10-15-1971

Docket Entry 101 - Filed Memorandum of Authority in Support of above Motion to Dismiss Counterclaim and Strike Parts of Answers of Intervenor-Defendants and Defendant

STAN PITKIN
United States Attorney

DOUGLAS D. McBROOM
Assistant U. S. Attorney

1012 U. S. Courthouse
Seattle, Washington 98104

(206) 442-7970

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

CIVIL NO. 9 2 1 3

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM AND STRIKE PORTIONS OF ANSWERS

ON MOTION TO DISMISS COUNTERCLAIM

The United States has not consented to be sued in this case by Carl Crouse, the Washington State Game Commission (hereinafter called "Game"), or the State of Washington. There are several cases that discuss and decide the proposition that the United States does not consent to be sued by the mere filing of a suit in the name of the United States. Fule 13(d) Fed. R. Civ. P. One of the most helpful discussions of the subject was written by Chief Judge Magruder in Waylyn Corp. v. United States, 231 F.2d 544 (1st Cir. 1956), cert. denied, 352 U.S. 827 (1956). He wrote, at 547:

> The filing of a suit in the name of the United States does not in itself amount to a waiver of sovereign immunity, subjecting the United States to an affirmative adverse judgment on a counterclaim filed by the defendant in such suit. This settled doctrine is reaffirmed, maybe out of an excess of caution, in Rule 13(d) of the Federal Rules of Civil Procedure.

The Ninth Circuit Court of Appeals has held to the same effect, in United States v. Finn, 239 F.2d 679 (9th Cir. 1956). There the court said, at 683:

GPO : 1966 OF—214-854

101

> There is no merit in the contention that, by bringing this action, plaintiff gave its consent to the Finns' counterclaim. This action was brought for plaintiff by its attorneys -- the United States Attorney for the Southern District of California and two of his assistants. Plaintiff's attorneys were not authorized to give its consent to the Finns' counterclaim, nor did they attempt or pretend to do so. * * * [O]nly Congress could have given such consent.

The proposition is well and solidly established in our jurisprudence. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940); United States v. Shaw, 309 U.S. 495, 503 (1940); and Nassau Smelting & Refining Works v. United States, 266 U.S. 101 (1924).

In the Nassau case, Mr. Chief Justice Taft, speaking for a unanimous Court, stated, at 106:

> The question is not one as to the introduction of counterclaims as a mere matter of procedure. The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.

Insofar as said counterclaim is incorporated as a counterclaim against the various Intervenor-Plaintiffs, it should be stricken not only as an unconsented suit against such tribal entities, United States v. United States Fidelity & Guaranty Co., supra; Twin Cities Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966), cert. denied, 385 U.S. 918, but also for failure to state a claim upon which relief can be granted. Rule 12(b)(6) Fed. R. Civ. P. The Intervenor-Defendants have no power to control or prevent the alleged actions of the United States upon which said counterclaim is based.

ON MOTION TO STRIKE AFFIRMATIVE DEFENSES

Points and authorities in support of the motions to

GPO : 1966 OF—214-854

strike each of the three affirmative defenses asserted by Intervenor-Defendants Course and Game are set out in the Memorandum of Intervenor, Muckleshoot Indian Tribe, et al.

The Indian Claims Commission has no jurisdiction over claims of Indian tribes to enjoin unauthorized state infringement of rights secured to them by the Federal Government. Act of August 13, 1946, § 2, 60 Stat. 1049, 25 U.S.C. § 70a. Nor does it have any jurisdiction to modify or terminate any rights secured by federal treaties.

The "equal footing" doctrine supports rather than negates the application to the State of Washington of the command of Clause 2 of Article VI of the Constitution of the United States of America with respect to treaties affecting fish and game. See Missouri v. Holland, 252 U.S. 416 (1920).

Said Intervenor-Defendants' third affirmative defense does not, and said Intervenors are unable to, identifyn any subsequent international treaty, agreement or understanding of the United States which pertains to any species of anadromous fish over which said Intervenors have any jurisdictional interest or which applies to any waters over which said Intervenors have jurisdiction or responsibility. Nor does it, or can they, specify any way in which any such treaty, agreement or understanding has superseded or modified any of the Indian treaties involved in this action, particularly in any manner pertaining to the jurisdiction or interest of said Intervenors, or affected in any way the applicability of Washington's game laws or regulations to Indians.

The Supreme Court of the United States has frequently said with respect to Indian treaties that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). Repeals by implication are not favored and

GPO : 1966 OF—214-854

a purpose "by statute to abrogate a treaty * * * must appear clearly and distinctly from the words used in the statute * * *." United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902). Construction of a later statute to restrict the terms of an Indian treaty "is to be avoided, if possible." United States v. Payne, 264 U.S. 446, 449 (1924). When two statutes or treaties "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." Whitney v. Robertson, 124 U.S. 190, 194 (1888). These principles are also applicable to repeal or modification of a treaty with one party by a later treaty with a different party.

DATED this _____ day of October 1971.

STAN PITKIN
United States Attorney

Douglas D. McBroom

DOUGLAS D. McBROOM
Assistant U. S. Attorney

GPO : 1966 OF—214-854