of California was found
4 that squarely decides the issue that you want litigated
5 against you? Now --

6 MR. JONES: That --

7 QUESTION: -- That's a matter of State law,
8 then, isn't it?

9 MR. JONES: I would expect the Federal court to
10 look for sources of State law here, just as it does in any
11 other case where it decides questions of State law.

12 QUESTION: Why, sure. Why, sure. And you --
13 and you would be stuck with it. So -- so -- so you really
14 are wanting to litigate an issue of State law.

15 MR. JONES: Well, actually, we want to litigate
16 facts as well. We want to litigate the question of
17 whether the contractor under our Federal contract is a
18 construction contractor.

19 QUESTION: Right, exactly.

20 MR. JONES: There are factual questions and
21 legal questions that implicate the rights of the United
22 States, and we think they should be decided in Federal
23 court.

24 QUESTION: Well, let's assume that there's a --
25 a State supreme court case that's -- that is so similar

1 to this that anyone would say it would control.

2 MR. JONES: In that event, I suppose the
3 district court properly should decide that there was a
4 lawful justification of public funds. But on this record,
5 this Court has to assume there was no lawful
6 justification.

7 And I want to -- I should point out, just in --
8 that in the Board of County Commissioners case the Court
9 emphasized that nothing -- and I think I quoting --
10 nothing that the State can do will be allowed to destroy
11 the Federal right, which is to be vindicated. And our
12 point is that we should be allowed to determine our
13 Federal right under the Federal common law in Federal
14 courts.

15 I'd like to reserve any time I have left for
16 rebuttal.

17 QUESTION: Very well, Mr. -- Mr. Jones.
18 Mr. Milam, we'll hear from you.

19 ORAL ARGUMENT OF ROBERT D. MILAM

20 ON BEHALF OF THE RESPONDENTS

21 MR. MILAM: Mr. Chief Justice, and may it please
22 the Court:

23 Although the contractor's attorney disclaimed
24 any representation of the United States, the joint
25 appendix is clear that the United States -- States

1 directed and controlled that action.

2 Not only at joint appendix pages 131 and 135
3 does it show that -- the United States obligated to pay
4 the contractor's attorney, at joint appendix page 58 the
5 WBEC attorney told the Board of Equalization at the
6 hearing on petition -- at the petition for redetermination
7 that the United States was instructing WBEC as to each
8 step in the process.

9 Joint appendix pages 59 and 60 show that the
10 United -- the WBEC attorney told the Board of Equalization
11 at that same hearing that he had been not authorized to
12 discuss a certain subject with the board.

13 QUESTION: May I ask you this question, does
14 that really make any difference? Under your theory of the
15 case, I don't think you have to establish that the
16 Government controlled the case, do you?

17 MR. MILAM: I agree. I don't think so.

18 QUESTION: Yeah.

19 QUESTION: Could the -- you say the Government
20 did control this case, but could it formally have
21 intervened under California law?

22 MR. MILAM: Your Honor, under -- under the
23 judicial remedy, the Code of Civil Procedure, section, I
24 think, 389, authorizes and almost requires a real party in
25 interest to be before the court. And as to the judicial

1 remedy, I believe it could have intervened under that
2 section.

3 QUESTION: And did it get to -- it never got
4 beyond the administrative stage, did it?

5 MR. MILAM: I don't understand the question, I'm
6 sorry.

7 QUESTION: Did the -- well, the contractor
8 wanted a refund?

9 MR. MILAM: Yes.

10 QUESTION: And it -- and it -- and it employed
11 the administrative remedy.

12 MR. MILAM: Right.

13 QUESTION: Did it -- did it -- it never got to
14 court, did it?

15 MR. MILAM: WBEC filed two court actions in
16 State court, yes, at the direction of the United States.

17 QUESTION: And those were -- and those were
18 settled?

19 MR. MILAM: Those were not -- I agree with Mr.
20 Jones' characterization of that, that the -- the Board of
21 Equalization, through discovery, found that it had --

22 QUESTION: Uh-huh.

23 MR. MILAM: -- Misapplied the tax to some
24 extent.

25 QUESTION: To some extent.

1 MR. MILAM: And so they agreed to pay that back.
2 And the result of that was the dismissal of the suit by --
3 of the two suits by WBEC.

4 QUESTION: So --

5 MR. MILAM: There was no settlement, as such.

6 QUESTION: No, no, no. Well, but nevertheless,
7 did -- did the contractor raise the issue that the United
8 States wants to litigate?

9 MR. MILAM: Yes. The -- the issues before the
10 State courts would be the same issues before the Federal
11 court.

12 QUESTION: And -- and so that issue never went
13 to judgment.

14 MR. MILAM: It did not.

15 QUESTION: It did not.

16 MR. MILAM: It was -- the cases were dismissed.

17 QUESTION: And you think -- and -- and -- you
18 think the United States could have intervened in those two
19 cases.

20 MR. MILAM: Yes, I believe --

21 QUESTION: And if they lost in the -- in the
22 trial court on the issue they wanted to litigate, they
23 could have appealed.

24 MR. MILAM: Yes, I believe that. Also, I
25 believe, contrary to Mr. Jones, that the United States,

1 under circumstances of this case, could have had an
2 administrative remedy also -- could have -- could have
3 filed a claim for refund and pursued administrative
4 remedy. There are circumstances when that -- that would
5 not be possible, but under the circumstances of this case
6 I think they could have.

7 QUESTION: But assuming this is Federal property
8 at issue, do you know of any other instances where in
9 order to hold on to its own property the Federal
10 Government has to appear in State proceedings?

11 MR. MILAM: I cannot identify any other
12 instances. I would -- I would suggest that when State
13 taxes are at issue, the State and State courts have a
14 tremendous interest in -- in resolving those issues, but I
15 cannot cite another case to -- to support that.

16 QUESTION: Do you accept the premise of its
17 being Federal property?

18 MR. MILAM: That -- the money was -- was paid
19 from Federal funds. Now, whether they want Federal
20 property back or not, I really don't know, because WBEC
21 was a taxpayer, we assessed the taxpayer, and they had
22 some mechanism to -- to pay the money with Federal funds.
23 It's hard for me to believe that they want Federal funds
24 back, but I -- I don't know how to resolve that -- that
25 argument of theirs.

1 This was -- the State court suits were an action
2 -- was an action -- were actions by a State taxpayer,
3 WBEC, against the taxing entity that imposed the taxes,
4 and the only issue was the application of State tax law.
5 And this Court has often held --

6 QUESTION: Was -- was Mr. Jones correct in
7 saying that the -- the State was told that -- when the
8 case was dismissed or the cases were dismissed, that the
9 United States was going to pursue the issue in Federal
10 court?

11 MR. MILAM: I think he cited something in the
12 joint appendix. I'm not aware of that, but he -- he cited
13 something in the joint appendix that I'm not aware of. I
14 do not know.

15 QUESTION: So, I suppose the State could have --
16 could have refused to have the case dismissed?

17 MR. MILAM: No, I think dismissal is -- is a
18 duty. I mean it -- it is a right of a party who brought
19 the suit and -- and actually under California law it's
20 very difficult to -- almost impossible to contest that.
21 If they want to dismiss without prejudice, they are
22 allowed to do so.

23 QUESTION: Even after the case has -- even after
24 discovery and things like that?

25 MR. MILAM: Yes. I had -- to give you an

1 example, I had one case on appeal where I had -- in the
2 California courts -- where I had filed my respondent's
3 brief after the appellant's brief had been filed. And
4 after I filed my respondent's brief, the court allowed the
5 taxpayer to dismiss the -- the appeal over -- over my
6 protest. But the -- the opportunity to -- to dismiss the
7 case is very broad in California.

8 QUESTION: But you say the United States could
9 have intervened at any time?

10 MR. MILAM: Yes, Your Honor. The United --
11 under section 389 of the Code of Civil Procedure, a real
12 party in interest has the right to be before the
13 California courts. In fact, I think they're almost
14 required to be before the California courts.

15 QUESTION: Now, would it have had the -- the
16 right also, in your view, to intervene in the
17 administrative proceedings?

18 MR. MILAM: I'm sorry, I did not hear you.

19 QUESTION: Would it have had the same right to
20 intervene in the administrative proceedings?

21 MR. MILAM: Under the circumstances of this
22 case, they could have either intervened, stepped into the
23 shoes, or, on their own, pursued the administrative
24 remedies. As I said, that's not always the case if the
25 circumstances were different. But they could have done

1 both in this case.

2 This Court has often held that in the interests
3 of Federalism and -- and the principle of comity, State
4 courts are the best place to determine the application of
5 State tax law. Comparing the interests of the United
6 States and the State of California in this case presents a
7 dramatic example of why this should be the result in this
8 case.

9 California has retained as part of its
10 sovereignty the ability to tax its own citizens. A part
11 of that finality -- a part of that sovereignty is the
12 power to determine the finality of its tax payments. That
13 is, when they can no longer be refunded.

14 Joint appendix page 21 shows that the first WBEC
15 case was filed on February 18th, 1983. And here we are
16 more than 10 years later, arguing whether the United
17 States has a cause of action in Federal courts. In
18 contrast, under California law trial -- court -- cases
19 must be brought to trial within 5 years or be subject to
20 mandatory dismissal.

21 Joint appendix page 95 shows that upon
22 instruction of the United States, the WBEC -- E-C cases
23 were dismissed, and joint appendix pages 46 and 49 show
24 that they were dismissed within 1 month of the running of
25 the 5-year statute, the California 5-year statute.

1 United States interest, on the other hand, is
2 simply that of a taxpayer. There are no issues unique to
3 the United States in this case, no Supremacy Clause
4 issues, no sovereign immunity issues, no discrimination
5 issues, no Federal constitutional issues, and no Act of
6 Congress is involved.

7 A Federal contractor can take advantage of the
8 United States tax immunity because it derives from the
9 Federal contract. The reverse also must be true. When
10 the contractor cannot take advantage of the United States
11 tax immunity, the right of the United States to sue the
12 State for a tax refund derives solely from the Federal
13 contract.

14 The United States agreement to reimburse WBEC in
15 this case, under the contract, merely provides the
16 opportunity for the United States to step into the shoes
17 of the taxpayer, and enabling the United States to pursue
18 those remedies of a taxpayer. Indeed, because the United
19 States controlled and directed these actions, it shows
20 that the United States actually stepped into the shoes of
21 the taxpayer in this case. The actions of the United
22 States in controlling the actions and the willingness of
23 WBEC to submit to that control shows that they view their
24 relationship as one of subrogee and subrogor.

25 The United States is asking this Court to do two

1 things. First, to disregard the available State remedies
2 in asking this Court to have the Federal courts instruct
3 California on the application of State tax law. To
4 paraphrase this Court in Penhurst State High School or
5 Hospital versus Halderman, it's an invasion of California
6 sovereignty for the Federal courts to instruct the State
7 officials on the application of State tax law.

8 QUESTION: May I ask a question that's kind of
9 running through my mind about the analogy with the
10 litigation costs and all? Suppose -- the United States
11 under the contract had to pay the attorneys fees, I think,
12 did it not, of the contractor?

13 MR. MILAM: They obligated themselves to -- to
14 pay --

15 QUESTION: And if -- if they were persuaded that
16 the attorney had overcharged the client and they wanted to
17 recover the overcharge from the client, would they --
18 and -- and the California statute of limitations had run,
19 would they be able to sue in Federal court, in your view?

20 MR. MILAM: I do not know the answer to that
21 question.

22 QUESTION: Isn't that the same question we have
23 here?

24 MR. MILAM: I don't believe so.

25 QUESTION: Why not? It's a State law cause of

1 action. It overcharges a matter -- say there's some State
2 rule you don't charge unreasonable fees, or something like
3 that. And the United States basically is a subrogee to
4 the contractor, trying to get back, on a State cause of
5 action, an excess charge. And here -- here the contractor
6 gave too much money to the tax collector, and it also gave
7 too much money to its lawyer. Why are they different?

8 MR. MILAM: Well, the only -- the thing that I'm
9 relying on in this -- in this case is the sovereign power
10 of California to impose taxes. And that sovereignty, I
11 think, makes it different from the example you -- you gave
12 me. I'm not sure there's the same interest of California,
13 but --

14 QUESTION: Well, they have the sovereign power
15 to decide how much -- what is a fair fee for a lawyer, I
16 guess, a member of the State bar, and so forth and so on.
17 But you think that's different?

18 MR. MILAM: I think it's different, yeah.

19 QUESTION: Yeah. Of course, even if you
20 admitted in that case, as I suspect might be the case, the
21 United States could sue in Federal court, that's not the
22 issue here. It's just whether the State statute of
23 limitations would apply to that suit, isn't that -- isn't
24 that right?

25 MR. MILAM: I'm not sure I understand the

1 question, Justice --

2 QUESTION: We're just arguing about what statute
3 of limitations applies. That's -- that's the issue in
4 this case, isn't it?

5 MR. MILAM: Well if --

6 QUESTION: So even if your response to Justice
7 Stevens were yes, the United States would -- could proceed
8 in Federal Court against the -- against the lawyer, you --
9 you still might be --

10 QUESTION: Even if -- even if the statute of
11 limitation is run, is my question. Even if the State
12 statute's run.

13 QUESTION: Even if it's run, I see.

14 QUESTION: That's why.

15 MR. MILAM: Now, the State's -- the difference
16 between sovereign power and a running of a State statute
17 of limitation is that under this Court's decision in
18 United States v. Dalm, the principles of sovereign
19 immunity indicate whether or not there's a claim against
20 the sovereign. And the -- the Dalm case found that the --
21 both a timely filing of a Federal claim for refund and a
22 timely filing of a lawsuit were conditions precedent to
23 the accrual of a cause of action.

24 CHIEF JUSTICE REHNQUIST: We'll resume there at
25 1:00, Mr. Milam.

1 (Whereupon, at 12:00 p.m., the oral argument in
2 the above-entitled matter was recessed, to reconvene at
3 1:00 p.m., this same day)
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AFTERNOON SESSION

CHIEF JUSTICE REHNQUIST: Mr. Milam, you may
resume.

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

The United States is asking the Court to invoke
equitable remedies, that of a contract implied in law or
money had and received, and declaratory relief. And
California's position is that this Court's answer should
be consistent with the long line of authority, from Dows
V. City of Chicago in 1870 to Fair Assessment in Real
Estate v. McNary in 1981, that the Federal Government
cannot invoke equitable remedies, at least against a State
where no Federal issues are involved, unless the effective
pursuit of remedies, State remedies, is pursued -- is
done.

QUESTION: Well, I take it you're -- you're
saying that this so-called common law cause of action the
Government relies on just doesn't apply in the -- the
State tax context.

MR. MILAM: That's our position. Yes, Your
Honor.

QUESTION: Yes, uh-hum.

QUESTION: What was the first of those cases you
just mentioned?

1 MR. MILAM: Dows v. City of Chicago in 1870.
2 QUESTION: D-o-w?
3 MR. MILAM: D-o-w-s, I believe.
4 QUESTION: Yeah. Where is that cited in your
5 brief?
6 MR. MILAM: I don't believe I cited it in my
7 brief. Excuse me.
8 QUESTION: Why didn't you?
9 MR. MILAM: I have no excuse.
10 QUESTION: Could you give us the citation now?
11 MR. MILAM: I do not have it handy, Your Honor.
12 I'm sorry, I do. 78 US 108 1870.
13 QUESTION: But there are several court of
14 appeals cases that -- to the contrary to your position,
15 aren't there?
16 MR. MILAM: There are and I'm going to -- I'm
17 going to discuss those in a few seconds, but first I want
18 to discuss the Department of Employment case which deals
19 specifically with this area.
20 QUESTION: The what?
21 MR. MILAM: Department of Employment v. the
22 United States.
23 QUESTION: Oh yes, uh-hum.
24 MR. MILAM: Mentioned by Mr. Jones.
25 QUESTION: Uh-hum.

1 MR. MILAM: The Department of Employment case
2 was a case that refused to apply the Tax Injunction Act as
3 to State taxes because a Federal instrumentality was being
4 taxed in violation of its sovereign immunity. That rule
5 does not apply in this case because WBEC was not a Federal
6 instrumentality and there's no issue of sovereign
7 immunity.

8 Indeed, if you take the facts of the Department
9 of Employment case and take away the Supremacy Clause
10 issue in that case and substitute in its place the
11 principle of comity, because tax -- State tax law was
12 involved, it's California's position that even Federal
13 instrumentalities must be required to pursue State
14 remedies before seeking relief in the Federal courts.

15 There are three cases at least, and maybe more,
16 that -- I've put down -- I've put three cases that the
17 United States has cited that fall into this category. The
18 United States v. Benton, United States v. Broward County,
19 and United States v. DeKalb County all involve issues of
20 application of tax -- State tax law only and there are no
21 Supremacy Clause issues.

22 And California believes that to the extent that
23 these cases stand for the proposition that State remedies
24 need not be pursued, they are wrongly decided. These are
25 all lower court decisions.

1 QUESTION: Those are the ones on the
2 Government's brief page 20, I think, yeah, yeah.

3 MR. MILAM: So California's answer to the
4 question presented by the United States is that assuming
5 it had -- just assuming for purpose of argument that it
6 can state a quasi-contract cause of action, when the issue
7 is one of application of State tax law only and there are
8 no Supremacy Clause issues, pursuit -- effective pursuit
9 of State remedies is required before the access to Federal
10 Courts, and this includes meeting all the procedural
11 requirements of State law.

12 QUESTION: Why is that? I don't understand. I
13 mean I can understand the other basis for the result you
14 want, namely the basis that -- where the United States is
15 just subrogated to a -- to a claim of someone else. If
16 that someone else has no right to ignore the State
17 procedures, neither does the United States; that makes
18 sense to me.

19 But you're -- this theory you're giving us now
20 that even if it were the United States in its own right
21 that were suing, it would have to follow the State
22 procedure --

23 MR. MILAM: Well, that was the question
24 presented.

25 QUESTION: -- That seems, that's a lot harder to

1 swallow.

2 MR. MILAM: I'm sorry, I'm -- I interrupted you,
3 I didn't --

4 QUESTION: That -- that was the question
5 presented?

6 MR. MILAM: The question presented is that the
7 United States assumes it has a quasi-contract cause of
8 action, and the question then is do they have to pursue
9 State remedies. And our answer is yes, even if they can
10 state a cause of action --

11 QUESTION: The quasi-contract cause of action
12 precludes any subrogation theory.

13 MR. MILAM: I don't believe it precludes
14 subrogation theory. I think the subrogation theory is
15 correct. But the United States, in presenting the
16 question to the Court, assumed it had a quasi-contract
17 cause of action.

18 QUESTION: Oh, so I have to assume that this
19 case is the same as though the United States were suing in
20 its own right, as though the tax had been posed on the
21 United States and not on its contractor?

22 QUESTION: Well, haven't you already answered
23 that, yes, by saying that the United States could have not
24 only intervened but might -- should have been required to
25 intervene because it's the real party in interest?

1 MR. MILAM: Yes. That's right, Your Honor.
2 QUESTION: Uh-hum.
3 QUESTION: Well.
4 QUESTION: Who's -- you may agree with the
5 subrogation theory but that isn't really the main thrust
6 of your argument at all.
7 MR. MILAM: Well it -- it -- it -- it is. We
8 think it's the correct answer, but the problem that, of
9 course, we've had with -- with that --
10 QUESTION: Yes, but you say --
11 MR. MILAM: There's no court that has -- has
12 held that. And -- and it's a new -- it's an issue that
13 this Court's never -- never reached. And so to rely
14 solely on that.
15 QUESTION: Well why is that -- why is that a
16 problem? I this Court has never held -- never expressed
17 an opinion one way or the other, why does that prevent you
18 from urging it to us?
19 MR. MILAM: It doesn't. It just causes me
20 to -- to -- to be careful and not putting all my eggs in
21 one basket just in case it -- this Court doesn't agree
22 with me.
23 QUESTION: You want to have several strings to
24 your bow.
25 MR. MILAM: Exactly, Your Honor.

1 QUESTION: What about the --

2 QUESTION: At least one egg out of a half a
3 dozen.

4 (Laughter.)

5 QUESTION: I'm not sure -- the State's -- the
6 Government's proceeding on a common law count for money
7 had and received.

8 MR. MILAM: That's my understanding, yes.

9 QUESTION: Well is -- was that an equitable
10 action at common law?

11 MR. MILAM: I don't know the answer to that.
12 I --

13 QUESTION: Well, I -- I think it was not, which
14 is what -- why I'm not sure why you say that equity
15 requires that it follows exhaustion of remedy. You don't
16 have to exhaust remedies to sue for money had and
17 received, do you? What's your authority for that?

18 MR. MILAM: I have no authority, Your Honor.

19 QUESTION: Do you -- let's -- let's go back to
20 the cause of action again for a moment. Mr. Jones relied
21 heavily on -- on the Bend & Hoyt and the City of
22 Philadelphia case. Do you accept them as being in point?

23 MR. MILAM: I don't accept them as having a -- a
24 contract -- a quasi-contract cause of action. But they
25 may be in point if they do have a contract, quasi-contract

1 cause of action.

2 QUESTION: Well I thought -- I looked at them
3 very quickly. I thought they did, but do you -- can you
4 think of any basis to distinguish them from the -- from
5 the case that you've got today?

6 MR. MILAM: The only basis that -- that I've
7 been able to distinguish the common law quasi-contract
8 action is that the money was supposed to be paid
9 involuntarily. And although WBEC may be said to -- to
10 pay -- have paid the taxes involuntarily, I don't think
11 that could be said of the United States and the United
12 States is the one asserting this action.

13 QUESTION: Yeah.

14 MR. MILAM: So I'm not sure they meet the common
15 law definition.

16 QUESTION: Okay.

17 MR. MILAM: All the other cases -- all the
18 cases, besides the three I mentioned, relied upon by the
19 United States involve Supremacy Clause issues. And in
20 that sense -- and that situation is the only time that the
21 courts allow the United States to go directly to the
22 Federal Court. Those issues are not present in this case.

23 The Clearfield Trust case also would not apply.
24 The Clearfield Trust was a response to this Court's
25 decisions in Erie v. Tompkins and Hinterleiter v. LaPlada.

1 Those two cases stand for the proposition that Federal
2 courts can invoke Federal common law to protect the
3 interests of the United States.

4 However, the application of that rule has some
5 conditions precedent which aren't present -- which have
6 not been discussed. One is that this Court has held that
7 when the United States and a State are the parties, then
8 the interests of both governments must be considered. And
9 when you consider the interests of State government, the
10 principle of comity also comes into play. That was the
11 Board of Commissioners v. the United States, 308 US 343,
12 1939.

13 Also, this Court has stated that the invoking of
14 Federal common law is usually applied in situations where
15 a Federal rule is necessary to protect uniquely Federal
16 interests. There's no uniquely Federal interest in this
17 case that needs protection.

18 Third, in determining whether to apply common
19 law, this Court has held that a guiding principle is a
20 significant conflict between the use of State law and
21 Federal interest or policy. And as the Ninth Circuit held
22 in this case, there is no such conflict.

23 The United States does not have a quasi-contract
24 cause of action, although up to this point I've been
25 assuming it had, for two reasons. First, the Ninth

1 Circuit was correct in holding there has been no unjust
2 enrichment of California as that term is used in the
3 quasi-contract action.

4 How can California be unjustly enriched when
5 WBE -- State court actions could have resolved every State
6 law issue in this case, including whether taxes were
7 overpaid. California cannot be unjustly riched --
8 enriched at the expense of the United States when the
9 United States directed and controlled the State court
10 actions and failed to bring the suits to trial within 5
11 years and directed WBEC to dismiss the actions.

12 The second reason that the United States has no
13 quasi-contract cause of action in this case is that the
14 United States as a subrogee can invoke only those remedies
15 of WBEC, and WBEC did not have a remedy of a quasi-
16 contract action in this case.

17 QUESTION: Well, as I suggested, that is
18 somewhat inconsistent with your notion that the United
19 States was the real party in interest and could have and
20 should have intervened.

21 MR. MILAM: I don't believe so, Your Honor.
22 If -- if the United States steps into the shoes of the --
23 of the contractor it becomes -- it becomes a real party in
24 interest. I think the real party in interest is the one
25 whose money is at stake, and I don't believe that being a

1 subrogee has any conflict with that concept at all.

2 QUESTION: Well, why is the United States the
3 real party in interest if it isn't its money that's
4 involved?

5 MR. MILAM: That's the reason it is the real
6 party in interest.

7 QUESTION: Okay.

8 MR. MILAM: But that -- I don't think that
9 conflicts with being a subrogee.

10 The United States' claim in this case is based
11 entirely upon California tax law. And like this Court's
12 decision in United States v. Dalm, the United States --
13 the California tax law requires the filing of a claim for
14 refund and the filing of a suit within 90 days of the
15 notice of denial of the claim for refund.

16 WBEC did go through this procedure. Notice of
17 denials were made and it filed suit within 90 days.
18 However, because it's a part of the California accrual of
19 a cause of action under a waiver of sovereign immunity,
20 once the dismissals were made WBEC's actions -- claim
21 against the State of California were extinguished by
22 operation of law when the dismissals were made.

23 The Ninth Circuit said that a dismissal means
24 those cases were never filed, and if the WBEC cases were
25 never filed no case was filed within the 90 days of the

1 notice of denial of WBEC's claim for refund. So the
2 United States can make no claim against California either
3 as a taxpayer, because it did not file a claim for refund,
4 or as a subrogee of WBEC. And it's reliance upon
5 Summerlin --

6 QUESTION: But can you bring a suit for money
7 had and received as subrogee? I mean the question we'd
8 accepted is whether invoking -- in invoking the Federal
9 cause of action for money had and received, the United
10 States must comply with the State law requirements. Can
11 you do that when you're a subrogee?

12 MR. MILAM: I don't -- in this case I don't
13 believe so because WBEC had no such action and a subrogee
14 just takes the remedies of the subrogor.

15 So the United States reliance on the Summerlin
16 case is misplaced because it fails to distinguish between
17 a statute -- State statute of limitations depriving the
18 United States of a preexisting valid claim and the
19 conditions precedent to an accrual of a cause of action
20 under a waiver of sovereign immunity.

21 The first question for Summerlin and Summerlin
22 analysis is is there a valid cause of action. If there's
23 no valid cause of action, then you never get to the second
24 element of Summerlin, the deprivation -- depriving of the
25 United States of a cause of -- of a claim.

1 Even if you assume that during the pendency of
2 the State court actions that WBEC filed the United States
3 had a valid claim, that claim was not denied by statute of
4 limitations, that claim was denied by the voluntary
5 dismissal of those cases under direction of the United
6 States.

7 I have nothing further.

8 QUESTION: Thank you, Mr. Milam.

9 Mr. Jones, you have 1 minute remaining.

10 REBUTTAL ARGUMENT OF KENT L. JONES

11 ON BEHALF OF THE PETITIONER

12 MR. JONES: Excuse me. Federal -- Federal
13 common law has been applied to actions brought by the
14 United States to recover States taxes. This is not the
15 first case of this type. Board of County Commissioners
16 was a suit by the United States to recover taxes paid to
17 the State of Kansas. I just --

18 QUESTION: But there the only question this
19 Court decided was whether interest would be available,
20 wasn't it?

21 MR. JONES: It's the only question the Court
22 decided, but it's not the only question the Court
23 discussed and addressed. The Court specified the fact
24 that Federal common law creates the remedy and -- and
25 governs the choice of the -- of the rules to apply.

1 QUESTION: But nobody was arguing otherwise in
2 that case.

3 MR. JONES: I -- I assume that's correct, but I
4 don't know, I wasn't up there.

5 QUESTION: Well, I mean judge -- I don't claim
6 to have been present at the argument. I'm just saying
7 from the opinion it doesn't appear that anyone was arguing
8 otherwise.

9 MR. JONES: Well, the opinion discusses the
10 issues as if they were relevant to its decision, and so I
11 assume that those issues were discussed before the Court.
12 But as far -- I'm just being honest -- in terms of what
13 was actually presented to the Court, I'm -- I'm not
14 certain.

15 The second point is that common -- at common
16 law, at -- the exhaustion of remedies was not required.
17 The City of Philadelphia v. Collector, this Court's
18 decision specifically rejected a suggestion that the
19 Federal remedy should not be available because there was
20 an administrative procedure not exhausted. The Court said
21 there was no support for that proposition.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.
23 The case is submitted.

24 (Whereupon, at 1:17 p.m., the case in the above-
25 entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

United States ✓
California State Board

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BY Ann Marie Federico

(REPORTER)